SUMMARY OF COMMENTS PROVIDED BY INTERNATIONAL PPP EXPERTS ON THE DRAFT LAW OF BELARUS «ON PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS IN THE REPUBLIC OF BELARUS»

Please take note of the following while reading the comments provided by the experts of the Team of Specialists on PPPs, namely Tony Smith, Wim Timmermans, Spyros Panagopoulos, Bruno de Cazalet and Tatiana Bessarab:

1. Comments and/or changes proposed by the PPP experts do not necessarily represent the views of the secretariat;
2. Text in track changes have been suggested by the experts to change wording in the provisions in the draft PPP law;
3. If the articles are not listed in this table it means that none of the experts had any comments to such articles.

Draft Belarus PPP Law Article No.	Tony Smith Farne Project Consultancy	Wim A Timmermans Timmermans & Simons Int'l Business Lawyers	Spyros Panagopoulos Panagopoulos & Partners - Law Office	Tatiana Bessarab Bessarab and Partners Attorneys at Law
Article 1. Scope of Application of This Law		W.T.: Remark 1: Apparently, there is also a Law on concession agreements, as well as on investment agreements. It is unclear to me why this Law would not apply to concession agreements, as PPPs are basically set up as concessions. See also my comments on Article 8.		The definition is similar to formulation of the "scope of application" as stated in the Law of Ukraine "On Public-Private Partnerships", which is not really the best practice and does not really prevent from collision of applicable laws. The Law should cover all PPP contractual investments, including those based on the concession or investment scheme. Moreover, it is advisable to state that in case of the PPP contract based on the investment or concession legal structure, the provisions of the Law shall overrule the respective investment\concession rules as more specific norms applicable to the PPP. Otherwise, the article 1 as it is stated now will definitely lead to collision of legal norms between the Law, investment regulations and concession regulations (comprised in the Investment Code of Belarus and other legislative acts).

Article 2. Main Terms Used in This Law and Their Definitions	*Reference is made to the word 'Definitions' in the title of the article 2.* T.S.: Define other terms here for consistency throughout draft law. 1. For the purposes of this Law the following main notions and their definitions are used: public-private partnership – mutually beneficial cooperation on the partnership conditions on the ~~Agreemental~~ Agreement basis between the public and private partners with the aim to implement significant infrastructure projects, to render public services, providing for consolidation of property and (or) non-property contributions of partners for the economic activities with distribution of earned incomes, responsibility and risks between them; T.S.: Please check for suitable definitions. Perhaps this is due to an inconsistent translation into English.	*Reference is made to 'Public-Partner' in paragraph 1 of article 2.* W.T.: Remark 1: what is the difference between the Government (Правительство) and the Council of Ministers (Совет Министров)? Remark 2: I notice that apparently no cities other than Minsk are entitled to conclude a PPP agreement. *Reference is made to 'public-partnership agreement' in paragraph 1 of article 2.* W.T.: Remark 3: the term «договор» -dogovor (contract) – has the connotation of a civil law agreement based on the principles of freedom of contract, voluntariness, equality of the parties, etc. Is the PPP agreement governed by the Civil Code of the Republic of Belarus? *Reference is made to 'object of the Agreement' in paragraph 1 of article 2.* W.T.: Remark 4: this seems to exclude PPPs regarding the provision of services; see also Article 5 below, where explicit reference is made to 'public services'; why not refer to public services here, too? (Note: it is possible that the Russian word объект (object) refers to physical objects only, whereas the word предмет (object, subject) might refer to immaterial objects, too.)	1. In Art. 2 para. 1 of the RoB PPP law, the definition of "*other public organization*" is relatively abstract. The term "public organizations" could be further clarified by inserting a number of criteria that determine the "*public*" nature of the organization, i.e. dominant ownership, control or influence by a public authority etc. For example, is a public enterprise in the form of a commercial company regarded as a "public organization" within the meaning of the PPP law? 2. According to Art. 2 para. 1 the private partner can be a legal entity or an individual entrepreneur or an association thereof. This provision could be reconsidered, taken into account the established international PPP regulation and practice, according to which the winning bidder or consortium is required to form a "*Special Purpose Vehicle*" (SPV) solely and exclusively for the purposes of the Partnership -usually a S.A. company- that enters into the PPP agreement with the public partner. This practice serves legal clarity and certainty of the contractual relationships between all stakeholders to a PPP project (government, public partner, private partner, shareholders, financiers, subcontractors) and facilitates the streamlining of the funding process and of the project's operations. 3. In Art. 2 para 1, the definition of "PPP Agreement" restricts to certain extend the scope of application of the RoB PPP law, since it stipulates that PPPs are established exclusively in relation to social infrastructure and public services. With this wording the said provision seems to exclude PPP relationships that are established with a view of joint development and *exploitation of public assets*, mainly immovable property through *commercial activities*.	1. Reference is made to the definition of the "private partner" in part 1 of Article 2. The definition of the private partner should be revised in view of the project finance techniques and international practice. As a rule, the private partner is structured in a complicated way, including the consortium or contractual joint venture of different legal entities who act jointly and severally liable for the implementation of the project, and who establish, for financing and operational purposes, a local entity (special purpose vehicle, usually in a form of a limited liability company under the laws of the country of public partner). Therefore, the definition of a private partner shall include not only "associations" of legal and private entities, but "contractual joint ventures, simple partnerships, **and** the special purpose vehicles (companies, enterprises or representative offices\branches) established by such entities, associations or joint ventures\consortia for the purposes of PPP project implementation". 2. Proposed above extended definition of the private partner would allow concluding the PPP agreement with multiple parties on the side of a private partner (members of consortia or joint venture), and therefore - avoiding delays in commencing of the project implementation (which was the case in some of Ukrainian infrastructure projects with international financing and international consortia as bidders). 3. The concept of special purpose vehicle or other company acting for the operation and financing of the project is unknown and inapplicable in standard public procurement procedures in Ukraine and Republic of Belarus, however for the PPP agreement purposes should be introduced. It should be noted, that the special purpose vehicle acts as a person on the side of the private partner, and an establishment of the special purpose vehicle by private partner shall not be considered as "substitution" or "assignment" of the rights of

			4. Furthermore, a basic element of a PPP agreement is *risk transfer* from the public to the private partner. This could be potentially further clarified in Art. 2, by stipulating the mandatory character of risk allocation and clearly stating that the Private Sector Partner (PSP) shall assume a substantial part of the risks associated with the financing, construction, availability of or demand for the Partnership object, as well as the related risks such as, indicatively, management and technical risk. 5. A significant difference between PPPs and traditional public procurement is the method of payment. Currently the *contractual PPP* projects are divided into 2 main categories: (a) concessions and (b) the "av*ailability payments*" PPPs. This distinction could be inserted into Art. 2 by stating that the payments to the PSP are to be made f.i. "*either as a lump sum or in installments by the Public Entities or by the final users of these works or services*". 6. Moreover, a core component of the PPP instrument is private funding and the associated risks that are born by the PSP in the PPP model. This could be explicitly mentioned in the definition of PPP in Art. 2 of the RoB PPP law, by requiring that the financing, in whole or in part, of the construction of the works or the provision of services, shall be accomplished with capital and other resources secured by the private entities.	the private partner. The latter remains responsible for the PPP project implementation and for the actions of such special purpose vehicle. 4. Based on Ukrainian legal and practical experience, the correct definition of the private partner directly in the Law and especially introduction of the "special purpose vehicles" as a tool of project finance is very important, and will allow the Law to work in practice, ensure poper financing and operation of the PPP project and its bankability. Also, clear legislative provisions in the Law (not only limiting to this Article) regarding the consortia and special purpose vehicles will allow avoiding the potential conflicts between the international consortia participating in tender and public partner. 5. Reference is made to the definition of the "contract on public-private partnerships". The definition of the "socially important projects" and the "public services" seem to be vague, as such notions are defined nor in the Law, nor in the other legislative acts of Belarus (to the best of our knowledge). Therefore, there is a need for definition or listing of such projects additionally in the Law or some Decree to achieve the transparency of the scope of Law application (further to UNCITRAL recommendations).
Article 3. Laws of the Republic of Belarus on Public-Private Partnership				*Reference is made to the collision between the public procurement legal regulations and the Law.* It is really important to establish that the rules and especially criteria for the public procurement tender and the selection of the private partner should be different. Still, it is important to underline that the process of the selection of private partner shall be based on the principles of transparency and non-discrimination.

