



BOT contracts: Mechanisms for Realising Public-Private Partnerships - Algeria as a Model

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Abstract:

This study aims to address one of the currently prevalent contracts for the realisation of public-private partnerships and the use of the latter's expertise and resources to promote economic development in countries. This is exemplified by BOT contracts, which contribute to the effective and efficient development of infrastructure projects in the host country, with Algeria being used as a model for legislative .

Keywords: BOT; contracts; Partnerships.

Introduction:

The BOT contract is considered one of the most common agreements in the partnership between the public and private sectors, particularly in the financing of infrastructure projects, due to its characteristics that suit this purpose. As a result, it has been adopted in many Western and Arab countries¹, including Algeria, which has adopted the main innovative mechanisms used by countries to award contracts for the management and operation of public facilities. One of the most important of these is the Build-Operate-Transfer (BOT) contract, under which the state grants the contracting investor the right to construct and operate the project on its territory and to benefit from its revenues for a specified period².

The BOT contract is seen as a strategic alternative for financing infrastructure projects and as a means of reducing the economic burden on countries, particularly developing countries. It also facilitates a balance between the objectives and aspirations of the public and private sectors within a framework of cooperation based on mutual interest. Given its importance and benefits to host governments and project companies³,

the question posed by this study is:

Can BOT contracts represent the best options for public-private partnerships, and what are the areas of their application in Algeria, as established by law?

¹- Barak Mohammad & Abdel Hamid Fijel, "BOT Contract as a Partnership Mechanism Between the Public and Private Sectors for Financing Infrastructure Projects: A Reference to Western and Arab Experiences", *Contemporary Economic Studies Journal*, University of M'sila, Vol. 03, No. 05, June 2016, p. 08.

²- DalaliAbd el Jalil&BayaAbdelkader, "The BOT System as an Innovative Contractual Mechanism in Investment and Public Facility Management," *Al-Mufakkir Journal for Legal and Political Studies*, Vol. 03, No. 04, December 2020, p. 76.

³- Bousaq Ahmed & Bahri Ali, "The Role of Partnership Between the Public and Private Sectors According to the BOT System in Financing Infrastructure Projects", *Research in Financial and Accounting Sciences Journal*, University of M'sila, Algeria, Vol. 07, No. 02, 2022, p. 44.



To address this issue, the study is divided into two main sections. The first section discusses the conceptual framework of the study, while the second section is dedicated to illustrating the application of BOT contracts in Algeria from both a legal perspective.

Section One: The Conceptual Framework of the Study

In order to clarify the concept of the BOT contract as a model for public-private partnerships, it is first necessary to define the terms of the partnership under the BOT contract and to distinguish it from concession contracts.

1. Partnership under the BOT contract

Public Private Partnership:

Public-Private Partnership (PPP) can be defined as the various forms of interaction and cooperation between the public and private sectors, related to the use of their human, financial, administrative, organisational, technological and knowledge resources. This cooperation is based on shared participation, commitment to goals, freedom of choice, shared responsibility and accountability to achieve economic and social objectives that affect the wider community and have a long-term impact⁴.

Partnerships with the private sector can take various forms under so-called investment contracts, including BOT contracts. Investment contracts are those agreements under which foreign capital is transferred directly to the host country where the investor establishes a commercial project either independently or in partnership with national capital⁵.

Some define these contracts as those concluded by the state or its related entities with a foreign private party in the field of investment, while others describe them as all contracts concluded by the state with a natural person or a private law entity relating to activities within the framework of the country's economic development⁶.

2. Definition of BOT contracts

The use of the BOT contract as a modern approach is often traced back to the signing of the agreement for the construction of the Channel Tunnel between France and the UK in 1984, involving three parties: the French government, the UK government and the private company Eurotunnel⁷.

In particular, Turkish Prime Minister Turgan Ozal was one of the first to advocate the use of the BOT model in meetings with private sector companies and contractors in his country in the early 1980s. He outlined his strategy for economic development and reform by proposing that infrastructure projects be entrusted to the private sector, based on a complex economic approach known as: the establishment of projects and their operation by private entities, followed by a transfer to the state at a later stage⁸.

Investment contracts are those agreements under which foreign capital is transferred directly to the host country, where the investor establishes a commercial project either independently or in

⁴- Bousaq Ahmed & Bahri Ali, *op. cit.*, p. 46.

