

NEW PERSPECTIVES FOR CONCESSION AGREEMENTS: A COMPARISON OF HUNGARIAN LAW AND THE DRAFT LAWS OF BELARUS, KAZAKHSTAN, AND RUSSIA

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I. INTRODUCTION

The concession agreement¹ has been used widely throughout the nineteenth and twentieth centuries for investing abroad. However, its forms, characteristic features, and applications have undergone significant development² that reflect the changing business and political environment. We face tremendous economic and political changes in some parts of the world — especially in Central and Eastern Europe and the independent states which once formed the Soviet Union. Several countries, newly independent from the former Soviet Union, are drafting and discussing laws on concession agreements. Other countries from Central and Eastern Europe already have some legislation on concessions.³ Apparently, the drafters of such laws consider the legal regulation of concession agreements to be an important priority in the process of transition to a market economy.

This article attempts to answer the question of how the draft laws of three formerly communist countries⁴ visualize the

1. The term "concession agreement" is used in this paper as a generic term that includes all other forms of the modern concession: production-sharing contracts, work and service contracts, participation agreements, and various combinations of these. See *infra* notes 77-79 and accompanying text. A concession agreement may be defined as a license granted by a sovereign government to a foreign corporation or business for the express purpose of exploiting a natural resource, developing a geographic area, or pursuing some particular venture, for which the government desires the corporation's expertise, assets, technology, or capital. KENNETH W. DAM, *OIL RESOURCES: WHO GETS WHAT* 12-18 (1976).

2. For an overview of the historical development and the forms of the concession agreement, see HENRY CATTAN, *THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AMERICA* 1-25 (1967); CHARLES OMAN, *NEW FORMS OF INTERNATIONAL INVESTMENT* 26-37 (1984); DAVID N. SMITH & LOUIS T. WELLS, JR., *NEGOTIATING THIRD WORLD MINERAL AGREEMENTS* 31-37 (1975); Ernest E. Smith, *From Concessions to Service Contracts*, 27 *TULSA L.J.* 493, 494-98 (1992); Note, *From Concession to Participation: Restructuring the Middle East Oil Industry*, 48 *N.Y.U. L. REV.* 774, 775-79 (1973); Ahmad N. Roushdy, *The Legal Framework of Oil Concession Agreements* 16 (1979) (unpublished S.J.D. thesis, George Washington University). The largest part of the literature focuses on the oil industry, where the concession agreement and its forms have been widely used.

3. See, e.g., Iwona Ryniewicz, *Mining Concessions: For Reliable Firms Only*, *GAZETA BANKOWA*, Nov. 15, 1991, at 10 (noting the passage of Polish concession laws which regulate the prospecting, surveying, and exploiting rights of foreign investors); *Private Funding for the Public Sector*, *FIN. E. EUR.*, May 20, 1993, available in *LEXIS*, World Library, Allwld File (describing the positive impact of foreign investing as a result of new concession laws in Poland and Hungary).

4. This article discusses three draft laws: DRAFT STATUTE OF THE REPUBLIC

concession agreement, and what role the concession agreement will play in the transition to a market economy. To answer this question, this article makes a comparative analysis of current legislation and enacted laws, focuses on the possibilities and impediments that such legislation brings, and attempts to draw conclusions on the role of the concession agreement for emerging market economies.

II. LEGAL NATURE OF THE CONCESSION AGREEMENT IN THE COUNTRIES OF EASTERN EUROPE AND THE NEWLY INDEPENDENT STATES

The legal peculiarity of the concession agreement stems from its dual nature as a contract and as an act of the sovereign. Typically, some of the contract clauses are generated by legislation, decrees, or regulations and are imposed on the private party.⁵ The basic legal systems in the world treat such contracts differently. Common law countries distinguish between private contracts and government contracts. Parties to a private contract have contractual and tort remedies protecting them against breach.⁶ However, at common law, a private party to a government contract has no recourse against the government if the government breaches the contract.⁷ Exceptions exist where the government expressly allows itself to be sued, either by statute or the express terms of the specific contract.⁸

OF BELARUS ON FOREIGN CONCESSIONS (1993) [hereinafter DRAFT BELARUS CONCESSION LAW] (copy on file with the *Houston Journal of International Law*); DRAFT OIL LAW OF THE REPUBLIC OF KAZAKHSTAN (1993) [hereinafter DRAFT KAZAKHSTAN OIL LAW] (copy on file with the *Houston Journal of International Law*); DRAFT LAW OF THE RUSSIAN FEDERATION ON CONCESSION AGREEMENTS AND AGREEMENTS FOR PRODUCTION SHARING WITH FOREIGN INVESTORS (1993) [hereinafter DRAFT RUSSIAN CONCESSION LAW] (copy on file with the *Houston Journal of International Law*). All three laws are in various stages of the legislative process and were submitted for legal assessment to the Central and East European Law Initiative at the American Bar Association in January and February 1993.

5. Roushdy, *supra* note 2, at 35.

6. Brian R. Levey, *Tortious Government Conduct and the Government Contract: Tort, Breach of Contract, or Both?*, 22 PUB. CONT. L.J. 706, 708-09 (1993).

7. *Id.* at 713 (explaining that the doctrine of sovereign immunity stems from the old English common law belief that "the King could do no wrong").

8. *Id.* at 712-13. The distinction (public or private) is less clear in tort actions. Geoffrey Samuel, *Governmental Liability in Tort and the Public and Private Law Division*, 8 LEGAL STUD. 277, 278 (1988) (contrasting English common

There are two main "subtraditions" in the civil law countries: the French and the German legal systems.⁹ The French civil law system¹⁰ has the doctrine of "contrat administratif" as distinguished from "contrat prive."¹¹ The French system treats the parties to a "contrat administratif" unequally and enables the state or its instrumentality, which is party to the contract, to amend unilaterally the provisions of the contract.¹² In certain cases, the state may even decide to abrogate the contract.¹³ Under the German civil law system, the contractual character of agreements between the government and private persons is less important. Legally, the granting of a concession or a license is considered a unilateral administrative act.¹⁴

Most of the countries in Central and Eastern Europe and the former Soviet Union have a civil law system influenced by German legal doctrines and concepts.¹⁵ Therefore, there is no tradition in distinguishing between government and private contracts. A concession is generally regarded as an administrative act *followed* by a contract. Only the administrative act can have the legal effect of granting concession rights. The role of the contract is to elaborate the relationship between the concessioner and the government.¹⁶ However, the contract's binding

law with Roman law).

9. See RENÉ DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 54-55 (3d ed. 1985) (reviewing their historical roots and characteristics).

10. *Id.*

11. See generally OTTO KAHN-FREUND ET AL., *A SOURCE-BOOK ON FRENCH LAW* 151-52 (3d ed. 1991).

12. *Id.* at 152.

13. *Id.*

14. See generally E.J. COHN, *MANUAL OF GERMAN LAW* 5-23 (1968); NORBERT HORN ET AL., *GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION* 71-89 (1982).

15. See Olympiad S. Ioffe, *Soviet Law and Roman Law*, 62 B.U. L. REV. 701, 726 (1982). The legal systems of Hungary, the Czech Republic, and Slovakia are based primarily on the German model. W.J. Wagner, *The Law of Contracts in Communist Countries (Russia, Bulgaria, Czechoslovakia, and Hungary)*, 7 ST. LOUIS U. L.J. 292, 295 (1963). The Bulgarian and Polish systems developed under mixed influence, while the Russian law, both before and after the Communist Revolution in 1917, drew from the German legal tradition. *Id.*; Kazimierz Grzybowski, *Reform of Civil Law in Hungary, Poland, and the Soviet Union*, 10 AM. J. COMP. L. 253 (1961). Kazakhstan inherited the Soviet law, but one may expect that countries like Kazakhstan, and especially Turkmenistan and Azerbaidjan, will be influenced by Islamic law.