Article 4. Principles of Public-Private Partnership		*Reference is made to the **principle of legality** in article 4.* W.T.: Remark 1: does the principle of «законность» (legality) also include the protection of ownership in the meaning of Article 1, 1st Protocol, European Convention for the protection of Human Rights?		We note that the principles established in this article are related only to the "development of the public-private partnership", however they should be established rather as the principles of the PPP projects implementation or principles of PPP agreement, and further serve as a basic norms for the public partner in the PPP projects.
Article 5. Subject of the Agreement		W.T.: Remark 1: re 'public services' – see my Remark 4 under Article 2 above.		
Article 6. Objects of the Agreement		W.T.: Remark 1: Would the above objects allow PPPs with regard to the provision of public services in urban transport or the operation of a prison?	1. In Art. 6, the first section could be reformulated as follows: "*The Agreement may be concluded for the purposes of the construction of works or provision of services in the area of competence of the Public Partner in relation to following objects and (or) part thereof*". 2. In the said Art. 6, PPPs in the energy sector are restricted in the area of energy from renewable sources. Does this mean that PPP cannot be used for the construction / operation of *other types of energy generation facilities (nuclear, gas, coal etc)*? Furthermore, there is no reference to *energy efficiency* or *energy grids PPPs* which are activities that can be also object of PPP agreements. 3. Another possible gap in Art. 6 is the absence of reference to Information Technology (IT) sector. Instead there is reference only to telecommunication facilities. The IT sector is an increasingly expanding PPP market. Thus the following reformulation is proposed: "*information and communication (fixed or mobile) technology facilities or services*". 4. Finally, as a general remark on Art. 6, maybe it could be further clarified through a general clause, that PPPs shall not be	1. The current wording of the article might restrict the application of the PPP in other spheres, not specifically listed hereto. Therefore, it is recommended either to restate the list of the objects as non-exclusive (i.e. finish the list with the words "and other objects owned and managed by the state partner"), or re-state the article by listing the spheres or the objects with respect to which PPP cannot be implemented (i.e. "The Agreement may be concluded with regard to any engineering, social, telecommunication and other infrastructure, energy objects (..) except for ……."). 2. The wording of the applicable spheres\objects of PPP should be in any case non-ambiguous and clear with regard to the spheres or objects which may be not acceptable\not allowed for PPP in order to avoid misinterpretations of the sphere of applicability of the law in future. Usually such not acceptable objects belong to the defense and\or nuclear spheres; however those spheres should be clearly identified by the government of Belarus prior to re-stating the wording of this article.

			allowed to engage in projects or activities that are the direct and exclusive province of the State under the terms of the Constitution of the Republic of Belarus, f.i. national defence, police work, the award of justice, and the execution of judicially imposed penalties etc.	
Article 7. Attributes Intrinsic to Agreement	*Reference is made to "the Agreement period is from 5 till 50 years;"* T.S.: Also for extensions.	*Reference is made to "the relations of partners are of equitable nature based on the interests of both parties in the course of execution of the Agreement;" in paragraph 1 of article 7* W.T.: Remark 1: Why not extend the principle of equality (равноправие) of Article 4 to the performance of the agreement? The language of Article 4 is a bit ambiguous, as it only guarantees 'equal access to participation in PPPs' and not equality of the partners (both state bodies and private sector parties). The present wording of Article 7 is also a bit vague – it provides that the relations of the partners (I assume both state bodies and private sector) at the execution of the agreement are of an equal nature – which in my opinion is not the same as an equal treatment principle. *Reference is made to paragraph 2 of article 7* W.T.: Remark 2: is this a признак (feature) of a PPP? I do not think so. For reasons of law drafting systematic, I suggest to transfer this subsection 2 to a separate Article dealing with the duration of the PPP Agreement (together with priznak 2 – duration of 5-50 years).		1. The Law as it is shall establish intrinsic attributes of the public-private agreement\contract that are exclusive to the PPP arrangements. However, those attributes should be taken as **aggregate** because if taken separately, each such attribute may be applicable\intrinsic to different contracts. Therefore, the beginning of the article should be restated as "the agreement on public-private partnership shall have the aggregate of the intrinsic attributes of the public-private partnership, namely…." 2. We would also not recommend including here the reference to the "socially important projects", as such reference is 1) ambiguous and 2) the purpose of the PPP is established above in the text of the Law. 3. Such attribute or element of the PPP agreement as the distribution of risks should be re-formulated as the "equitable distribution of the risks". The equitable distribution of risks should be also stated as one of the principles of the PPP arrangements. This principle is however new to Belarus legal theory, and moreover practice, so its introduction should be done in the Law unambiguously and in a more detailed way.

Article 8. Forms of Public-Private Partnership	*Reference is made to "investment agreement"* T.S.: Definitions of 'investment agreement' etc should be included for clarity.	*Reference is made to paragraph 1 of article 8.* W.T.: Remark 1: It is rather confusing to determine that a PPP may be realized through different types of contracts, including PPP, concession and investment agreements, but at the same time stipulate that the present law shall not apply to concession and investment agreements (see Article 1). Apparently, there are three separate laws that are more or less interrelated. For reasons of coherence and consistency I suggest considering to combine all three types of agreements into one single law or rather choose for one single type of agreement – which in my view should be the concession agreement. It is a lawyer's nightmare to have an agreement covered by different laws (PPP law, concession law, and the Civil Code). Remark 2: why is the PPP contract called an agreement (соглашение) and the concession and investment contracts – договоры (dogovory)? A dogovor is a civil law concept governed by the Civil Code but a soglashenie (соглашение) may suggest that it is a special type of contract concluded between a state body and a private sector person and based on an administrative relationship rather than a civil law relationship with equal status of the parties. *Reference is made to paragraph 1 of article 8. "The concession and investments agreements shall be concluded in accordance with the existing laws."*	1. Art. 8 states that a PPP may be exercised in the form of "PPP agreement". This wording causes confusion, since the overall notion of "PPP" is identified with one of its "forms". Probably, the legislator intends to distinguish the concessionary model from the PFI model. We propose that the term PPP is used as an "umbrella" term to define all forms and models of PPP relationships. As far as the categorization of PPP forms is concerned, a possible solution could be the adoption of the methodological approach of the EU Commission, that recognizes 2 basic types of PPPs: (a) contractual and (b) institutional and further distinguishes two main forms of contractual PPPs, namely: (i) the works / services concession model and (ii) the PFI model. 2. Moreover, it is not clear what the meaning of the "investment" PPP is. Does it refer to the "institutional PPP" model or other type of Public-Private economic transaction (f.i. full or partial privatization)? Clarification is deemed necessary for reasons of legal certainty. 3. In Art. 8 it is further stipulated that "concession" or "*investment*" PPPs agreements that "*shall be concluded in accordance with the existing laws*". This clause seems to contradict the overall purpose of the law –as we understand it- to regulate the implementation of all types of PPP in the RoB in an uniform and consolidated manner (Art. 1). That should be the goal anyway, in order to enhance legal certainty and simplify and streamline the implementation of the RoB PPP program. 4. Furthermore, the notion of "Institutional PPP" could be clarified in Art. 8 by providing that this PPP model can be established either by the "*formation of new jointly* held entity or by the *transfer of*	1. The Article is recommended to be restated. It seems as there is confusion between the forms of PPP and the forms of PPP agreement. There are basically two forms of PPP – contractual or institutional, however these forms may and shall be defined in the PPP agreement. Given the civil legal traditions of post-soviet countries, PPP agreement might be based on either concession scheme, or joint investment activity etc., however most probably will have so called "mixed" legal nature. All these issues shall be therefore reflected in the new wording of the article. 2. It would be advisable to restate the article in a way that it would entitle the public partner to have flexibility on decision the form of the PPP and create the PPP agreement which should be regulated specifically by the Law. 3. Another important remark is regarding the sentence 2 of the part 1 of the Article 8 - as the Law aims to create new type of the civil agreement under laws of Belarus and specific legal rules for its execution and implementation, such priority shall be excluded. The Law should establish priority of the Law on the regulation of the PPP agreement over other civil and commercial regulations (notwithstanding the mixed nature or basic elements of the agreement). Otherwise, it will create the collision of existing legal norms regulating investments in Belarus and the new Law on PPP. A similar provision is currently envisaged in the Ukrainian Law on PPPs, which, in our opinion, shall be removed as an obstacle for creating the workable legal environment for the introduction of the PPP agreements in Ukraine. It would be advisable that Belarus would not repeat the similar to Ukrainian PPP Law mistake, which created confusion and collision in application of legal norms.