⁵- Masoudi Youssef, "Applicable Law on Investment Contracts", *The Truth Journal*, University of Adrar, Algeria, No. 37, 30 June 2016, p. 242.

⁶- SoumiaYahiaoui, "Foreign Investment Contracts", *Journal of Rights and Human Sciences*, University of Djelfa, Algeria, Vol. 12, No. 04, 26 December 2019, p. 213.

⁷- For more details, see: Dalali Abd el Jalil & Baya Abdelkader, *supra*, p. 78.

⁸- Nouri Abdul Aziz, "Public Facility Commitment Contracts BOT: Types and Benefits", published research, accessed via [Mohamah.net](<https://www.mohamah.net/law>), accessed on 18/12/2023 at 14:17.



partnership with national capital⁹. Some define these contracts as those concluded by the state or its affiliates with a foreign private party in the field of investment. Others define them as all contracts concluded by the state with a natural or legal person of foreign private law for activities that fall within the framework of the country's economic development¹⁰.

With regard to the BOT contract, which is considered to be one of the most important models of public-private partnership the term "BOT" is an abbreviation for a three-letter English word:¹¹

- B stands for "build", to construct a project.
- O stands for "operate", which means to manage or run the project that has been created.
- T stands for "transfer Convert", Any transfer or Convert of ownership of the project to the administration that requested the establishment of the facility.

The United Nations Commission on International Trade Law (UNCITRAL) defines the BOT system as a form of project financing whereby a government grants a concession to a group of investors, known as the financial consortium, to design, operate and commercially exploit a specific project for a number of years sufficient to recover the construction costs and earn a reasonable profit from the revenues generated by the operation of the project. At the end of the concession period, ownership of the project is transferred at no cost or for a pre-agreed nominal fee¹².

In the same context, the United Nations Industrial Development Organisation (UNIDO) defines a BOT contract as: "a contractual arrangement whereby a private sector party undertakes to construct a basic facility in the state, including the processes of appraisal, financing, operation and maintenance of that facility. This private entity manages and operates the public facility for a specified period of time, during which it is allowed to charge reasonable fees to users of the facility, provided they do not exceed those proposed in the bid or specified in the contract or project agreement. This is to enable the party to recover the funds invested, as well as operating and maintenance costs, in addition to a return on investment. At the end of the specified period, the said party is obliged to return the facility to the government or to a new party selected through a public process¹³.

Definition of BOT Contract:

The BOT contract is defined as a form of financing and establishment of various projects whereby the State grants private entities and investors the privilege to undertake, implement and manage a specific project for a specified period of time sufficient to recover the costs and generate profits for the concessionaire, with the entire project reverting to the State at no cost¹⁴.

Alternatively, it can be described as a contract in which the State or one of its administrative bodies grants a concession to a private individual or legal entity (which may also be public), whether national or foreign, to construct one of the necessary public facilities and to operate it for a period of time

⁹- Masoudi Youssef, "Applicable Law on Investment Contracts", *Al-Haqiqah Journal*, University of Adrar, Algeria, No. 37, 30 June 2016, p. 242.

¹⁰- SoumiaYahiaoui, *op. cit.*, p. 213.

¹¹- Boumzber Badis, "The BOT Contract and Its Applications in Algeria", *Humanities Journal*, University of Constantine, Algeria, Vol. 32, No. 02, June 2021. P97.

¹²- NouraSaadani, "Investment according to the BOT contract", *Journal of Law and Society*, University of Adrar, Algeria, Vol. 05, No. 02, December 2017, p. 176.

¹³- Nouri Abdul Aziz, *op. cit.*, accessed on 18/12/2023 at 14:17.

¹⁴- Laachaach Mohamed, "Public Facility Delegation Contracts Under the BOT System in Light of Presidential Decree No. 15-247", *Journal of Legal and Economic Studies*, Faculty of Law and Political Sciences, University of Tamanghasset, Vol. 08, No. 05, 2019, p. 131.



under the supervision and control of the contracting administrative body, ensuring that the facility is returned to the administration in good condition and free of charge at the end of the contract¹⁵.

Distinction between BOT and concession contracts

Concession contracts under the BOT system are considered a modern means of establishing and managing public facilities in the state. They are granted to private persons in order to involve the private sector and protect public funds, and allow the concessionaire to charge users throughout the concession period in order to recover costs and make a profit. These contracts are administrative in nature; however, legal scholars have disagreed on the legal nature of the BOT system itself¹⁶.

