

# Russia and PPPs: Is Russian Law Fit To Enable PPPs?

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# Outline of Presentation

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- Introduction
- Enabling legal environment for PPPs
- Russian legal framework for PPPs
- Russian investment climate
- Lessons to be drawn for the Yukos affair
- Conclusions



# Introduction (I)

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- Basic features of a PPP:
  - Construction and operation of infrastructure
  - Sharing risks and responsibilities between public and private sectors
  - PPPs begin where privatization ends



# Introduction (II)

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- PPPs may have various forms:
  - Contracting out or management contracts
    - Provision of service or
    - managing a facility
    - for an agreed period and fee
    - without taking on financing or revenue risks



# Introduction (III)

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- Joint Ventures:
  - Public and private sectors jointly finance, own, and operate a facility
- Leasing:
  - All or most of the risks connected to funding, developing, managing and operating the facility are allocated to the private sector, which receives lease payments from the public sector



# Introduction (IV)

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- BOT (Build-Operate-Transfer):
  - Project developed by private sector
  - Private sector takes primary responsibility for
    - Funding
    - Designing
    - Building and
    - Operating the facility
  - For a sufficient period of time
  - To service and repay the debt
  - And earn suitable return



# Introduction (V)

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- Other varieties of BOT concept:
  - BOOT: Build Own Operate Transfer
  - DBFO: Design Build Finance Operate
  - DCMF: Design Construct Manage Finance
  - BLT: Build Lease Transfer
- BOO: Build Own Operate
  - Control of the project and/or ownership of the assets remain in private hands

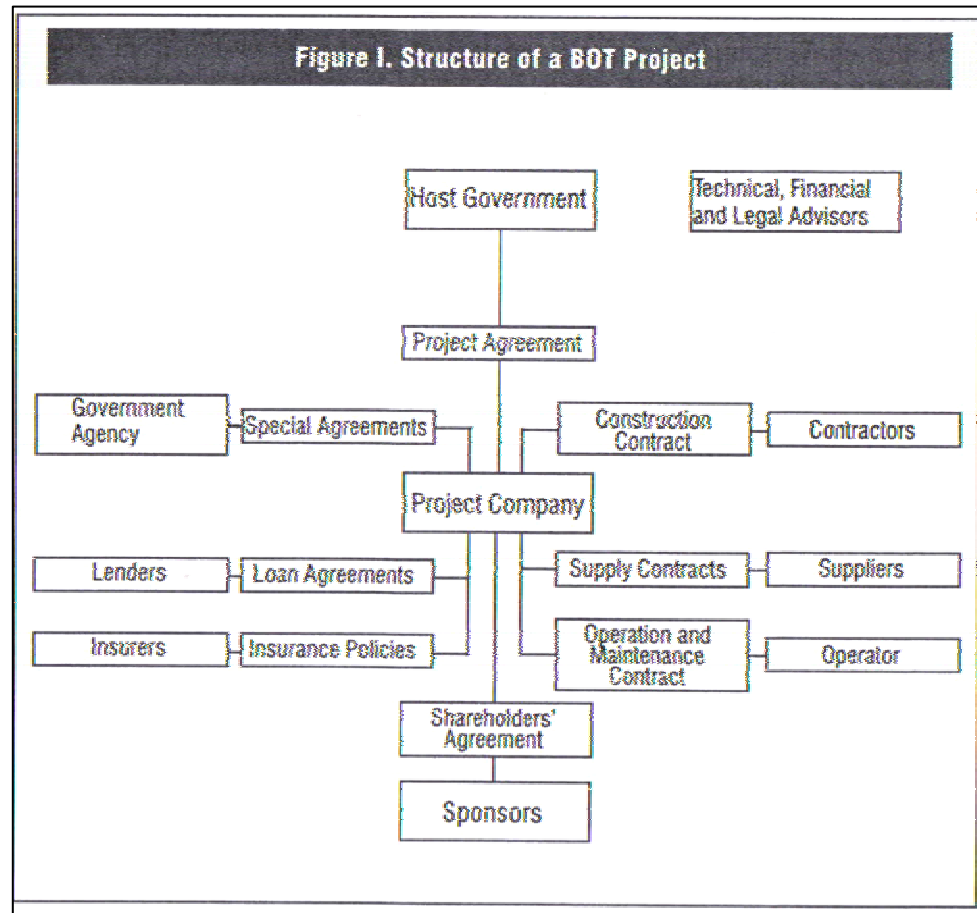


# Introduction (VI)

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- Many parties involved: gov't, local authorities, operators, constructors, financiers, insurers, suppliers, advisers (technical, financial, and legal), etc.
- Complex contract structure
- Heart of the PPP is the concession agreement (see figure on next slide)

# Introduction (VII)



# Enabling Legal Environment

## (I)

- Essential elements of the overall legal framework for PPPs include:
  - Stage of development of the relevant laws of the host country
  - Stability of its legal system
  - Adequacy of remedies available
- Greater legal certainty and a favorable legal framework will translate into a better assessment of country risks by lenders and project sponsors