		W.T.: Remark 3: I suppose that this provision provides that the conclusion of concession and investment contracts is governed by the applicable laws. However, does this provision mean that this applies to the conclusion of such contracts only and not for the fulfillment of such contracts? Reference is made to paragraph 1 of article 8. "Institutional partnership may be a form of public-private partnership: Agreement of entrusted administration of property, agreement of society in participation (agreement on cooperation), share holding in authorized capitals of legal entities in the form of the economic entity or commercial joint organization, which procedure is governed by the civil legislation." W.T.: Remark 4: This seems a rather superfluous provision, as the above forms of a PPP are normal civil law concepts, which should – by their very nature – always be available for realizing civil law goals. *Reference is made to paragraph 3 of article 8.* W.T.: Remark 5: in my view it would be better to leave it to the parties, i.e., both state and private sector, to determine the most suitable form of the PPP.	*share capital of an existing public entity"* to the PSP. 5. Para. 2 of Art. 8 is not considered necessary, since it actually repeats Art. 5 of the law, according to our understanding.	
Chapter 2	**POWERS OF THE PRESIDENT OF THE REPUBLIC OF BELARUS, PUBLIC BODIES OF THE REPUBLIC OF BELARUS AND OTHER ORGANIZATIONS IN THE FIELD OF PUBLIC-~~PUBLIC~~ PRIVATE PARTNERSHIP**	W.T.: Remark 1: in my view, there are too many state bodies involved in the PPP decision-making process. Maybe the functions of the President can be transferred to the Council of Ministers?		

Article 9. Powers of the President of the Republic of Belarus in the Field of Public-Private Partnership	*Reference is made to "national policy"* T.S.: Is there a PPP policy already in place? Is this the unitary national policy referred to in Article 10?		Art. 9 of the RoB PPP law raises some questions regarding the involvement of the President of the RoB in the general management of the public bodies in the field of PPPs. If this provision implies that the President retains decision making powers in relation to the implementation of specific PPP projects (f.i. decision to implement a project as PPP, choice of PPP model, procurement process etc) it could be held disproportionate to the institutional status of the President. The President would ideally focus on setting the general policy, institutional and regulatory guidelines for the RoB PPP program and exercise the general oversight. On the other hand, the Office of the President could be involved in the implementation of PPP projects that are deemed vital for the national or economic interests of the Republic of Belarus.	
Article 10. Powers of the Council of Ministers of the Republic of Belarus in the Field of Public-Private Partnership	*Reference is made to "approve the regulations on maintenance of the State Register of Public-Private Partnership Agreements "* T.S.: Expected that regulators will be separate from providers of servicers. Ensure that regulator is functionally independent and also ensure that regulatory procedures and decisions are made public. There should also be the ability for the project company to request a review of a regulatory decision by an independent and impartial body. Further, a dispute procedure should be in place where appropriate.		1. Artt. 10-14 list the competences of central / local government actors in the implementation of the PPP program of the RoB. However it is not clear, how and by whom the overall process will be coordinated. It seems that the co-ordination will be exercised to a certain degree at least by the Council of Ministers (CoM), whilst other powers are conferred to the Ministry of Economy (MoE), the Ministry of Finance (MoF) and the Local Executive and Regulatory Authorities of the RoB in the fields of PPP. 2. However, for reasons of consolidation of the decision making process and especially of the establishment of an efficient and expedient procedure for the assessment / approval of PPP projects, I propose the establishment of a dedicated inter-governmental body that will be formed with the participation of some members of the CoM be entrusted with the key decisions on the implementation	

			both of the PPP program and the individual PPP projects. 3. This body could take the form of a "*Inter-Ministerial Committee for PPPs"* (PPP/IMC) that will comprise as *regular members* the Minister competent for Economy, the Minister competent for Finance, and the Minister competent for Public Infrastructure and as *special members* the Minister or Ministers supervising each of the public authorities participating in a PPP, or party to a PPP contract, or to ancillary agreements. The Minister of Economy would probably chair the Committee, supervise its work and be responsible for submitting the respective proposals to the Committee. The PPP/IMC shall make its decisions following proposals by a special *Task Force for PPPs* (PPP/TF) that will be established within the Ministry of Economy. The purpose of PPP/IMC will be to elaborate government policy on the construction of works and the provision of services with private capital involvement. *[UNECE remark: Upon request the detailed description of the PPP/IMC's and PPP/TF rights & obligations can be provided.]* 4. Note that the establishment of dedicated PPP "Task Force" or "Unit" or "Agency" has become standard best practice in the PPP regulation at a global level. The main advantage is obviously the centralized and uniform treatment of PPP projects by a specialized and versatile team of PPP experts who are qualified to deal with all aspect of the implementation of PPPs that usually cannot be confronted by public entities, due to lack of expertise and experience with the complexities of PPP transactions.	

Article 11. Powers of the Ministry of Economy of the Republic of Belarus in the Field of Public-Private Partnership		*Reference is made to article 11 in whole.* W.T.: Remark 1: apparently, there is a difference between state and republican ownership; I suppose this is governed by the Civil Code or a separate law on state ownership. A special status for state – and also republican – ownership with – I suppose – special protection may not be very attractive for (foreign) private investors, who want protection of their investment at the same footing as the State.		
Article 13. Powers of the Local Executive and Regulatory Authorities of the Republic of Belarus in the Field of Public-Private Partnership	*Reference is made to the title of the article.* T.S.: Define separate entities, e.g., national, provincial and local authorities.	*Reference is made to article 13 in whole.* W.T.: Remark 1: from Article 2, one gets the impression that PPPs are initiated on the level of the (central) state and the province (oblast'), as well as on the level of the City of Minsk only – and not at the municipal level in general. Although the present Article 13 seems to imply that PPPs may be carried out at the level of municipalities, an unambiguous statement that PPPs may be set up at the local level would be welcome. However, from the above text it is not clear if municipalities have an autonomous right to decide on PPPs. It rather looks as if their powers are restricted to facilitating PPPs initiated at a higher level. I would suggest that clearer language is used to specify the rights and duties of municipalities as far as their autonomous right to set up PPPs is concerned.		
Article 14. Powers of United Organizations (Associations		*Reference is made to article 14 in whole.* W.T.: Remark 1: excellent idea to engage social organizations in (the	Finally, it is not clear the exact legal nature and role of the "*United Organizations*") in the fields of PPPs (Art. 14 of the RoB PPP law). These associations are defined as "*public united*	

and Unions) in the Field of Public-Private Partnership		preparation of) PPPs and to give them a specific role.	*organizations*" and are entrusted with a variety of services related to the development of the RoB PPP program. They seem to have an advisory and intermediary role between public and private stakeholders. They could contribute into the development of the PPP market in RoB, possibly acting in coordination and collaboration with the PPP/TF, as far as they avoid conflicts of interest and operate under a transparent regime.	
Article 15. Property Backing of Agreements	*Reference is made to the whole article 15.* T.S.: State which public (or public partner, depending on defined term used throughout) may provide such economic support. What types of support are they authorized by this draft law to provide? *Reference is made to paragraph 4 of article 15.* T.S. Consider including a provision explicitly enabling the grant to the project company of the right to collect tariffs etc. Also consider the ability to grant the right to take security over tariff income and other rights under the project agreement and the power for the procuring authority to enter into direct agreement with the lenders to enable them to deal with project company's possible default.	*Reference is made to paragraph 1 of article 15.* W.T.: Remark 1: land plots or other immovable property on which the object of a PPP will be constructed cannot be given into ownership of the private sector party. Most likely, the right given to the private sector party is a right of use but not a right in rem (see also below). *Reference is made to paragraph 2 of article 15.* W.T.: Remark 2: no charge on the property is permitted; this may hamper the financing of the PPP, as sponsors will likely require security for their investment. *Reference is made to paragraph 4 of article 15.* W.T: Remark 3: Thus, it is possible for a private sector party to obtain joint ownership of a bridge, tunnel, road or other object of a PPP. I suggest to make the right of the State to buy the private sector party's interest a right of first refusal.		1. Reference is made to the part 2 of the Article. The part 2 of the Article provides for the rule which would make the bankability of the PPP project questionable, if not impossible. If such wording would not be changed, then at least the legislator should propose the alternative ways of the financing of the PPP project, such as pledge over the assets of private partner in Belarus (in this case introduction of the special purpose vehicle\project company is necessary, see remarks above), mortgage of some infrastructure or real estate objects, rights for the bankers and financiers to take over the control on the SPV-project company etc. We would also recommend removing the ban on mortgaging the property transferred to PPP\being PPP object, unless such property is strategically important for the Republic of Belarus. 2. Moreover, taking into account the part 4 of the Article, there might be a "private part" owned by the private partner in the infrastructure\objects of PPP, so it is not clear why such privately owned property (at least) could not be pledge serving as highly liquid collateral.