16. See KEITH W. BLINN ET AL., *INTERNATIONAL PETROLEUM EXPLORATION &*

force is conditioned upon the existence of a valid administrative act.¹⁷

In the history of concession agreements and disputes surrounding them, host governments often attempted to deny the binding character of the concession agreement based on arguments of sovereignty.¹⁸ On almost all occasions, however, ad hoc tribunals, institutional arbitrations, and courts have rejected such arguments and maintained the binding contractual force of the concession agreement¹⁹ based upon international law and the legal aspects of concession agreements.²⁰ The major and still controversial problem is whether international law or local law justifies a right of the host government to modify and terminate concession contracts and whether the denial of such rights is compatible with sovereignty.²¹

EXPLOITATION AGREEMENTS 54-55 (1986). The main features of a concession agreement are: (1) the investor's exclusive right to explore and exploit at its own risk; (2) the investor's freedom to dispose of any production, subject to an obligation to supply the local market; (3) the host nation's right to receive surface rents from the investor; (4) the host nation's right to receive royalties either in kind or in cash, as it chooses; (5) the host nation's right to receive taxes on profits made by the investor; and (6) the investor's right to freely own and dispose of any equipment and installations on the site. *Id.*

17. See, e.g., JUHA KUUSI, *THE HOST STATE AND THE TRANSNATIONAL CORPORATION* 61 (1981).

18. See, e.g., *Texaco Overseas Co. v. Libya*, 53 I.L.R. 329, 422 (I.C.J. Arb. 1977); *Saudi Arabia v. Arabian Am. Oil Co.*, 27 I.L.R. 117, 164-65 (Int'l Arb. Trib. 1958); Arthur Nussbaum, *The Arbitration Between Lena Goldfields Ltd. and The Soviet Government*, 36 CORNELL L.Q. 31, 39 (1950).

19. See, e.g., *Texaco*, 53 I.L.R. at 468-83 (reaffirming a doctrine that maintained the binding force of a concession agreement based upon the presence of a "stabilization clause"). A stabilization clause in the agreement expressly outlaws nationalization or other forms of unilateral termination of the concession, other than those provided for in the concession agreement itself. *Id.* at 477-78.

20. See, e.g., Francis A. Mann, *The Aminoil Arbitration*, 1983 BRIT. Y.B. INT'L L. 213. See also ZOUHAIR A. KRONFOL, *PROTECTION OF FOREIGN INVESTMENT* 68-94 (1972); Derek W. Bowett, *Claims between States and Private Foreign Entities*, 35 CATH. U. L. REV. 929, 933 (1986); Terence Daintith & Ian Gault, *Pacta Sunt Servanda and the Licensing and Taxation of North Sea Oil Production*, 8 CAMBRIAN L. REV. 27, 30 (1977). Several resolutions of the United Nations were also prompted by and affected issues related to concession agreements. See, e.g., *Permanent Sovereignty Over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15-16, U.N. Doc. A/5217 (1962).

21. Michael E. Dickstein, *Revitalizing the International Law Governing Concession Agreements*, 6 INT'L TAX & BUS. LAW. 54, 63 (1988).

III. COMPARATIVE ANALYSIS OF THE LEGISLATION ON CONCESSION AGREEMENTS IN BELARUS, HUNGARY, KAZAKHSTAN, AND RUSSIA

A. Overview

There are generally two approaches toward the legal regulation of concession agreements by the host government. Some countries regulate these agreements by a separate legislative act,²² while others have no formal legislation on the subject other than basic contract and administrative law.²³ The Belarussian Draft Law on Foreign Concessions,²⁴ the Russian Draft Law on Concession Agreements and Agreements for Production Sharing with Foreign Investors,²⁵ and the Hungarian Law on Concessions²⁶ are examples of comprehensive legislative approaches whereby one piece of legislation attempts to cover the whole legal regime.²⁷ The idea is not novel. Several countries have "mining codes" dealing with a variety of issues concerning concessions in the mining industry from ownership of mineral resources and exploration permits to state participation in mining operations, tax regulation, and social security for mine workers.²⁸ In some oil exporting countries, legislation is even more detailed and often incorporates a standard form of concession agreement which defines the limits of bargaining.²⁹ However, most of the laws on concessions in regions other than

22. See SMITH & WELLS, *supra* note 2, at 28-29.

23. *Id.*

24. DRAFT BELARUS CONCESSION LAW.

25. DRAFT RUSSIAN CONCESSION LAW.

26. ACT XVI ON CONCESSIONS (1991) (Hung.).

27. Assorted pieces of legislation regulating mineral resources have always been a common practice in Russia, Belarus, and Kazakhstan, as well as in Hungary and Bulgaria. However, the primary function of such legislation establishes an administrative regime for the exploitation of natural resources by the various state and municipal bodies and enterprises. See, e.g., LAW ON THE WATER RESOURCES (1973) (Bulg.); CODE ON THE SUBSURFACE (1976) (USSR) (repealed by Russia, 1992).

28. See, e.g., SMITH & WELLS, *supra* note 2, at 28 (discussing the "mineral" laws of several Latin American countries); Nour E. Terki, Comment, *The Algerian Act of 1986 and the Encouragement of Foreign Investment in the Area of Hydrocarbons*, 6 OIL & GAS L. TAX'N REV. 80 (1987) (commenting on the Algerian Mineral Law).

29. See, e.g., Libyan Petroleum Law, No. 25 (1955) (copy on file with the *Houston Journal of International Law*).

Eastern Europe apply only to specific industries — usually those dealing with mineral exploitation.³⁰ Therefore, the codification in one statute of the legal regime of concession agreements, regardless of the industry, is a new technique.

As a result of the civil law traditions in the East European countries, the adoption of a separate piece of legislation on a certain matter does not necessarily mean that the matter is not governed by other laws. Quite to the contrary, the subject draft laws include numerous references to other laws, either existing or pending adoption. For example, the Hungarian law should be read in conjunction with the Hungarian Civil Code.³¹ The Belarussian Draft Law provides for additional laws to be adopted.³² The Russian Draft Law also refers to the laws concerning foreign investment and any other applicable Russian legislation.³³ It should be applied in concert with the 1992 Licensing Regulations³⁴ and the Law on the Subsurface.³⁵

Some of the references in the considered legislation even incorporate blanket statements, such as “in accordance with current law.”³⁶ This expression may seem confusing, but it is often seen in statutes from civil law countries. Although it means almost nothing in the American legal system, the effect of such phrasing in a civil law country is to reserve the regulation of certain issues for the supreme legislative body — the parliament — and to outlaw its regulation on a different level — local legislatures or the executive branch. The word “law” is

30. See, e.g., Mineral Workings (Offshore Installations) Act, 1971, ch. 61 (U.K.). See also New Roads and Street Works Act, 1991, ch. 22 (Eng. & Wales); LAW NO. 1 (1973) (Egypt) (concerning foreign investment in tourist establishments). For a discussion of LAW NO. 1, see *Southern Pac. Properties v. Egypt*, 32 I.L.M. 933, 948–52 (ICSID 1993).

31. ACT XVI ON CONCESSIONS art. 19 (1991) (Hung.).

32. DRAFT BELARUS CONCESSION LAW art. 2.

33. DRAFT RUSSIAN CONCESSION LAW art. 2.

34. STATUTE OF THE RF MINING & INDUSTRY INSPECTORATE (1992) (Russ.).

35. LAW ON THE SUBSURFACE OF THE RUSSIAN FEDERATION arts. 10, 13–15, 16 *Vedomosti RF* 1076 (1992) [hereinafter RUSSIAN SUBSURFACE LAW] (limiting the terms for which a license to exploit subsurface natural resources can be issued; regulating the procedure for granting licenses; and regulating various other issues which are touched upon in the considered draft law as well). Clearly, under the civil law interpretation principle *lex specialis derogat legi generali* (the specific law prevails against the general law), the RUSSIAN SUBSURFACE LAW should prevail whenever it states rules concerning concessions on underground resources. *Id.*

36. See, e.g., DRAFT KAZAKHSTAN OIL LAW art. 14.

used in its strict sense and means "act of parliament."³⁷ Therefore, one must have a thorough knowledge of the existing legislation in its entirety to interpret it correctly based on the civil law principles of construction and interpretation.³⁸ However, despite the existence of numerous additional sources which regulate concession agreements, the existence of a separate piece of legislation on concession agreements undoubtedly brings clarity and comprehensiveness to the legal regime.³⁹

In other countries, such as Bulgaria and Poland,⁴⁰ there are no separate legislative acts on concession agreements. Therefore, concession agreements will be governed by various laws depending on the legal form used (concession, license, or contractor arrangement). Also, the concession agreement itself inevitably will be the ad hoc source of its legal regime.