# Enabling Legal Environment (II)



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- Several organizations have drawn up *wish lists*, including:
  - UNIDO (BOT Guidelines, 1996)
  - UN Economic Commission for Europe (PPP Guidelines, 2000)
  - EU (Guidelines for Successful PPPs, March 2003)
  - UNCITRAL (Legislative Guide on Privately Financed Infrastructure Projects, 2001)
  - World Panel on Financing Water Infrastructure (Financing Water for All, March 2003)

# Enabling Legal Environment

## (III)

### **Example of such a wish list contained in the EU publication:**

- Legal capacity of parties and legal requirement of the State to provide services
- General legislation allowing or restricting private sector involvement particularly by foreign companies
- Existence and legal basis of cost recovery mechanisms
- Ability to provide guarantees
- Property issues of land and infrastructure
- EIA requirements
- Land acquisition
- Planning permission requirements
- Licenses
- Need for project specific statutory requirements
- Potential conflict with EU Directives
- Transparency of laws
- Administrative coordination
- Dispute settlement provisions
- Forms of possible state financial support
- Competition and antitrust regulations
- Potential impact of employment and social security laws
- Currency and profit repatriation rules
- Public sector borrowing restrictions
- Tax and accounting liabilities
- Adequacy of selection and procurement procedures
- Legislation governing project agreements and operational issues
- Property law
- Intellectual property law
- Transfer of know-how and technologies
- Adequacy of oversight and monitoring provisions and authority to regulate services

# Enabling Legal Environment (IV)



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- Essential legislation shall include the following legal instruments
  - Freedom of contract
  - Foreign choice of law
  - Enforceability of commercial contracts
  - Recognition and enforcement of foreign arbitral awards (1958 New York Convention)
  - Appropriate corporate law

# Enabling Legal Environment

(V)

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- Essential legislation (cont'd):
  - Adequate investment protection laws
  - Sufficiently clear sector specific laws providing for:
    - Provision of public services
    - Operation of assets
    - Tariff setting
    - Collection of fees

# Enabling Legal Environment (VI)



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- Essential legislation (cont'd):
  - Clear authority on the part of the public sector
    - to award the project on the agreed terms
    - Grant the delegated powers it entails
    - Waive any sovereign immunity
  - Banking laws compatible with the proposed financing structure

# Enabling Legal Environment (VII)



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- Ability to grant effective security to lenders
- Concession law



# Russian Legal Framework for PPPs (I)

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- Russian Civil Code provides adequate framework for PPPs
- Russian Civil Code provides for
  - freedom of contract
  - Company law
  - choice of law
  - However, contracts in relation to real estate shall be subject to Russian law (Article 1213, subsection 2, Civil Code)



# Russian Legal Framework for PPPs (II)

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- Enforceability of commercial contracts in Russia:
  - Enforcement needs improvement, too
  - education of those who have to enforce the law (police, prosecution, judiciary)
  - However, the three supreme courts take lead in improving legal climate
  - E.g., Constitutional Court in defining and expanding economic rights (ownership)



# Russian Legal Framework for PPPs (III)

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- Recognition and enforcement of foreign arbitral awards:
  - Russia is signatory of 1958 New York Convention
  - Adequate provisions in Procedural Codes
  - However, in practice, courts are often relying on grounds for refusing recognition and enforcement



# Russian Legal Framework for PPPs (IV)

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- Investment protection:
  - Adequate foreign investment law providing for:
    - National regime
    - No expropriation
    - Nationalization only on the basis of a law and against adequate, prompt and effective compensation
    - Grandfather's clause
    - Tax allowances
    - Etc.



# Russian Legal Framework for PPPs (V)

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- International treaties and organizations:
  - Many CIS Treaties, including CIS Treaty on investment protection, patent law
  - Bilateral investments treaties
  - Energy Charter Treaty
  - World Bank, IMF, EBRD
  - No member of WTO (not yet)



# Russian Legal Framework for PPPs (VI)

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- Several sector-specific laws
- However, doubtful whether they are sufficiently supportive of PPPs



# Russian Legal Framework for PPPs (VII)

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- Adequate authority of public sector
  - Formally, Russia is a federal state
  - However, strong tendency towards centralization
  - Delegation of powers will be difficult to enforce
  - Waiver of sovereign immunity inadequate
  - Currently, strengthening of state



# Russian Legal Framework for PPPs (VIII)

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- Banking laws:
  - Restructuring of financial sector is still ongoing
  - Still a large number of banks (some 1,400)
  - Leasing is still being developed
- Enforcement of security interests is still weak



# Russian Investment Climate

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- Russian investment climate is not improving due to
  - Negative impact of Yukos affair
  - Centralization of power
  - Restriction of freedom of press
  - Undue pressure on judiciary
  - Undue influence of *siloviki*



# Lessons learnt from the Yukos Affair

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- Do not choose for aggressive tax planning
- Try to stick to the law, in particular tax laws
- Do not get involved in any of the oligarchs' businesses, as they seem to be vulnerable
- Always opt for foreign arbitration



# Conclusions

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- Russian legal framework is more or less in place
- Apart from a concession law, which is still missing
- Implementation and enforcement still rather weak
- Changing role of the state – central state is assuming more powers
- Politics are again prevailing over law