Article 16. Financial Backing of Agreements	*Reference is made to the whole article 16.* T.S.: State which public authority (or public partner, depending on defined term used throughout) may provide such financial support.	*Reference is made to article 16 in whole.* W.T.: Remark 1: I assume that the above financing instruments are in accordance with the Budget Code.		
Chapter 4 INITIATION AND DECISION-TAKING ON CONCLUSION OF AGREEMENT	*Reference is made to the word 'Conclusion'.* T.S.: Do you mean 'selection of a concessionaire'?		Chapter 4 of the RoB PPP law deals with the initiation of a PPP project. It should be absolutely clear that a vital factor for the success of a PPP project is the *in-depth assessment and reasoned / documented approval of the project prior to procurement / contracting*. In order to achieve this, following regulatory measures are deemed necessary:	
Article 17. Initiation of the Agreement		*Reference is made to article 17 in whole.* W.T.: Remark 1: Excellent that the Law provides for unsolicited proposals from the private sector. However, it would be good to ensure some kind of priority for such unsolicited proposals, if they make it to the status of a PPP project.		Generally, the provisions enabling private partners to initiate the PPP project (unsolicited proposals) are progressive, but should be more developed through the Law, stating the possible preferences for such initiators and clarifying the applicable selection process in case of such proposals. Also, reference is made to the part 3 of the Article 17 of the Law, which needs to be restated in part of the definition of the private partners entitled to initiate the PPP agreements. Such partners should not be limited to private individuals or legal entities only, but have to include the consortia and joint ventures (both institutional and contractual).
Article 18. Decision on Conclusion of the Agreement	*Reference is made to the whole article 18.* T.S.: Not clear from this English translation what this Article 18 is trying to achieve. By 'conclusion of the Agreement' do you mean the award of the concession/PPP project?	*Reference is made to paragraph 1 of article 18.* W.T.: Remark 1: Note that apparently here, too, the Law does not provide for an autonomous right of a municipality to conclude a PPP agreement. *Reference is made to paragraph 2 of article 18.* W.T.: Remark 2: may this organization also be a private company experienced in the	1. Entrust the assessment of PPP projects in comparison to other options (conventional public procurement, privatization) to a team of qualified experts and a specialized central government structure. International best practice suggests that individual public authorities, both at central and local government level, seldom possess the qualified staff to evaluate PPP project proposals, run the public sector comparator test and issue the final approval, subject to certain modifications and adjustments that will	1. Based on Ukrainian practical experience in preparation of the PPP projects, it is recommended to create single agency (PPP unit) (similar to the state property management agency), which will define the list of the potential PPP objects, and also will perform assessment\efficiency analysis of the PPP projects, and provide full support of the PPP project cycle, on the basis of which the final decision on PPP project will be taken. 2. We note that the decision making on the PPP may be also entrusted\delegated to such

		tendering process? The term organization seems to imply so. *Reference is made to paragraph 3 of article 18.* W.T.: Remark 3: it would be good to have some objective criteria for determining when a PPP will not be tendered.	render the project bankable, optimize risk allocation and safeguard both the public interest and the legitimate interests of the private sector economic operators (investors). 2. Thus we propose that the competence for issuance of the decision of Art. 18 of the RoB PPP law is transferred to the PPP/IMC, that will be supported by the PPP/TF. The latter will evaluate the material submitted by the public authority that intends to implement a PPP project and issue a preliminary approval, after obtaining a positive opinion from the MoF. Final approval will be granted only by the decision issued by the PPP/IMC.	agency\PPP Unit, or, if left with the respective ministries, the clear guidelines and terms of delivery of such final decisions should be established in order to avoid bureaucratic delays. 3. Establishment of such PPP unit would be especially helpful for the local projects\municipal authorities, which, as Ukrainian practice shows, very often have the real necessity in realization of social and infrastructure projects through PPP, but lack of required resources and qualification.
Article 19. Preparation of the Decision on Conclusion of the Agreement			Insert in the PPP law, or alternatively in secondary legislation, the main criteria and a clear process for the assessment and approval of PPP projects. This is partially done in Art. 19 of the RoB PPP law, however the said provision does not clarify who will draft and check / approve the feasibility study. Furthermore, the criteria for assessment and approval of PPP projects could be further elaborated in Art. 19 of the law.	It is very important that the assessment of the PPP efficiency is done through the single PPP unit. As Ukrainian practice shows, the creation of single PPP unit is absolutely necessary to overcome the administrative and organizational restraints in PPP development, and demonstrate transparency in the decision making process to the potential private partners and investors on PPP. Also, entrusting the assessment\efficiency evaluation process to different ministries (Ministry of Economics and Ministry of Finance), apart from being time consuming, will require more expenditures of the state of Belarus on hiring new staff and\or training and capacity building. Therefore, the assessment\efficiency evaluation should be entrusted to the specialized unit which will perform it through its own resources and\or with the assistance the outsourced consultants. It is clear that Belarus, similar to Ukraine, is lacking, as of now, the specially trained staff that may perform the assessment of PPP efficiency. This fact together with the current wording of the article may clearly delay the startup of the PPP projects in Belarus. Also, the mentioned article requires clarification with regard to:

				1) Definition of a sole agency responsible for the coordination and preparation of the technical\economic feasibility study (as a complex and final document) – should be either of the ministries, or, ideally – single PPP unit. The Article as stated now is very ambiguous in definition of the responsible agency\body for performing the feasibility study; 2) Exact list of mandatory elements of such feasibility study, and its structure (should include final recommendations re proceeding with PPP); 3) Introduction of clear and transparent notion of the "efficiency analysis" and criteria for its performance; 4) Removing of the additional necessity of the "state expertise" of the feasibility study. Ministry of Finance might be entrusted with issuance of its opinion on state support\budgetary influence -as a part of a single feasibility study; 5) Introduction of the clear timelines and procedures for the issuance of the single feasibility study as a basis for the issuance of the final decision on PPP project.
Chapter 5. Competition for right to conclude agreement	*Reference is made to chapter 5.* T.S.: Consider re-organizing the sub-article of this Chapter 5 into a chronological order of the tender process. Also please check for repetition as some articles do repeat large sections of other articles. Advisable to provide a specific procedure for unsolicited bids. *Reference is made to the title of the Chapter 5.* T.S.: Do you mean the pre-selection procedure of a private company? i.e. the pre-tender process?	*Reference is made to paragraph 2 of article 20.* W.T.: Remark 1: Without having a look at the law on state secrets, it is difficult to comment on the impact of this provision. But given the presence of such a provision in this Law I am afraid that a substantial number of objects would fall under the law on state secrets. I would recommend deleting this provision, as a state secrets and PPPs are not well compatible. Also, this provision would contradict the principle of transparency contained in Article 4 of the present law. Finally, I would recommend reserving closed tender to special cases, like, for instance, when the potential interested parties are already known given their specific know how and experience.	Chapter 5 of the RoB PPP law regulates the procurement of PPP projects, i.e. sets the rules applicable for the selection of the PSP. The following issues related to the procurement system of the RoB PPP law may be (re)considered:	