37. See JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 22-23 (2d ed. 1985).

38. In civil law countries, there exists a system of interpretational principles that is substantially different from the principles an American lawyer would use in extracting and applying the holding of a case, or even in interpreting a statute. See DAVID & Brierley, *supra* note 9, at 117-18, 136-37. Statutes (acts of parliament) in the civil law countries are phrased in a more general manner and are always interpreted in conjunction with each other as pieces of a whole. See generally HENRY P. DE VRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER: A CASE ILLUSTRATED INTRODUCTION TO CIVIL LAW INSTITUTIONS AND METHOD* 243-62 (1976) (discussing the principles and methodology of the civil law); ARTHUR T. VON MEHREN, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 87-95 (1977) (same).

39. See DAVID & Brierley, *supra* note 9, at 147-48 (explaining how the lack of legislation stimulates legal writing ("doctrine") which may have diverging approaches to the subject at issue).

40. For a brief overview of the legal and business considerations concerning investment in Eastern Europe, see LEGAL ASPECTS OF DOING BUSINESS IN EASTERN EUROPE AND THE SOVIET UNION 41-55 (Dennis Campbell ed., 1986) (reviewing the legislation prior to the beginning of the 1989 reforms); OLIVIER BLANCHARD, *REFORM IN EASTERN EUROPE* (1991). See also BLINN ET AL., *supra* note 16, at 34 (synthesizing the petroleum legislation models found world-wide into three types: the "fixed content" system used by most countries in the Western Hemisphere; the "agreement" system used by various countries around the world, with no set geographic pattern; and the "flexible" system which is a combination of the first two).

B. Comparative Analysis

1. Scope of Concession Regulation

All the subject legislation, except the Kazakh Draft Law,⁴¹ regulates concession agreements in all fields of the economy. The Belarussian and the Russian Draft Laws and the Hungarian law each include an article which defines their scope.⁴² They do so either by enlisting the fields of the economy where concessions may be granted,⁴³ or more generally, by defining the different types of business activities.⁴⁴ Notably, however, the emphasis in the considered legislation is not the same. The Hungarian law focuses mainly on concession agreements for the exploitation of national roads, airports, and telecommunications.⁴⁵ The Belarussian Draft Law stands in the middle, attempting to provide for and distinguish between concessions on natural resources and agreements involving exploitation of industrial or other facilities.⁴⁶ It includes an unusual idea:

41. DRAFT KAZAKHSTAN OIL LAW.

42. DRAFT BELARUS CONCESSION LAW art. 3; DRAFT RUSSIAN CONCESSION LAW art. 1; ACT XVI ON CONCESSIONS art. 1 (1991) (Hung.).

43. DRAFT BELARUS CONCESSION LAW art. 3 states: "Concessions are admissible in industries, agriculture, transportation and communications, communal services, catering services and other branches of the economy" ACT XVI ON CONCESSIONS art. 1 (1991) (Hung.) states:

(1) This act sets forth the basic rules of conveying by way of granting concession of the following:

(a) national public roads and their engineering structures, railways, canals . . . ports, public airports and regional utilities,

(b) the communications trunk network and the frequencies that can be used for the purposes of telecommunications,

. . . .

(e) mining research and exploitation

44. DRAFT RUSSIAN CONCESSION LAW art. 1 states:

In accordance with the concession agreement the state . . . provides a foreign investor with the rights for the following types of activities:

(a) search and prospecting, development and operation of replenishable and non-replenishable natural resources . . . ;

(b) performing certain types of business activities, which are monopolized by the state;

(c) long term leasing of government property

45. ACT XVI ON CONCESSIONS art. 1 (1991) (Hung.).

46. Compare DRAFT BELARUS CONCESSION LAW art. 26 (concerning concessions of land and other natural resources) with *id.* art. 33 (concerning concessions of "Edifices, Constructions, [and] Equipment").

granting concessions to operate manufacturing enterprises.⁴⁷ The Russian Draft Law and ultimately the Kazakh Draft Law emphasize concessions on natural resources.⁴⁸

These differences obviously stem from the peculiarities of the economies in the considered countries, but they also raise interesting questions about the role of the concession agreement as a vehicle in the transition to a market economy. The concession agreement has always been considered useful for achieving economic development and exploration of national resources in a field where the government is unwilling to give up its rights of ownership.⁴⁹ In fact, this is the very nature of the concession agreement.⁵⁰ Government unwillingness, however, has always been justified by the importance of certain sectors of the economy for the national sovereignty.⁵¹ Such fields of the economy were traditionally limited to strategic natural resources, communications, transportation facilities, and energy. It is unclear whether the provisions for concessions on state owned enterprises⁵² or on businesses that are state monopolies⁵³ are motivated by the "sovereignty" concern. Perhaps in the specific circumstances of a transitional economy in a large-scale privatization process,⁵⁴ there is a threat of rapid concentration of

47. *Id.* art. 32.

48. DRAFT RUSSIAN CONCESSION LAW art. 1; DRAFT KAZAKHSTAN OIL LAW pmbl.

49. Smith, *supra* note 2, at 494.

50. BLINN ET AL., *supra* note 16, at 55, 68. The most specific feature of the concession agreement as a form of investing abroad is the participation of a government or its instrumentality as a party to the contract. See SIMON G. SIKSEK, *THE LEGAL FRAMEWORK FOR OIL CONCESSIONS IN THE ARAB WORLD* 16 (1960). Historically, the foreign investor entered into a concession agreement whenever the investment was in a sector of the economy or concerned a type of activity which could be profitable and successful if handled by obtaining exclusive rights. See BLINN ET AL., *supra* note 16, at 17 (suggesting that the inherent high risks of exploitation require some protection from competitors to allow a profit that justifies the risk). Exclusive rights for an entire geographic area or in a certain type of business activity cannot be obtained by dealing with a private party. See Kenneth S. Carlston, *International Role of Concession Agreements*, 52 NW. U. L. REV. 618, 621 (1957). From the point of view of the host government, the concession agreement is a possibility to obtain foreign investment, to develop certain fields of the economy, and to introduce technology without losing the ownership and, therefore, ultimate control over national resources. SMITH & WELLS, *supra* note 2, at 13-15.

51. Smith, *supra* note 2, at 494.

52. DRAFT BELARUS CONCESSION LAW art. 32.

53. DRAFT RUSSIAN CONCESSION LAW art. 31.

54. A major problem in the transition from non-market to market economies

economic power in the hands of foreign multinational corporations. This rationale may justify the preservation of government ownership and control not only of resources traditionally regarded as strategic, but of large industrial enterprises as well.