Despite the significant similarities between concession contracts and BOT contracts, especially since the latter emerged as a form of concession contract in the context of the transfer of public facilities, the main differences can be summarised as follows:

In concession contracts, the contractor is obliged to provide a public service to the public by managing a public economic entity for a specified period of time. In contrast, under BOT contracts, the investor is responsible for constructing and equipping the public facility to provide the service, using its own funds for these operations, and then managing it for a predetermined period specified in the contract, after which ownership of the project assets is transferred to the state¹⁷.

Moreover, since the State contracts with the investor to build and manage the public facility through BOT contracts, it cannot intervene in the operational mechanisms of the project, as is the case with concession contracts. In the latter, there is supervision of the operation of the facility, guidance on observations and the imposition of penalties when necessary, all to ensure the smooth and regular functioning of the public facility without undermining the principle of financial balance in the contract.¹⁸

BOT contracts are financing contracts, while concession contracts are management contracts. In a BOT contract, the investor designs the project, builds it and bears the costs by purchasing the necessary equipment and machinery. This investor thus assumes a significant economic burden.

The risks associated with BOT contracts are borne by the financing institutions, so the revenues from the project serve as a guarantee. Consequently, the burden does not fall on the project company or the contracting authority, as may be the case with a concession contract¹⁹.

Section Two: The application of BOT contracts in Algeria from a legal perspective

It is important to begin by highlighting the importance of these contracts, which led the Algerian state to recognise and adopt them in law.

First - the importance of BOT contracts:

As the BOT contract is one of the methods of this partnership, its importance can be seen in the following aspects:

¹⁵- Noura Saadani, *op. cit.*, p. 178.

¹⁶- Laachaach Mohamed, *op. cit.*, p. 122.

¹⁷ - Boulqouas Sana, "The Delegated Management of Public Facilities and Transformations in the Creation and Management of Public Facilities in the Concession Contract of the BOT", *North African Economics Journal*. University of Chlef, Algeria, Vol. 15, No. 21, September 2019, p. 401.

¹⁸- - Boulqouas Sana, *op. cit.*, p401.

¹⁹- Nouiri Abdel Aziz, "Contracts for Public Utility Obligations BOT: Types and Methods of Benefiting from Them", research published on the website: <https://www.mohamah.net/law/>, accessed on 18/12/2023, at 14:17.



-The main advantages of this type of public utility concession contract are the transfer of the burden of Financing projects to the private sector while ensuring a degree of supervision And the control by the state, which enables it to continue the movement of construction and development Without burdening the state budget with financial burdens or resorting to borrowing, as this contributes Method of assisting the state in directing its public resources to the social sectors

Which does not have a direct economic return such as education and health in addition to providing opportunities New work through the foreign private sector in the implementation of these projects and the transfer of Modern technology and technical knowledge to the country and this in turn leads to the lifting of

Operating efficiency and level of infrastructure services.²⁰.

- Investment in infrastructure: The involvement of the private sector in infrastructure investment leads to internal development without harming the public interest, which the State, which grants these contracts, seeks to protect²¹.

- An innovative investment approach: The BOT contract is a new investment method and an advanced economic contract that stimulates the national and international economy. This contract makes it possible to overcome the obstacles that countries face in finding sources of financing for large-scale infrastructure projects. The BOT contract is a new formula for financing these projects by allowing the private sector to contribute while the state relinquishes its traditional role in project construction²².

- Provision of public services: BOT contracts ensure that the state can provide public services according to its development plans without being constrained by its budgetary capacity for public investment²³.

- Increased private sector participation: Increasing the involvement of the private sector in the management of infrastructure projects leads to faster implementation and cost savings, as the private sector is more inclined to achieve these goals than others. In addition, this participation improves the operational efficiency of public facilities and the quality of services provided, as the private sector has considerable financial and technical expertise and a direct interest in attracting the public, which ultimately leads to revenue generation that allows the project company to recoup its investment²⁴.

- Focus on essential public facilities: BOT contracts focus on essential public facilities (infrastructure projects) that provide a range of services provided by the government. These include labour-intensive services such as waste collection and transport, as well as infrastructure components such as roads, airports, ports, railways, drinking water stations and networks, electricity generation stations and networks, natural gas and sewerage networks, communications facilities and health services²⁵.