Article 20. Competition for the Right to Conclude the Agreement	*Reference is made to 'hereinafter – the competition' in paragraph 1 of article 20.* T.S.: As above regarding use of defined term 'competition'. *Reference is made to 'closed competition' in paragraph 2 of article 20.* T.S.: i.e. a single stage procedure for pre-selection. Suggest a separate sub-article for this to separate from two-stage procedure. *Reference is made to 'public secret' in paragraph 2 of article 20.* T.S.: Perhaps define this in Chapter 1. Perhaps this means secrets related to the state? See below for continued use throughout draft law. This should be limited so as not to permit use for bypassing proper procurement. *Reference is made to 'thirty days' in paragraph 4 of article 20.* T.S.: This likely to be too short to allow the bidders to provide detailed proposals. *Reference is made to 'expiry of the time for submission' in paragraph 4 of article 20.* T.S.: Suggest define this term - e.g. 'Submission Expiry Date'?. *Reference is made to 'The time for preparation and submission of the competition offers for the closed competition shall start on the date when the individual invitations have been sent' in paragraph 4 of article*		1. In the PPP law there are several – direct or indirect- references to the public procurement principles (Art. 21. 5). The main principles of public procurement that are recognized internationally are: (a) transparency, (b) equal treatment / non-discrimination, (c) proportionality, (d) fair / genuine competition, (e) confidentiality, (f) mutual recognition. These principles play a key-role in a public procurement regulatory framework, since they function as general clauses and interpretative instruments that allow stakeholders to interpret and apply the procurement rules in an effective manner with a view of meeting the ultimate goal, i.e. the best possible value for money option for the public authorities when assigning economic activities to the private sector. Thus, in order to stretch out the importance of these principles and elevate their regulatory superiority and function, we propose that they are listed in separate Article at the start of chapter 5 of the RoB PPP law. 2. Two procurement procedures are provided for in the RoB PPP law: (a) the *open* and (b) the *closed*. The latter seems to be reserved for contracts that are declared as public secrets, actually introducing derogation from the basic regulation, i.e. the open competition. However, the key term (public secret) is not defined in the law. Thus it remains possible that *the derogation may be misused through broad interpretation*, for example by declaring contracts secret excessively and with no good reason, in order to circumvent the application of the open (transparent and objective) procedure. In any case, the public authorities should bear in mind, when choosing the procurement process, that derogations should be interpreted restrictively and the public authorities should strive to procure PPP projects	Based on Ukrainian experience, it is recommended to restate the articles related to the tender\selection of the private partners procedure and limit them only to: 1) principles of the private partner selection (including transparency, non-discrimination and other internationally recognized principles of the selection process); 2) basic procedures and clear timelines for each procedure, principles and criteria for selection of the winner partner; 3) principle of single tender for the selection of private partner shall be clearly established - i.e. the process of selection of private partner shall be sole and exclude necessity of conducting of any other tendering procedures regulated by other laws for the PPP agreement to enter into force (investment regulations, land regulations, licensing regulations etc.); 4) clear regulation on channeling\directing of the unsolicited proposals into the single tender and establishing certain privileges for the private partners initiating the PPP; 5) clear rules regarding the possibility of the consortia, incorporated and contractual joint venturesto participate in the selection process; 6) unambiguous authorization for the private partner to establish special purpose vehicle (SPV) for the execution of the project\performing works\rendering services and principles of liability division between such SPV and private partner; 7) clear authorization for the public

	20. T.S.: Do these relate to output/performance specification, contract terms etc.? Will negotiations be allowed? Will there be clarification meetings to provide best value and will the authority be permitted to amend its documentation as a result of negotiations, etc? *Reference is made to 'open competition' in paragraph 8 of article 20*. T.S.: i.e. a two stage procedure for pre-selection. *Reference is made to 'placement on the official Internet site' in paragraph 8 of article 20.* T.S.: Define this - be careful of use.		through open and transparent procedures. 3. Actually the "open" procedure of the RoB PPP law seems to be a "restricted" procedure within the meaning of EU public procurement directives, since it is provides for a pre-selection aka pre-qualification (in the PPP law: "preliminary selection") stage. Thus the open competition is actually conducted in 2 stages: (a) submission of applications for participation (expression of interest) and (b) submission of offers (bids). 4. However, by restricting the option for the procurement procedures to the two aforementioned types (open / closed), the RoB PPP law deprives from the Belarusian public authorities the possibility to utilize other procurement procedures and techniques that are frequently used for the procurement of PPP projects at an international level, such as the (a) competitive dialogue procedure, the negotiated procedure with publication of a contract notice or even (c) the open procedure (see EU directive 2004/18/EC). Maybe this regulatory choice could be re-examined, in order to offer to public authorities that intend about to procure PPP projects a broader "palette" of procurement procedures to choose from, according to the specific needs and requirements of each project.	partner to establish special rights or grant the right to the private partner on establishment of the tariffs that are overruling the existing regulations on tariff\price regulations. All other detailed selection regulations might be regulated separately by the implementation\secondary regulations based on the aforementioned principles.
Article 21. Competition Documentation.	*Reference is made to title of article 21.* T.S.: Clarify using appropriate defined terms for documentation relating to two-stage pre-selection procedure, e.g. does this 'Competition Documentation' relate to documents to be submitted as pre-selection process, or documents relating to the actual tender? *Reference is made to 'conditions of*	*Reference is made to paragraph 2.3. of article 21 " evaluation criteria of competition offers stipulated in accordance with Article 21 of this Law; "* W.T.: Remark 1: I assume that 'Article 21' should read 'Article 22', as Article 22 provides for the criteria for evaluating the tender proposals.	1. An important question in any procurement process is to decide who will draft the tender documents. We propose that the tender documents should be drafted by the contracting authority (Art. 21), possibly with the support of external legal financial and technical consultants, but approved by the PPP/TF. 2. Another important element for an efficient procurement system is transparency. Sufficient transparency is only possible if a comprehensive set of	

	the competition' in paragraph 2 of article 21. T.S.: Perhaps separate this as sub-clause with what should be included in 'competition documentation' as a minimum. *Reference is made to 'sum of advance money to be granted as security of execution of the obligations on conclusion of the Agreement (hereinafter – the advance)' in paragraph 2 of article 21.* T.S.: An 'advance' should only reflect the cost of participation in the selection/tender proceedings such as contribution for printing of documents. Such request for 'advance' should not be used as a tool to limit the number of bidders. It is not clear what 'conclusion' of the Agreement means. For example, it would be unreasonable to request and require an 'advance' sum of money for a project that a bidder may not even b granted. *Reference is made to 'ten business days' in paragraph 8 of article 21.* T.S.: With the normal term of a tender this would be ok provided there is enough time to formulated clarifications. *Reference is made to 'five business days' in paragraph 9 of article 21.* T.S.: If this is five business days and the above is ten business days, how can you submit any questions? *Reference is made to 'ten days' in paragraph 11 of article 21.*		advertisement / publicity rules is included in the procurement regulation. The RoB PPP law disposes of sufficient advertisement requirements, notably by utilization of electronic means (Art. 20 paras 6 - 11). However it is essential that the Government of RoB establishes a *centralized advertisement system* (f.i. a web-based PPP portal) where contract notices, initiation to express interest and all relevant information will be published (This is implied in Art. 20 par. 10). 3. Moreover, a factor that will raise the level of transparency both in quantitative and qualitative terms, would be the *standardization of the PPP tender / contract documentation*, possibly the PPP/TF. The standardization of the documents for PPP procurement and contracting has become an internationally accepted best practice and will surely streamline and accelerate the PPP contracting process. 4. As far as transparency in concerned, in Art. 20 par. 5 it not absolutely clear why it is necessary to prohibit bidders in closed procedure to be present during the opening of the bids. 5. Furthermore, the option for *modifying the tender documentation* (Art. 21 par. 11) *is not fully compliant* with *the obligations of transparency and equal treatment*, since it may raise complaints from other contesters or economic operators that have not participated in the procurement process on the basis of the initial terms and conditions of the tender documents, but would probably have done so, if they knew the new, modified conditions. For these reasons, we propose that any modification to the tender documents after the initiation of the procurement process should be limited to clarification of procedural matters. Should the contracting authority decide to modify	