It is very likely, however, that inertness and old concepts inherited from the philosophy of the centrally planned economy are shaping the idea not to privatize, but to grant concessions on industrial enterprises and thus preserve some control. Indeed, a concession agreement may benefit the host country if it requires the concessioner to provide access to modern technology and maintain professional training programs for the employees. However, all this may be included in a foreign investment law, as is done in many other countries.⁵⁵

A possible advantage in the long run (after the expiration of the concession, when the question of privatization occurs again) is that at this stage, two or three decades ahead in development, enterprises could be sold to large domestic private companies instead of distributing their shares to thousands of small voucher holders and/or to multinationals.⁵⁶ However, the

in the former communist countries is the necessity to transform the system of centrally planned and state owned industry, services, and agriculture into a system governed by market forces. Richard C. Schneider, Jr., *Property and Small-Scale Privatization in Russia*, 24 ST. MARY'S L.J. 507, 511-19 (1993). It is universally recognized that privatization is the most important vehicle in the reform. *Id.* at 508. For general analysis of the legal and business issues involved, see BLANCHARD, *supra* note 40, at 32-35; Zbigniew M. Czarny, *Privatization of State Industries in Poland*, 20 INT'L BUS. LAW. 151, 151-54 (1992); Olympiad S. Ioffe, *Privatization in the USSR and Commonwealth*, 8 CONN. J. INT'L L. 19 (1992); Schneider, *supra* at 511-19.

55. See, e.g., LAW TO PROMOTE MEXICAN INVESTMENT AND TO REGULATE FOREIGN INVESTMENT arts. 13.V., 13.XII., 1973 D.O. (Mex.), *translated in* NATIONAL COMMISSION OF FOREIGN INVESTMENTS, FOREIGN INVESTMENT: JUDICIAL FRAMEWORK AND ITS APPLICATION 45 (1984).

56. Privatization in Eastern Europe is currently developing in two basic avenues: the sale of whole corporations or substantial shares thereof to foreign investors through negotiations or tenders; and legislation which entitles the citizens of the country to purchase or receive for free, under certain conditions, special bonds ("vouchers" in former Czechoslovakia) which are exchangeable for stock. See, e.g., Czarny, *supra* note 54, at 152. The defect in the first option is that it allows foreign control over the economy. The second possibility leads either to lack of a "real owner," when a corporation is owned by thousands of small stockholders, or to ownership through mutual funds or other similar institutions. *Id.* These two basic systems are utilized in various combinations in an effort to forge a third avenue which would circumvent the negative consequences of the lack of domestic capital. See, e.g., Linda Corman, *Few*

concession scheme of foreign investment in industry, services, or agriculture, as visualized in the considered draft legislation, could create bureaucratic control, which is disadvantageous.

The scope of application envisaged in the Russian and Belarussian Draft Laws is defined in extremely broad terms. This may mean that there is an intention on the part of the drafters to utilize concession agreements as a substitute for privatization in the transition from a non-market to a market economy, whenever selling out industrial enterprises, facilities, or government property would be for some reason inappropriate.⁵⁷

Regardless of the expressly defined scope of regulation in the draft laws of Belarus, Russia, and Kazakhstan, and in Hungarian law, the proliferation of concession agreements in the economies of these countries will ultimately depend on the practice of their governments. The decision whether to grant concessions on certain facilities is left to the discretion of the government agencies,⁵⁸ and their policies will be the most significant factors.

2. Scope of Regulation Towards Persons (Natural or Legal, Local or Foreign)

The scope of the considered legislation towards persons is narrowed in the Belarussian and Russian Draft Laws and is wider in the Kazakh Draft Law and the Hungarian law.⁵⁹ The

Privatizations in the East Bloc Go Very Quickly, NAT'L L.J., Feb. 24, 1992, at 19; Richard D. English, *Privatization by General Fund: Economic Empowerment for Central and Eastern Europe*, 24 GEO. WASH. J. INT'L L. & ECON. 527, 533-46 (1991).

57. Since only the draft laws and no protocols or other parliamentary documents were available at the time this article was completed, such conclusions are, of course, based solely on the interpretation of the draft legislation itself.

58. See *infra* text accompanying notes 60-76 (discussing the powers of the governmental bodies involved in the negotiation, adoption, and supervision of the concession).

59. Compare DRAFT BELARUS CONCESSION LAW art. 6 ("The concessioners are foreign states, juridical and natural persons who have proven their capabilities to effectively conduct business activities . . .") and DRAFT RUSSIAN CONCESSION LAW pmbl. ("This Law regulates legal, economic and organizational conditions for foreign investments . . . in the form of concessions and agreements for production sharing.") with DRAFT KAZAKHSTAN OIL LAW pmbl. ("The present law regulates relationships related to the conduct of oil operations.") and ACT XVI ON CONCESSIONS art. 3 (1991) (Hung.) ("The State . . . may conclude a contract

former regulate concessions granted only to foreign natural or legal persons, whereas the latter do not distinguish between local and foreign persons and create a unitary legal regime.

The adoption of a law on concessions which regulates only agreements with foreigners is a novel approach that can hardly be justified. Besides the interpretation problems concerning, for example, locally incorporated companies which are wholly foreign owned, the narrow scope of the draft laws in the absence of additional legislation leaves unanswered a major question — is it at all possible for a local person or company to bid for a concession? If not, this seems to be a strange and unfounded discrimination. If so, then what different rules will apply once the scope of the law is limited and no other legislation exists? The unitary regime of the Kazakh Draft Law and the Hungarian Law on Concessions is definitely a better solution.

3. State Instrumentalities and Government Bodies Involved in the Negotiation, Approval, and Supervision of the Concession

The instant legislation typically creates a specialized governmental agency to prepare and supervise the bidding for the concession, negotiate the concession agreement, and submit the concession agreement to a specific government agency for approval.⁶⁰ The specialized agency exercises supervision and control for the duration of the concession.⁶¹ In addition to the agency of the central government, the Russian and the Kazakh Draft Laws provide for the creation of local agencies.⁶² The Russian Draft Law also vaguely attempts to distinguish the jurisdiction of the federal state bodies from the jurisdiction of the republics, regions, and autonomous districts.⁶³ The Hungarian law does not establish a central governmental instru-

of concession . . . with residents or with non-residents . . .").

60. See DRAFT RUSSIAN CONCESSION LAW art. 6 (providing for the powers of the "Specially Authorized Agency"); DRAFT BELARUS CONCESSION LAW art. 5 (creating the "Concession Organ"); DRAFT KAZAKHSTAN OIL LAW art. 4 (defining the "Competent Body" and its rights and obligations).

61. See, e.g., DRAFT KAZAKHSTAN OIL LAW arts. 4-5 (creating a national "competent body" and "local state agencies").

62. *Id.*; DRAFT RUSSIAN CONCESSION LAW arts. 4-5.

63. DRAFT RUSSIAN CONCESSION LAW arts. 4-5.

mentality but instead allows the competent ministries or municipal authorities to form temporary bodies whenever they work on a concession project.⁶⁴

The organization, structure, and powers of the specialized agency are generally vague in each of the laws at issue.⁶⁵ The Russian and the Belarussian Draft Laws define the role of this newly created governmental instrumentality by enumerating its "functions,"⁶⁶ rather than providing for specific measures and acts in which it can engage. The Belarussian Draft Law provides for significant and broad powers of the "Concession Organ."⁶⁷ This instrumentality publishes a list of the objects to be offered for bidding, organizes the tender, negotiates the agreement, approves changes in production, environmental and other aspects of the concessioner's undertakings, and may request information and data from the concessioner at any time, in addition to its other related functions.⁶⁸ The Kazakh Draft Law seems clearer because the powers of the central government agency and the local state agencies are extensively described and distinguished.⁶⁹

Two of the draft laws provide an active role for the parliament in executing concession agreements. Under the Belarussian Draft Law, concession agreements are divided into two groups: (1) agreements that can be executed by the local authorities; and (2) agreements that must be approved by the Supreme Soviet, the parliamentary body in Belarus.⁷⁰ The Russian Draft Law distinguishes concession agreements which do not contain existing legislation exemptions from those which do contain exemptions.⁷¹ The former are approved by the President of the Russian Federation and the latter by the Russian

64. ACT XVI ON CONCESSIONS art. 2 (1991) (Hung.).

65. See Smith, *supra* note 2, at 502 (emphasizing the difficulty in deciding with whom to negotiate in the former Soviet Union in the absence of special legislation on concessions). Such concern has been enunciated in conversation by some American lawyers, who have had to renegotiate seemingly closed deals after several authorities in Kazakhstan claimed jurisdiction over the same issue.

66. See, e.g., DRAFT RUSSIAN CONCESSION LAW art. 6(d) (entrusting the "Specially Authorized Agency" with the "supervision over the adherence to concession agreements").

67. DRAFT BELARUS CONCESSION LAW art. 5.

68. *Id.* art. 7.

69. DRAFT KAZAKHSTAN OIL LAW arts. 4-5.

70. DRAFT BELARUS CONCESSION LAW art. 7.

71. DRAFT RUSSIAN CONCESSION LAW art. 9.

Supreme Soviet.⁷² The rationale underlying the involvement of the President and Supreme Soviet is most likely to ensure consideration of the long-term national interests in every case and to avoid corruption among government officials. The inevitable politicization of the process, however, could hamper the ultimate goals to be achieved. Additionally, parliamentary approval of a concession agreement could have significant legal consequences.⁷³

The Kazakh Draft Law takes the other extreme by leaving the question of entering a concession agreement to the discretion of the government,⁷⁴ which presumably can execute the concession agreement itself or delegate this right to a ministry or other state instrumentality.⁷⁵ The Kazakh Parliament may, however, impose a requirement for parliamentary approval through provisions in specific laws regulating certain industries or on an ad hoc basis. The Hungarian Law on Concessions provides that approval on the parliamentary level may be required under regulations issued by the executive on particular occasions.⁷⁶

4. Types and Legal Status of the Concession Agreement

It is an established view that the concession agreement in foreign investment has developed from the traditional model⁷⁷ used throughout the nineteenth century until the 1960s, to a

72. *Id.*

73. See *infra* text accompanying notes 85–86.

74. DRAFT KAZAKHSTAN OIL LAW art. 8.

75. See, e.g., *id.* art. 4(1) (granting responsibility to the "competent body . . . [a]t the direction of the Government of the Republic of Kazakhstan, to conclude contracts with a contractor"). A contractor may be a concessioner or party under a production-sharing or other type of agreement. See *id.* art. 1 (defining "contractor" as "any legal or physical person, or an association of such persons, states, and/or international organizations that conduct oil operations in the Republic of Kazakhstan").

76. ACT XVI ON CONCESSIONS art. 18 (1991) (Hung.).

77. See SMITH & WELLS, *supra* note 2, at 31. The major characteristics of the traditional model are: (1) extremely long terms (from 50 to 99 years); (2) payments mainly in the form of royalties based on the volume or the value of the output; and (3) extensive discretionary rights of the concessioner to decide whether and to what extent to exploit the "conceded" territories or facilities. *Id.* at 31–32. For an analysis of traditional concessions and their associated conceptual problems, see Francis B. Sayre, *Change of Sovereignty and Concessions*, 12 AM. J. INT'L L. 705 (1918).

modern one.⁷⁸ Modern concession agreements take several new, but not easily distinguishable, forms: the "production-sharing," the "service," and the "work" contracts.⁷⁹ The Russian Draft Law mentions concession agreements and production-sharing contracts in its title and throughout the text.⁸⁰ The Belarussian Draft Law, although using only the term "concession," is quite flexible in the actual legal nature of possible arrangements with foreign investors.⁸¹ The Kazakh Draft Law envisions product sharing contracts, service contracts, and concessions.⁸² The Hungarian law explicitly limits its scope to concessions.⁸³ Presumably, other arrangements are subject to the regulation of general commercial law.

There is little doubt that the considered legislation establishes the binding force of the concession agreement, regardless of its type, and emphasizes the protection of the foreign investor against nationalization in order to attract investment.⁸⁴ It

78. SMITH & WELLS, *supra* note 2, at 37. Major changes include: (1) a shift to taxation as a primary source of income for the government from the concession; (2) increased administrative control over the concession enterprise; (3) requirements for minimal production and for relinquishing the facilities or territories which are not fully exploited; (4) profit-sharing arrangements; and (5) equity participation of the host government. *Id.* at 35.

79. *See, e.g., id.* at 28 (categorizing forms into three models: traditional; modern; and production-sharing, service, and work contracts). For analysis of modern concession types and the "neighboring" arrangements, *see* OMAN, *supra* note 2, at 16; Smith, *supra* note 2, at 501-23; Note, *supra* note 2, at 785. Production-sharing contracts range from concession-like agreements granting exclusive rights for the exploitation of an area or facility, but providing for payments in the form of a share of the production, to arrangements in which the "investor" is almost a lender who is repaid only in the form of the stipulated share of the production. Smith, *supra* note 2, at 513-19. In consideration of the provision of financing, technical, or other services in service and work contracts, the foreign firm is entitled to recover costs and earn a fee. *Id.* at 519. The term "participation agreement" refers to arrangements where the government has some kind of participation in the operation of the enterprise, from a simple contractual relationship to minority or majority equity participation. *Id.* at 522. All forms are known in numerous hybrids. *Id.* at 523.

80. *See, e.g.,* DRAFT RUSSIAN CONCESSION LAW arts. 1-2.

81. This is illustrated in the discussion concerning the property rights of the concessioner. *See infra* notes 88-99 and accompanying text.

82. DRAFT KAZAKHSTAN OIL LAW art. 6.

83. ACT XVI ON CONCESSIONS pmbl., art. 1 (1991) (Hung.).

84. *See, e.g.,* DRAFT BELARUS CONCESSION LAW § 7 (addressing "Guarantees and Protection of Concessioner's Rights"); DRAFT RUSSIAN CONCESSION LAW art. 3 (stating that "a [concessioner] . . . has all state guarantees with regard to foreign investment protection foreseen by the . . . Foreign [I]nvestments in

is interesting, however, to assess the legal consequences of the involvement of the parliament in approving the concession agreement as provided for in the Belarussian and the Russian Draft Laws. The final approval by the Supreme Soviet seemingly brings some stability, since an attempt at a unilateral change in the agreement has to be made at the same high level and in a political environment. There is a view, however, that a concession is only a legislative act and not a contract if it has been conferred by and is contained in a legislative act.⁸⁵ An act of parliament may be amended or abrogated at any time regardless of any contractual obligation because a sovereign can always change the law.⁸⁶

Another issue is whether it will be possible to stipulate the application of the investor's country law or the law of some third country to the concession agreement. In the draft laws there are no provisions either mentioning or prohibiting such a possibility. All the draft laws conspicuously emphasize the importance of host country regulation of every legal aspect of the concession activities.⁸⁷ However, absent an express contrary provision, it is conceivable that in a particular concession agreement the application of foreign law may be agreed upon by the parties. Of course, there must be a reason for such a

Russian Federation,' as well as guarantees of international agreements, that have legal power on the . . . Russian Federation").

85. See, e.g., BLINN ET AL., *supra* note 16, at 25, 55 (characterizing the concession agreement as merely authorization by the host nation to explore and produce, and noting that this authorization is only as valid as the legislation which grants it).

86. Cf. Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 796 (1981) (noting that some parties to concession contracts wish to include provisions which "withdraw the relationship from the reach (and possible change) of the host state's law"); Ted L. Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal*, 78 AM. J. INT'L L. 1, 48 (1984) (suggesting that developing nations and East European countries believe that a "fundamental change in government policy" is a ground for relief from contractual relations).

87. See, e.g., DRAFT RUSSIAN CONCESSION LAW art. 2 (stating that concessions "are regulated by this law, by the laws of the Russian Federation about foreign investments, land, underground mining resources, environmental protection, and other legislative acts of the Russian Federation, as well as by international agreements signed by the Russian Federation"); DRAFT BELARUS CONCESSION LAW art. 2 (explaining that "concessions on the territory of the Republic of Belarus are regulated by the present statute and other legislative acts of the Republic of Belarus").

solution that is strong enough to override the policy favoring national regulation.