	T.S.: Inconsistent with the above time limits as you could not submit questions in time. There must be enough time for the bidders to read and this will depend on the extent of the change. *Reference is made to 'on the official Internet site within three business days' in paragraph 11 of article 21.* T.S.: Again, inconsistent with timings above. There must be enough time for the bidders to read and this will depend on the extent of the change. *Reference is made to 'The addenda shall be mandatory for all applicants and shall be brought to their notice within three business days from the date of approval' in paragraph 11 of article 21.* T.S.: Method of notice? A minimum form of notice should be stipulated?		substantial elements of the tender / contract documentations, the procedure should be re-initiated, in order to allow all potentially interested economic operators to express their interest.	
Article 22. Criteria of Evaluation of Competition Offers	*Reference is made to ' The following may be established as the criteria of evaluation of competition offers:' in paragraph 2 of article 22.* T.S.: Limiting the discretion may be dangerous. Perhaps should be 'the following will be established, as a minimum...'? *Reference is made to 'It is not permitted to use the competition criteria not stipulated by this Article' in paragraph 5 of article 22.* T.S.: Leave room for flexibility as each project should have its own criteria. Better to leave this in guidelines rather than the law. Check how this related to sub-article 2 of this article.		1. An important element of a procurement process is the determination of the *criteria used for the qualitative selection and prequalification of candidates* that express their interest to participate in the procurement process. This is a core part of any public procurement system and is regulate with more or less detail in the respective rules, in order to ensure legal clarity and certainty on these fundamental issue (*who is eligible to participate in the procurement process*). The eligibility and pre-qualification of candidates is usually performed by application of criteria related to their *professional* / *technical* capacity and / or *economic* standing. However, the RoB PPP law lacks respective detailed provisions, with the exception of general reference in Art. 21 para. 2.3. Thus we propose that the PPP law includes rules that regulate (a) the type and kind of	We suggest to remove such detailed regulations from the Law to secondary\implementation regulations, leaving only principles of selection and main criteria (which should be applicable notwithstanding the over other laws of Republic of Belarus). We also underline necessity to elaborate by the PPP unit (Ministry of Economics or other agency) the manuals\handbooks on the selection of a private partner, specifics of tender in different spheres, and conditions\model provisions of PPP agreement. *[UNECE remark: Please kindly note that detailed criteria can be provided either in the PPP Law or in secondary/implementation regulations or bylaws.]*

			minimum technical / economic requirements that can be used for qualitative selection (eligibility check) and subsequently for the pre-qualification as well as the respective *evidence* that the contracting authorities may require the candidates to submit. 2. Furthermore, the candidates that express their interest to participate in a procurement process are usually required to prove that they do fall under specific *exclusion grounds*. These are usually grounds connected to the *personal situation* of candidates and comprise elements related to: (a) their business activity status (bankruptcy, liquidation etc) as well as other personal elements such as criminal convictions and (b) violation of other legal obligations, f.i. failure to meet tax / social security obligations etc. Art. 27 para. 1 mentions the former (a), but includes nor reference to the latter (b). Thus we advise that the RoB PPP law includes a more detailed regulation on the grounds for exclusion as well as the respective evidence that the contracting authorities may require the candidates to submit. 3. Another important component of any public procurement mechanism is the *set of criteria used to evaluate the bids and award the contract* (in the case of PPPs select the PSP) aka “award criteria”. This is regulated in Art. 22 of the RoB PPP law, where a number of evaluation criteria (time-limits, prices etc) are listed. However, Art. 22 is not fully compliant with the respective regulatory practice at the international level. In most public procurement legal frameworks at international level, the respective provisions firstly determine the available “basic award criteria” i.e: (a) the *lowest price* or (b) the *most economically advantageous tender* from the point of view of the contracting authority aka	

			"*MEAT*". Moreover, when the latter criterion (MEAT) is chosen, the sub-criteria used to evaluate the bids and determine the most economically advantageous tender could be more than those listed in Art. 22 of the RoB PPP law, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. Note that in any case these sub-criteria should be linked to the subject-matter of the PPP contract in question and comply with the public procurement principles (transparency, equal treatment, non-discrimination, fair competition etc). 4. Furthermore, the RoB PPP law remains silent to the issues of: (a) participation of *consortia* in the tender process and (b) *subcontracting*. Both issues should be considered when designing a PPP procurement system. (a) The law may regulate the right of economic operators to form *groups* or *consortia* in order to participate in the procurement procedures of PPP projects. Moreover, it is important to clarify if the members of the consortia can rely on their cumulative technical and economic capacities in order to prove their eligibility. Also an issue that often arises is how a member of group / consortium of economic operators can be substituted during the procurement process (under which conditions and through which procedure). (b) Similarly, the issue of *subcontracting* is neglected in the RoB PPP law. This is mostly a managerial and ultimately a political issue. If the regulator's will is to open-up the competition to the secondary market, i.e. at subcontracting level, the PPP law could include a set of	

			rules allowing the contracting authority to require a minimum percentage of the works / services to be subcontracted or impose certain obligations to the PSP (SPV) for the selection of subcontractors. Note that a efficiently functioning PPP market needs a healthy and competitive construction / facility management industry. Thus the issue of regulating some aspects of subcontracting could be considered by the Government of RoB.	
Article 23. Competition Commission.	*Reference is made to 'The competition commission is established with the aim to carry out the **competition**' in paragraph 1 of article 23.* T.S.: Assume [the competition] means tender process? Again, inconsistency with translation? *Reference is made to 'The competition commission is empowered to take decisions, if **2/3 of the total number** of its membership is present at the meeting of the competition commission ' in paragraph 1 of article 23.* T.S.: Is 2/3 the quorum? If so, this may present some difficulties, if maximum allowed at CC meeting is 5 persons. Belarus should think to avoid situations where majority may not be reached. *Reference is made to 'to verify the documents and materials submitted by the applicants ' in paragraph 4 of article 23.* T.S.: As a minimum, should consider the following regarding the proposal submitted: (a) Technical soundness; (b) Operational feasibility; (c) Quality	*Reference is made to paragraph 1 of article 23.* W.T.: Remark 1: Who or what body is authorized to appoint the tender commission? *Reference is made to paragraph 3 of article 23.* W.T.: Remark 2: It is good to establish which persons cannot be appointed members of the tender commission. However, the law does not provide who may be appointed – do civil servants only qualify or may external experts be appointed, too? This might be deduced from this subsection 3.		

	of services and measures to ensure their continuity; (d) Social and economic development potential offered by the proposals. Criteria for evaluation of financial and commercial proposals should also be considered. In the EU, most host countries base their evaluation on the most economically advantageous tender, which may not be the cheapest valuation of costs of the project. For both sets of criteria above, thresholds may be set. In addition, the competition commission may also request demonstration of the bidders' qualifications as referred to in their submissions.			
Article 24. Announcement about Competition.	*Reference is made to 'thirty business days' in paragraph 1 of article 24.* T.S.: As above, this is likely to be too short to allow the bidders to provide detailed proposals. *Reference is made to 'requirements to participants' in paragraph 3 article 24.* T.S.: Perhaps detail the minimum requirements of a submission - such as output specifications, other characteristics of the project and main proposed contractual terms.			
Article 25. Submission of Applications for Participation in Competition	*Reference is made to 'the persons stated in the fourth paragraph' in paragraph 1 of article 25.* T.S.: Just state 'private partner' and use correct and consistent definition through draft law. 'Private Partner'			

	definition is not paragraph 4 of clause 1 of article 2 of this law. *Reference is made to 'thirty days' in paragraph 2 of article 25.* T.S.: As above, this is likely to be too short to allow the bidders to provide detailed proposals.			
Article 27. Preliminary Selection of Competition Participants	*Reference is made to 'the applicant's advance' in paragraph 3 of article 27.* T.S.: See above regarding requesting an 'advance'. *Reference is made paragraph 6 of article 27.* T.S.: Provide for this in this draft law as per international standards. *Reference is made to 'ten business days' in paragraph 8 of article 27.* T.S.: As above, this is likely to be too short to allow the bidders to provide detailed proposals. *Reference is made to 'the applicant has not submitted the offer for conclusion of the Agreement to the public partner – within five business days' in paragraph 9 of article 27.* T.S.: Provided set time is ok.			
Article 29. Opening of the Envelopes with Competition Offers	*Reference is made to the title of article 29.* T.S.: Note - Article 26 appears to refer to pre-selection, and this Article 29 to final proposal. Is this correct?			