5. Scope of the Rights Granted by the Concession

The Belarussian, Russian, and Kazakh Draft Laws each have provisions explicitly prohibiting the acquisition of ownership rights of the property granted for exploitation.⁸⁸ The draft laws further state that the concessioner owns the "products and profits"⁸⁹ or the "share of the product and profits"⁹⁰ or, in the case of oil, the "oil brought to the surface, subject to the provisions in the contract."⁹¹ This solution is generally in accord with the trends in the development of the modern concession contracts in countries which, unlike the United States, do not allow private ownership of natural resources.⁹² Similarly, the Hungarian Law on Concessions defines the property rights of the concessioner as rights to possess and use but not to alienate,⁹³ which actually means no right of ownership. By way of exception, an executive regulation may provide for acquisition of ownership rights in a particular case.⁹⁴

The Belarussian Draft Law, which articulates concessions on manufacturing enterprises most clearly, details whether severable improvements, made by the concessioner on the site, are his property and how the concessioner could be reimbursed (presumably upon expiration of the concession) for improve-

88. DRAFT RUSSIAN CONCESSION LAW art. 25 ("The transfer to the foreign investor . . . of the rights to dispose of and use the state property, does not provide the rights of ownership"); DRAFT BELARUS CONCESSION LAW art. 4 ("The transferral of objects to a concession does not entail a transferral of title of property for those objects to the concessioner"); DRAFT KAZAKHSTAN OIL LAW art. 2 ("Oil in its natural state underground in the Republic of Kazakhstan is the exclusive property of the republic.").

89. DRAFT BELARUS CONCESSION LAW art. 4.

90. DRAFT RUSSIAN CONCESSION LAW art. 25.

91. DRAFT KAZAKHSTAN OIL LAW art. 2(2).

92. See, e.g., ROBERT S. RENDELL & JOHN M. NIEHUSS, INTERNATIONAL FINANCIAL LAW: LENDING CAPITAL TRANSFERS AND INSTITUTIONS 31-32 (1983). However, a system in which property rights are granted would be beneficial for obtaining investments. In project finance, ownership rights are important because they can serve as collateral; and, even where no mortgage or pledge is used, the ownership of the facilities and equipment is an important security for the lenders. *Id.*

93. ACT XVI ON CONCESSIONS art. 23 (1991) (Hung.).

94. *Id.*

ments attached to the land.⁹⁵ Those provisions again raise the issue of the intended legal nature of a "concession" agreement on a steel factory, for example.⁹⁶ Such "concession" agreements could be regarded as long-term leases.⁹⁷ However, the Belarussian draft further complicates the picture by declaring: "[A] concession enterprise *becomes assignee* to property rights and responsibilities of the state-owned enterprise The concessioner must *fully or partially* assume payments of creditor debts of the enterprise."⁹⁸

These provisions illustrate the vagueness of the drafters' ideas concerning the use of concession agreements on manufacturing enterprises, farms, and other facilities. Perhaps the practice in Belarus and Russia will eventually turn to pure forms — concessions on natural resources, roads, and radio frequencies on the one hand, and leases on industrial enterprises on the other. It may be asserted, of course, that the concession form is beneficial even if the nature of the agreement is unclear because its regulated procedure for granting, protection clauses, and special legislation brings more stability and guarantees for the foreign investor. Since the Kazakh Draft Law deals only with oil concessions, its solution of the issue is conventional and does not raise similar problems.

The considered draft laws and the Hungarian law leave the determination of the exact scope and details of the concessioner's rights for the concession agreements. No draft laws include a model agreement, therefore, the flexibility left for negotiation is significant. In general, there is an emphasis on the contractual character of the relations between concessioner and state which makes the arrangements more akin to the license agreement and the production-sharing contract.⁹⁹

95. DRAFT BELARUS CONCESSION LAW art. 4.

96. Jay M. Vogelsson, Analysis of the Law of the Republic of Belarus on Foreign Concessions 2 (Feb. 15, 1993) (unpublished report of the Central and East European Law Initiative, American Bar Association, copy on file with the *Houston Journal of International Law*).

97. *Id.*

98. DRAFT BELARUS CONCESSION LAW art. 32 (emphasis added).

99. Smith, *supra* note 2, at 515 (distinguishing the production-sharing contract from the concession). See also sources cited *supra* note 79.

6. "Government Take"

The term "government take" denotes the combination of payments, obligations, and other considerations which the concessioner owes to the government under the contract.¹⁰⁰ Government take can be divided into two main categories: (1) contractual payments and obligations; and (2) government participation in the concession.

a. Contractual Payments and Other Obligations

In the legislation analyzed herein, a significant freedom for negotiations is left on the issue of payment obligations. The Belarussian Draft Law mentions the possibility for in kind, cash, or mixed royalty payments¹⁰¹ and for the imposition of obligations to fulfill a production program.¹⁰² However, it leaves all further details to the particular agreement,¹⁰³ and no guidance is provided as to the basis of calculation of those payments and obligations.¹⁰⁴

The Russian Draft Law distinguishes between the payments required under a concession agreement and those in a production-sharing contract.¹⁰⁵ The former are illustrated by a non-exhaustive list, containing, *inter alia*, concession fee, rent, in kind, and cash payments based on the profit, as well as taxes.¹⁰⁶ The production-sharing agreement will give the foreign investor a share of the production that can be determined either constantly or through a sliding scale depending on the volume

100. See, e.g., Alastair R. Lucas, *State Petroleum Corporations: The Legal Relationship*, 3 J. ENERGY & NAT. RESOURCES L. 81, 86-89 (1985). But see Smith, *supra* note 2, at 501 n.33 (recognizing that "in the host country's perspective, the issue is the size of the 'oil company take'"); Ahmed Z. Yamani, *The Oil Industry in Transition*, 8 NAT. RESOURCES LAW. 391, 392-94 (1975) (writing while serving as Saudi Arabia's Minister of Petroleum that a majority (51%) "take" in the oil company's profits gives the host nation an increased perception of ownership and control over the oil resources).

101. DRAFT BELARUS CONCESSION LAW art. 10 (allowing payment in "natural, money or mixed form").

102. *Id.* art. 9.

103. *Id.*

104. *Id.* art. 9 ("The concession agreement . . . is struck on voluntary terms . . . [and] contains . . . the procedure and size of payments . . .") (emphasis added).

105. DRAFT RUSSIAN CONCESSION LAW art. 22.

106. *Id.*

of the output.¹⁰⁷ The foreign investor also has the right to be reimbursed for the costs of exploration, but only from the share of the product.¹⁰⁸ The risk of unsuccessful operations is borne by the investor. It is unclear whether the foreign investor could be reimbursed for the accelerated costs and interest on the costs. No provisions for the manner of valuation of the product are made in either the Belarussian or Russian draft laws. The Kazakh Draft Law is similar in approach to the Russian Draft Law, but less elaborate.¹⁰⁹ The Hungarian law leaves the determination of payments and other considerations entirely up to the particular contract.¹¹⁰

Among these laws, the Belarussian Draft Law seems to contain the most vague and hidden government take. It provides for a fixed production program designed by mutual agreement,¹¹¹ requires the concessioner to enter collective agreements with the employees,¹¹² and articulates broad environmental obligations, which may include dealing with inherited pollution.¹¹³ The Russian Draft Law also expressly requires the investor to undertake obligations for "conservation of land, [and] rebuilding of the natural balance in wildlife."¹¹⁴ Of course, the ultimate significance of these requirements depends exclusively on the negotiated terms in the agreement. Therefore, a prudent investor could avoid most of the hidden obligations.

In contrast, some provisions of the Kazakh Draft Law are clearly not subject to negotiation. The draft law establishes a "priority right," under which the government can forcibly buy

107. *Id.* art. 23.

108. *Id.*

109. DRAFT KAZAKHSTAN OIL LAW art. 9(4) ("If a commercial find is not discovered as a result of geological exploration, the contractor shall not be entitled to remuneration of invested funds.").

110. ACT XVI ON CONCESSIONS art. 8(2)(d) (1991) (Hung.).

111. DRAFT BELARUS CONCESSION LAW art. 15.

112. *Id.* art. 22.

113. *Id.* art. 13. Preexisting pollution may bankrupt an otherwise solvent company. See Penina K. Lieber, Comment, *Pennsylvania Surface Mining Legislation: A Regulatory Mire*, 47 U. PITT. L. REV. 517, 532 (1986). In addition, the present concession owner may have no insurance coverage for pollution "inherited" from the previous owner. Sharon M. Murphy, Note, *The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161, 184 (1992).

114. DRAFT RUSSIAN CONCESSION LAW art. 10.

the production share of the investor at "world market prices."¹¹⁵ It also imposes on the concessioner the obligation to "give preference to equipment [and] materials . . . produced in the Republic of Kazakhstan if they are competitive in quality, price, [and] operating parameters,"¹¹⁶ to "give preference to Kazakh personnel and provide training,"¹¹⁷ and to fulfill a production program.¹¹⁸ Even if the government of Kazakhstan limits or waives some of those requirements in a particular agreement, a potential investor should carefully inquire into the binding force of such waivers if they are not implemented in an act approved by the Kazakh Parliament.

b. Government Participation

The Russian Draft Law requires mandatory equity participation of the government in the concession enterprise in cases to be determined by the "Federal and Regional listings."¹¹⁹ Participation in some enterprises is fixed at no more than fifty percent.¹²⁰ Concessions which do not require state participation can be obtained by foreign persons and companies, or by locally incorporated companies with or without participation of Russian companies and residents.¹²¹ If state participation is required, the local incorporation of a concession enterprise is mandatory.¹²² The production-sharing contract is a form of government participation itself, although not in equity.¹²³ Of course, the government may have an equity participation in a company which has entered a production-sharing contract, but

115. DRAFT KAZAKHSTAN OIL LAW art. 12.

116. *Id.* art. 16.

117. *Id.*

118. *Id.* art. 9(1). Some of those requirements are clear examples of "tying" arrangements which are prohibited under the antitrust laws of the United States and the members of the European Community. *See, e.g.,* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (Supp. II 1990); TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 85-86. *See also* Laurence R. Hefter & Philip F. Zeidman, *Preparing a Trademark License Agreement: Contractual and Antitrust Considerations*, 80 PAT. & TRADEMARK REV. 547, 550-51 (1982).

119. DRAFT RUSSIAN CONCESSION LAW art. 21.

120. *Id.*

121. *Id.* art. 33. As previously noted, it is unclear whether and to what extent foreign participation in a locally incorporated company is still under the scope of the draft legislation. *See supra* text accompanying note 59.

122. *Id.* art. 35.

123. *See supra* note 79 and accompanying text.

this is neither mentioned in the Russian Draft Law nor is likely to happen.

The Kazakh Draft Law does not require any government participation, which is surprising given the traditional government participation system in oil concessions.¹²⁴ The Belarus Draft Law does not require equity participation, nor does the Hungarian law. It should be noted that, although such a requirement is not fixed in the law, it may be articulated in an offer for a particular concession.

7. Awarding the Contract

Three typical methods of awarding the concession or production-sharing contract are known in international practice: (1) individual negotiations; (2) competitive biddings; and (3) tenders.¹²⁵ Among the considered legislation, only the Kazakh Draft Law allows all possible methods and leaves the issue to be decided ad hoc by the government.¹²⁶ The Russian Draft Law seems to opt for tenders only.¹²⁷ Although the term "bidding" is used throughout the text, the government will have some degree of discretion: "Concession agreements and agreements for production-sharing are *negotiated* with foreign investors on the basis of the results of the bidding."¹²⁸ The Belarussian Draft Law also provides for tenders, but scarcely regulates the procedure for submission of offers and their consideration.¹²⁹ The Hungarian law expressly declares tenders as the sole method of awarding concessions with the only exception in case of a one-time prolongation of an existing concession.¹³⁰

The tender as a method for awarding concession contracts is a compromise between the direct negotiations and bidding

124. This is true, for example, in the Middle East, Norway, Nigeria, and Venezuela. Smith, *supra* note 2, at 522-23. See also Roushdy, *supra* note 2, at 113.

125. Smith, *supra* note 2, at 503-05, 514.

126. DRAFT KAZAKHSTAN OIL LAW art. 8.

127. DRAFT RUSSIAN CONCESSION LAW arts. 11-19 (regulating the powers of the "specialized agencies" on territorial and federal/local criteria, the announcement of the tender, the submission of applications, the bidding, and the supervision of the tender).

128. *Id.* art. 11 (emphasis added).

129. DRAFT BELARUS CONCESSION LAW art. 7.

130. ACT XVI ON CONCESSIONS art. 4 (1991) (Hung.).

methods.¹³¹ Bidding is preferable for achieving impartiality but requires perfectly elaborated criteria and availability of economical and technical information on every aspect of the particular project.¹³² Direct negotiation, on the other hand, allows the parties to take into consideration various factors that are not susceptible to precise valuation in numbers and charts.¹³³

Tenders are used, for example, in the oil industry of the United Kingdom,¹³⁴ as well as in some Eastern European countries.¹³⁵ The tender is similar to a bidding "with reserve," which unlike the common bidding (without reserve), allows discretion in the assessment of the offers.¹³⁶ Unlike the direct negotiation method, however, tender is based on competitive bidding.¹³⁷ Therefore, it combines some of the advantages of the two other methods but perhaps some of their disadvantages as well.¹³⁸ The government is not obliged to award the contract to the highest bidder. Several of the highest bidders may be invited for negotiations before a final decision is made.¹³⁹

The procedural rules set forth in the Russian and the Belarussian draft laws are far from complete and clear.¹⁴⁰ A

131. SMITH & WELLS, *supra* note 2, at 156-57.

132. *See id.* at 158.

133. One commentator suggests that negotiations could be the best method for awarding oil concessions in Russia and the other countries of the former Soviet Union. Smith, *supra* note 2, at 503. This system might be easier and faster in situations involving lack of sufficient and precise economic data, or in cases where specially designed technology is needed, as well as in a complicated economic and political situation which requires numerous additional factors to be considered. *Id.*

134. *See* Michael H. Brenscheidt, *Petroleum Legislation in the North Sea Countries*, 11 TEX. INT'L L.J. 281, 297 (1976).

135. *See, e.g., Bulgaria; Foreign Tendering for Construction of Trakiya Highway*, SUMMARY WORLD BROADCASTS, Feb. 6, 1992, at EE/W0216/A/1 (reporting about tenders held in Bulgaria for the reconstruction and exploitation of the Trans-European Highway), available in LEXIS, World Library, Allwld File. Also, tenders for the construction of the telecommunication infrastructure in Hungary have taken place. *Business Briefs*, JERUSALEM POST, Oct. 18, 1993, at 8.

136. *See* DAM, *supra* note 1, at 4-8 (comparing pure competitive bidding without reserve, where the only criteria is the size of the bid, and discretionary bidding, where bids are judged on political or administrative criteria).

137. *Id.* at 8.

138. For a critical analysis of the tender, *see id.* at 33.

139. *See* SMITH & WELLS, *supra* note 2, at 158-59 (illustrating the advantages for the government of negotiating with two or more companies at once).

140. *See, e.g.,* RUSSIAN SUBSURFACE LAW art. 10.1 (providing for granting

prospective foreign investor should expect confusion and interpretational disputes. The Hungarian law is more comprehensive and intelligible.¹⁴¹

8. Protection of the Foreign Investor and Termination of the Concession

Virtually all provisions of the draft legislation in each particular jurisdiction, along with other basic laws,¹⁴² must be examined in order to obtain a full picture of the enforceability of concessioner's rights. With regard to protection against nationalization, expropriation, and unilateral termination or alteration of the concession agreement, broad declarations that the investments are guaranteed and that changes to the agreement are subject to mutual consent are included in some of the draft laws, as well as in related legislation.¹⁴³ As noted previously, customary international law has always been invoked in disputes about the validity of unilateral alterations of the concession terms and in cases of nationalization.¹⁴⁴

It is important to know whether the government may interfere in the management of the concession enterprise. All requirements for the fulfillment of a production program, and other "tying" provisions as mentioned above,¹⁴⁵ may be regarded as management interference. Nevertheless, these requirements are set forth in advance, and the potential concessioner can either accept them and adjust his other activities according-

licenses to exploit underground resources through bidding or tenders). Most likely, the tender for a concession will be considered a form of license granting procedure. See, e.g., Brenscheidt, *supra* note 134, at 294.