Article 30. Procedure for Examination and Evaluation of Competition Offers			Finally, a very sensitive and important issue regarding the procurement of PPP projects is the issue of procurement "remedies". The RoB PPP law does not include provisions on the legal protection of candidates / bidders rights. This undermines the effectiveness of the procurement system, and should be corrected by inserting a set of remedies provisions dedicated to PPP procurement (i.e. not the general administrative complaints rules but other specialized to the PPP tender process). This remedies system should be rapid and effective, function in a cost efficient manner and comply with established international standards, such transparency, simplicity, consistency, residence to corruption etc. Furthermore, both types of remedies should be available (administrative and judicial) and a dedicated remedies body could be established, in order to guarantee independent and objective rulings. Note however that the remedies issue depends largely from the legal tradition and administrative practice of each country.	
Article 31. Procedure for Assignment of Competition Winner	*Reference is made to 'best conditions' in paragraph 1 of article 31.* T.S.: Most favourable? Selection criteria should be more explicit than 'best conditions' in order to comply with international standard of transparency in selection process. Define new term that is used and use throughout draft law. *Reference is made to paragraph 4 of article 31.* T.S.: An independent procedure should be available as noted above.			We would strongly advise to add the provisions clearly authorizing conduct of the final negotiations on the PPP agreement – unlike public procurement, the PPP agreement conclusions involves participation of many stakeholders, financiers\bankers, multiple parties on the side of the private partners etc. Some conditions of the contract may and should be defined finally during such negotiations – therefore this would allow flexibility in the definition of the final agreement conditions without violation of the tender requirements (see the model provisions 17, 19 of the UNCITRAL).

Article 32. Contents of Minutes on Competition Results and Time for its Signing		*Reference is made to article 32 in whole.* W.T.: Remark 1: subsection 3 regarding the returned of amount paid in as a performance bond is in fact not something that is included in the protocol. Therefore, I suggest to transfer this provision to the Article dealing with the payment of the bond (задаток - zadatok) – Article 28, subsection 3.		
Article 33. Publication and Placement of Announcement about Competition Results, Notification about Competition Results to Participants of Competition	*Reference is made to article 33.* T.S.: It is good practice to also provide a summary of the essential terms of the project agreement. *Reference is made to paragraph 1 of article 33.* T.S.: Include in announcement a summary of the essential terms of the project.			
Article 34 Procedure for Conclusion of the Agreement	*Reference is made to phrase 'In the case of conclusion of the Agreement in accordance with clause 3 of Article 30 of this Law' of paragraph 3 of article 34.* T.S.: Check reference to correct article of draft law. *Reference is made to phrase 'clause 60 of Article 30 of this Law' of paragraph 4 of article 34.* T.S.: Do you mean clause 6? *Reference is made to phrase 'The Agreement shall enter into force at the moment of signing.' of paragraph 1 of article 35.*	*Reference is made to article 34 in whole.* W.T: Remark 1: it appears that the draft agreement is directed to the winner of the tender only upon the moment the decision as to who won the tender was made. Then it is up to the winner to take it or leave it. Apparently, no contract negotiations are provided for. But this is rather unusual. Although the draft agreement should reflect the main terms and conditions of the tender documentation, differences and new elements are possible. Therefore, it is herewith suggested to allow some time for negotiations or even better to include the draft agreement in the tender documentation (see also	Art. 34 para. 1 of the RoB PPP law stipulates that "*the Agreement should be signed at the time stipulates by the completion documentation and mentioned in the announcement about the completion*". Note that the stage starting from the finalization of the award decision and ending with the singing of the PPP contract and the ancillary documents is a vital part of the PPP procurement process. It is the stage when the *financial closure* takes place and requires input from all stakeholders (public partner, private partner, financiers, subcontractors etc.), in order to perform a final due diligence of the entire projects and finalize the contract documents. Thus the public authorities	

	T.S.: Leave this wide. Should enable date of entry into force at a further date, with particular note on any conditions to be fulfilled such grant of finance/permissions for the project.	Article 35, subsection 2, below, where contract negotiations have been provided for in the event when no tender was held.	should bear in mind to set a sufficient time in the contract notice (min. 60 days).	
Article 35. Conclusion of Agreement without Competition	*Reference is made to the title of article 35.* T.S.: Perhaps this should go in Chapter 5? Unless 'conclusion of Agreement' is meant in a different context? Does 'conclusion of Agreement' mean a concession award? *Reference is made to paragraph 1 of article 35.* T.S.: This appears to be too broad, as it does not attract international investors to a host country, who select concessionaires without competitive procedures. As such, it is common practice to only provide for concession awards without competition in exceptional circumstances which are stipulated in this draft law. *Reference is made to paragraph 3 of article 35.* T.S.: Define this term as do not understand what it refers to exactly. *Reference is made to "conclusion of the Agreement does not entail deterioration of the position of the Agreement lease parties" in paragraph 1 of article 35.* T.S.: Which public entity of Belarus will ensure compliance with this? i.e., who do private companies have to liaise with and receive permission from?			

Article 36. Conditions of the Agreement	*Reference is made to "The Agreement shall obligatory contain the following material conditions" in paragraph 1 of article 36.* T.S.: Consider inclusion of provisions controlling assignments of the project agreement by the project company and provisions controlling transfer of controlling interests in the project company. Consideration may also be given to specifying the minimum capital of the project company and also procedures for the approval of the governing statutes of the project company by the procuring authority. Also the public authority should have the option to require that the project company establish an independent legal entity with a seat in Belarus.		The PPP Contract and Ancillary Agreements shall contain clear and detailed descriptions of the rights and obligations of the parties under the PPP project concerning its object. Thus we propose that beyond the elements listed in Art. 36 paras 1, 2 of the RoB PPP law, the PPP contract documents shall make special provision for the issues listed indicatively below: – The specifications (technical and / or output) of the work or service to be provided, – the sum to be paid to the PSP under the contract, and the provisions defining how any amounts paid by the final users (if the PPP is a concession) for use of the work or provision of the service shall be shared by the parties to the contract. – The method of monitoring the performance and operation of the work or provision of the service either by independent companies recruited for this purpose by the public and private partners acting in common, or by the competent State agencies. – The methods of ensuring quality during implementation and operation of the work or provision of the service. – the penalties and bonuses to be applied in the event of failure to comply with the time-schedule or early completion, – The conditions under which the term of the PPP contracts may be extended or abridged. – The way of financing the implementation of the PPP project. – Any approval which may be required by the PSP for the financing contracts executed by the private entity, and the procedure for amending that approval. – The insurance policies for the contract object, or for the PSP. – Protection of rights of intellectual and	We would advise to restate the Article by means of narrowing the list of mandatory conditions (i.e. conditions, absence of which cause the invalidity of the PPP agreement) and provide instead for more detailed regulation of the particularly important mandatory conditions of the PPP Agreement. For instance, the provisions indicating the mandatory conditions should contain more exact provisions and rules on: - Identification of the main risks that should be handled by the public partner and establishing principle of the just and equitable distribution of the risks among parties to PPP agreement; - Mandatory conditions on the guarantees of stability for the private partners – i.e. guarantees of the public partner to the private partner in case of the change of legislation that worsens the conditions established by the PPP agreement. Should the public partner violate such guarantees, the private partner shall be entitled to sound compensation; - Establishing sound deadlines for the termination of the PPP agreement; - Right of the private partners to receive compensation – providing clear obligations of the public partner to reimburse the damages to the private partner, with indication of main cases for such reimbursement, types of damages to be reimbursed, ,minimum level\percentage of such reimbursement; - Conditions on financing – method of financing, rights of the public partner arising out of the state support\public funds co-financing of the project; minimum rights of the bankers\financiers re the PPP agreement (such as assignment, substitution etc.), rights of the SPV, and minimum requirements towards

			industrial property. – The mode of operation, maintenance and exploitation of the PPP object. – The amounts to be paid for use of the work or service by the users; the manner, in which these payments will be collected, and the grounds and methods for revision of such payments. The method of allocating between the public and private partners the benefits that will accrue either from a re-structuring of the loans of the private entity, or after a specific percentage return on its own capital has been attained. – The extent of the guarantees to be provided by the PSP for the proper implementation, operation and maintenance of the work, or for proper provision of the service. – The substitution of the PSP or the creditors by decision of the contracting authority, the circumstances under which such substitution may be permitted, and all related issues. – The payment of compensation and in general the reparation of any loss or damage caused in the event that either of the contracting parties is in violation of its contractual obligations. – The order of priority of any appendices or annexes to each contract. – A detailed definition of the minimum operation and maintenance requirements contained in the tender documents. – Determining the procedures for delivery of the project to the public sector upon the end of the exploitation period, the eventual obligations for training and transfer of know-how from the PSP to the public authority, the specifications applicable to the object on handover and the guarantees, as well as their duration, following the handover of the work or	such SPV; - Conditions on payments – consumer\user payments; minimum guarantees on tariffs compensation and mechanisms for such compensation, guarantees on fair profit distribution depending on the method of profit allocation; participation of the public funding; - Conditions on the termination and "exit" of the private partner or public partner – minimum terms\deadlines (not les then 3 month prior notice) and preconditions for the unilateral termination; grounds and conditions for the early termination of the PPP agreement by mutual consent of the parties; - Control and monitoring of the public partner over the private partner – exact terms and deadlines, forms of monitoring, exact rights of the monitoring authorities, - Right of the parties to resolve the disputes in international arbitration (in international arbitration institutions located outside Belarus), with the obligation of the public partner to waive the state immunity in disputes on PPP agreements. *[UNECE remark: Please kindly note that the list of mandatory conditions in the agreement can be provided either in the PPP Law or in secondary/implementation regulations or bylaws.]*