141. ACT XVI ON CONCESSIONS arts. 4-9 (1991) (Hung.).

142. See, e.g., FOREIGN INVESTMENT LAW arts. 2, 6-8 (1991) (USSR) (defining the legal forms of the ventures that foreign investors can start in Russia and their legal status and rights). The law guarantees foreign investment against expropriation. *Id.* art. 6. However, one should also study carefully Russian property law, trade law, procedural, and enforcement regulations, which are important when considering the real protection that can be expected.

143. See DRAFT BELARUS CONCESSION LAW art. 34 ("The state guarantees to the concessioner the unhindered realization of all rights established by the present statute."); DRAFT KAZAKHSTAN OIL LAW art. 29 (guaranteeing the concessioner "protection of its rights in accordance with current law"); DRAFT RUSSIAN CONCESSION LAW art. 3 (referring to the "guarantees" provided for in the FOREIGN INVESTMENT LAW).

144. See *supra* note 18 and accompanying text.

145. See *supra* text accompanying notes 101-18.

ly or simply refrain from embarking on the project. However, the issue remains whether interference is possible afterwards. The provisions concerning the supervision rights of governmental agencies contain broad and undefined terms¹⁴⁶ and may develop in practice as vehicles for interference in the management of the concession enterprise for purposes of achieving local or national economic goals.¹⁴⁷

There are basically three sources of rules concerning the termination of concession agreements: the considered legislation, the particular concession agreement, and other laws. The draft laws provide for termination of the concession upon expiration of its term,¹⁴⁸ upon mutual agreement,¹⁴⁹ and in case of violations on the part of the concessioner.¹⁵⁰ The legal consequences of the provisions that empower the host government to terminate an agreement because of false data submitted by the concessioner¹⁵¹ or because of another "substantial violation"¹⁵² are unclear. It is obvious that any breach of contract,

146. See, e.g., DRAFT RUSSIAN CONCESSION LAW art. 6(d) (entrusting to the "Specially Authorized Agency" the "supervision over adherence to concession agreements").

147. DRAFT BELARUS CONCESSION LAW art. 14 (declaring that, although such interference is impermissible except where the activities of the concessioner "pose a real threat to lives and health . . . or may entail other grave consequences," after a refusal of the concessioner to eliminate the threat, the state agency "may temporarily suspend the concessioner from managing the concession" until the problems are resolved). This provision apparently is a misconception and confuses the issues surrounding contractual relationships and law enforcement.

148. The term of the concession under the Russian draft law is 30 years or less, subject to one time prolongation for up to 20 additional years without a new tender. DRAFT RUSSIAN CONCESSION LAW art. 24. The Hungarian law sets a 35-year limit, subject to prolongation for not more than 17.5 years. ACT XVI ON CONCESSIONS art. 12 (1991) (Hung.). The Kazakh draft law does not limit the possible duration of the concession. DRAFT KAZAKHSTAN OIL LAW art. 7(1) ("The effective length . . . shall be determined by agreement of the parties . . ."). The Belarussian draft law envisions two types of concessions — short term agreements (up to five years) and long term agreements (up to 99 years). DRAFT BELARUS CONCESSION LAW art. 12. The concessioner, "who has conscientiously observed the basic conditions of the agreement, enjoys a priority right" when it seeks extension. *Id.* However, the substance of this right is absolutely unclear.

149. DRAFT RUSSIAN CONCESSION LAW art. 41(1)(b), 41(2)(a); DRAFT BELARUS CONCESSION LAW art. 13; DRAFT KAZAKHSTAN OIL LAW art. 27.

150. DRAFT RUSSIAN CONCESSION LAW art. 41(2)(b); DRAFT BELARUS CONCESSION LAW art. 13; DRAFT KAZAKHSTAN OIL LAW art. 27.

151. DRAFT KAZAKHSTAN OIL LAW art. 28.

152. DRAFT RUSSIAN CONCESSION LAW art. 41(2)(b).

if serious enough, would be grounds for an action by the injured party. This would be a matter of the applicable general law of contract.

The articulation of a "special" right of the government to terminate the contract could be regarded as an attempt to ensure that such a right will exist even if, for example, the parties have chosen the law of another country to govern the contract.¹⁵³ It may be interpreted, however, as a "special procedure" — a right to terminate the contract regardless of the presence of the legal cause of action under contract law.¹⁵⁴ In fact, the Kazakh Draft Law may establish such a right by distinguishing the cases when a court decision is required¹⁵⁵ from situations when "information . . . submitted by the contractor . . . does not comport with reality,"¹⁵⁶ and presumably the discretionary assessment of the government is sufficient. If the language of those provisions does not change before the adoption of the laws, they may hinder the rights of the concessioner and constitute an unequal treatment of the investor. The Hungarian law expressly refers to the Hungarian Civil Code and thus leaves the issue to general contract law.¹⁵⁷ The agreement itself can provide for particular grounds for termination of the concession agreement.¹⁵⁸ Since no model agreements are enclosed with the draft legislation, such grounds could vary widely.

Aside from the applicable general law of contract, separate legislation may provide for additional grounds for the termination of a concession agreement. For example, the Russian Subsurface Law requires the termination of a license to exploit underground resources in cases of hazardous pollution, war, or acts of God, as well as when the licensee does not begin the exploitation of the underground resources during the required

153. However, submission of the concession agreement to a foreign law is not envisaged in the draft legislation. See *supra* text accompanying note 87.

154. See Bowett, *supra* note 20, at 934-35 (discussing the existence of such a right in the municipal laws of the United States, England, and France). Sufficient compensation should be paid for a government's unilateral action. *Id.*

155. DRAFT KAZAKHSTAN OIL LAW art. 28 (declaring that a court decision is necessary for the termination of the agreement on the basis of corruption during the tender).

156. *Id.*

157. ACT XVI ON CONCESSIONS art. 19 (1991) (Hung.).

158. BLINN ET AL., *supra* note 16, at 302-03.

term.¹⁵⁹ Apparently, the termination of the license would mean termination of the concession agreement whenever a concession is granted on "underground" resources.

IV. CONCLUSION

The concession agreement as a form of foreign direct investment clearly will play a significant role in the emerging market economies of Eastern Europe and the new independent states. One reason is the availability of natural resources and the need for transportation, telecommunication, and other facilities. Development of these resources and facilities requires high technology, expertise, and huge investments. Local governments lack the necessary funds and technology to exploit and reconstruct them. Such circumstances have always been the classic incentive for granting concessions to foreign investors.

An additional unique motive, however, is the need to make a shift from a totally state managed economy to private initiative and a free market. The concession agreement may be used in this transition as a temporary solution to achieve the necessary change while minimizing the economic, social, and political difficulties of rapid privatization of enormous resources.

The draft laws, as well as the Hungarian law, attempt to encourage the involvement of foreign investors in concession agreements and to ensure the achievement of national social and economic goals. Generally, they create a comprehensive legal regime concerning the concession agreement and related forms. A careful study of this regime along with other basic legislation is important for the assessment of the possible risks and opportunities. Of course, because of the flexibility of the considered legislation and the dynamics of the economic and political climate in the transitional countries, government policies and practices will ultimately shape what may turn out to be a new phase in the use and development of the concession agreement in foreign investment.

159. RUSSIAN SUBSURFACE LAW art. 20.