			the service by the public entity. – The procedures for the resolution of disputes that may arise, by an panel of experts nominated by a joint decision of the involved parties.	
Article 37. Early Termination of the Agreement	*Reference is made to article 37 in whole.* T.S.: This article should allow for termination by either of the parties in the event that: (1) performance of obligations is rendered impossible by occurrence of circumstances beyond either party's reasonable control; and (2) both parties mutual consent to early termination. *Reference is made to 'without the partner's consent' in paragraph 1 of article 37.* T.S.: unilaterally			This Article shall be restated by provision of more exact conditions and timelines for the early termination (See comments supra to Article 36). We deem it necessary to notify the partner on the PPP agreement termination at least 3 months prior to such termination. Also, exact conditions of the exit of partner from the PPP agreement are not envisaged, so the Article has to be revised.
Article 38. Compensation in Case of Early Termination of Agreement		*Reference is made to article 38 in whole.* W.T.: Remark 1: it is herewith suggested to include here the usual wording 'adequate, prompt, and effective compensation". This formula is often found in legislation on the protection of foreign investment.		
Article 39. Guarantees for the Private Partner	*Reference is made to paragraph 3 of article 39.* T.S.: Suggest that bidder takes commercial changes in law and public partner takes the rest.	*Reference is made to paragraph 4 of article 39.* W.T.: Remark 1: the aforementioned terms "national security, public order, protection of rights and freedom, morale, public health, and protection of the environment" are rather vague and broad and might encompass a wide number of laws. It is therefore suggested to refer in this regard to the standing practice of the European Court of Human Rights, which more or less determines the limits of these concepts.	As far as *alterations* to the initial PPP agreement are contract, the public authorities should keep in mind that *substantial modification that cause a distortion of the initial balance of the economic relationship* between the parties to the PPP contracts may be held as violation of the principles of transparency and equal treatment. One way to avoid this is to describe the conditions and mechanism for alterations in both in: (a) the tender documents and (b) the PPP contract.	1. The provision on guarantees to both public and private partners shall be revised and stated more exactly. 2. Reference is made to part 4 – this part contradicts to the previous articles providing for the right of unilateral termination (see our comments supra); 3. Reference is made to part 5 – the wording needs to be restated: amending the PPP agreement may be done by the consent of the Parties; or unilaterally by contractual mechanism or through dispute resolution mechanism in certain

			Financing issues 1. An important factor for the success of a PPP transaction is to ensure clarity end efficiency concerning the financing of the project. This can be done to a great extent by involving the financiers early to the PPP procurement process. Thus we consider a good idea to provide for in the PPP law that the SPV that will undertake to execute works or provide services in PPP arrangements, shall bear all responsibility and risk concerning the required financing for the proper performance of their obligations under the relevant PPP contracts or ancillary agreements. The SPVs must furnish to the contracting authority, prior to the conclusion of the PPP contract, all necessary documentation demonstrating the availability of funding that is sufficient for the performance of the overall obligations to be undertaken by them under the relevant Invitation to Tender. Funding items shall involve in particular: a. the own capital of the SPV, b. The capital secured by the SPV in any form of credit or loan, and especially in the form of loans, bonds and securitization of future and existing receivables. c. the necessary guarantees or assurances required for obtaining the capital or credits of a. and b. above, d. The resources from exploitation of the PPP object during the construction period.	cases (minimum procedure requirements, clear grounds and minimum terms\deadlines for such termination in case of contractual\out of court termination shall be clearly foreseen).
Article 40. Guarantees for the Public partner	*Reference is made to 'The rights and legal interests of the partner' in paragraph 2 of article 40.* T.S.: Which partner? Both?			

Article 42. Procedure for Settlement of the Disputes	*Reference is made to article 42 in whole.* T.S.: Perhaps there should be mention of freedom to choose suitable dispute mechanism where disputes arise between third parties, not just between the public and private parties exclusively, e.g. lenders, contractors, suppliers, etc. Also, thought to be given to providing a specific procedure for handling disputes involving customers or users of infrastructure facility.	*Reference is made to article 42 in whole.* W.T.: Remark 1: the above Article does not seem to exclude arbitration outside Belarus. However, as foreign parties and foreign financiers will require foreign arbitration, an unambiguous provision in the law to that effect would be helpful.	1. One of the key aspects for establishing a PPP legal framework attractive for investors and sufficient for an effective implementation of PPP objects is the provision of a *fair, balanced and expedient dispute resolution system*. At the international economic level, the prevailing option for resolving disputes related to transactions with complex technical, legal and financial aspects and of significant economic value is the *alternative dispute resolution* (conciliation / mediation / arbitration). This is explained by the fact that regular national courts lack usually the expertise and resources to tackle the complex issues that arise from the execution of complex contracts, incl. PPP & concession agreements. Furthermore, the relatively slow pace of national jurisdictions is usually non-compatible with the operative time-constraints of international economic operators and funding institutions. 2. Thus, we propose to provide for in Art. 42 of the RoB PPP law that *any dispute arising in relation to the application, interpretation or validity of the PPP contracts or ancillary agreements shall be resolved by arbitration*. As far as the rules of arbitration are concerned, we advise that in deviation from the RoB laws in force for public sector arbitration, the PPP contract or ancillary agreements should set out the specific rules for the appointment of arbitrators, the rules of arbitration to be applied, the place of the Arbitration court (or other body), the fees to be paid to the arbitrators (where fees are not specified in the applicable arbitration rules) and the language in which the arbitration shall be conducted. The arbitrators' decision shall be final and irrevocable, and not subject to any further judicial or extra-judicial appeal; it shall be carried out without any requirement of ratification by the regular	Taking into account the CIS practice on the dispute resolution on construction and public procurement issues, as well as the requirements of international standards, recommendations of UNCITRAL\model legislative provisions, it is absolutely necessary to clearly foresee the resolution of the disputes on PPP agreements in international arbitration located outside Belarus, with the waiver of the state immunity over such disputes. This provision will serve as additional guarantee for private partners, and will serve also positively for bankability of the project by demonstrating transparency of dispute resolution rules for the private partners (especially foreign investors), bankers and financiers of the PPP projects.

			courts, and the parties involved shall be committed to comply immediately with its terms and conditions. For the resolution of disputes involving the interpretation, application or validity of the Partnership Contract, the substantial law of the RoB shall be applicable. 3. Furthermore, for disputes concerning technical issues, the recourse to arbitration could be preceded by a conciliation procedure for the resolution of the aforementioned disputes that may arise, by an expert's panel nominated by a joint decision of the involved parties. This procedure could be described in the PPP contract.	
Article 43. Procedure for Control over Implementation of Agreement		*Reference is made to article 43 in whole.* W.T.: Remark 1: Confidentiality might be included in a separate Article.		
Article 44. Termination of the Agreement.	*Reference is made to article 44 in whole.* T.S.: Should provide for calculation method for appropriate compensation by either party, including mention of fair value work and losses/loss of profits. Wind-up and transitional measures should also be mentioned.	*Reference is made to paragraph 2 of article 44.* W.T.: Remark 1: The consequence of this provision might be that a private sector party would be under a duty to continue its works or services in spite of a unilateral cancellation of the agreement by the state body. Compensation for such a continuation after the cancellation of the agreement would be recommendable.		The provision needs to be revised with an aim to be more detailed and specific towards PPP agreement (see our comments supra).

Article 46. This Law Entry into Force		*Reference is made to article 46 in whole.* W.T. Remark 1: Thus, it would be possible to conclude a PPP agreement prior to the entry into force of the other provisions. This could create a rather undesirable situation.		It is utterly important to review the other legislative acts that might require changes after the adoption of the Law and coordinate the required changes directly in the Law. In that way, the reform of the legislation on PPP in Belarus will be effective and efficient.