Second: Legally permissible areas for BOT contracts in Algeria

As far as Algeria is concerned, despite the fact that the term “BOT” is not explicitly mentioned in its laws, we can infer this legal formulation from the forms of concession contracts through a series of legal texts of a legislative and regulatory nature, such as Article 1 of Executive Decree No. 96-308 concerning the granting of concessions for motorways, as well as Executive Decree No. 97-475

²⁰- Boumzber Badis, *op. cit.*, p107.

²¹- Ibrahim Mujahidi, Nature of the bot contracts and their legal effects, National Criminal Journal, National Centre for Social and Criminal Research, , Vol. 62, No. 02 July 2019, p. 93.

²²- Saadani Noura, *op. cit.*, p. 174.

²³- QasidiFaiza, TafianiMoukhtaria, “The Role of the BOT Contract in Achieving Renewable Energy Infrastructure Projects,” The Journal of Assiut University Bulletin for Environmental Research, Vol. 24, No. 01, March 2021, p. 04.

²⁴- Belkawes Sana, “The Previous Reference,” p. 403.

²⁵- SharitFoudhil, “The Legal System for Delegating Public Utilities Under Executive Decree No. 18-199,” PhD Thesis LMD in Law, Faculty of Law, University of Constantine, 2021/2022, p. 46.



concerning the granting of concessions for small and medium-sized agricultural irrigation facilities, etc²⁶. We also find:

- Article 17 of Law No. 05-12 on water states: “Artificial public water resources²⁷, installations and works considered to be State property shall revert to the State without compensation after the execution of the concession and delegation contract for construction and operation concluded with a natural or legal person governed by public or private law”.

- Article 19 of Law No. 08-14 of 20 July 2008, which amends and supplements Law No. 90-30 of 1 December 1990 on national property, deals with this contract in a clear and comprehensive manner²⁸, in particular in Article 64 bis, which states that “The granting of a concession ... for the financing, construction and/or operation of a public facility ... shall result in the facility or equipment reverting to the authority holding the concession rights at the end of the concession period”.

- Decree No. 08-04: establishes the conditions and procedures for the granting of concessions on land belonging to the public domain for the implementation of the investment projects²⁹ referred to in Articles 1 and 4.

In addition, Article 02 of Law No. 02-01 of 5 February 2002 on the distribution of electricity and gas through pipelines states: “The concession is a right granted by the State to an operator who exploits and develops a network within a defined territory in order to sell electricity or gas distributed through pipelines”. Article 7 of the same law adds: “The new installations for the production of electricity and gas shall be constructed and operated by any natural or legal person, private or public, holding an exploitation licence...”³⁰.

In the field of air transport, Article 08 of Law No. 2000-05 states: “The State shall establish, construct, operate and exploit airports, the construction and/or operation of which may be the subject of a concession granted to natural persons of Algerian nationality or legal entities subject to Algerian law...”. In addition, Article 03 of Law No. 03-10 states: “The construction and operation of an airport or heliport with a view to opening it up to public air navigation may be the subject of a concession granted by the authority responsible for civil aviation...”.

In the same context, Article 10 of Decree No. 11-220 states³¹: “At the end of the concession period, if no request for renewal is made, the State shall recover, without compensation, the structures built for public use and the designated land”.

In this regard, Article 208 of Presidential Decree No. 15-247 stipulates that, at the end of the public service delegation contract, all the investments and properties of the public service belong to the legal entity under public law, even if the ownership was originally with the State from the beginning of the project and the transfer to the State is only nominal³².

Conclusion:

At the end of this study, we arrived at significant finding:

²⁶- For more details, see: Shamashma Hagar, “The BOT Contract and Its Applications in Algeria,” Master’s Thesis in Public Law, Faculty of Law and Political Science, University of Oum El Bouaghi, Algeria, 2013/2014, p. 10.

²⁷- Official Gazette No. 60, issued on: September 4, 2012.

²⁸- Shamashma Hagar, “The Previous Reference,” p. 13.

²⁹- Official Gazette No. 49 for the year 2008.

³⁰- Nouiri Abdel Aziz, “The Previous Reference,” see the article.

³¹- Dated June 12, 2011, defining the methods for the concession to use water resources by establishing seawater desalination structures or removing salts or minerals from saline water for public benefit or to meet specific needs.

³²- Laachaach Mohamed, “The Previous: Reference,” p. 127.



- The Algerian state has recently adopted legislative measures for BOT contracts as the best means of embodying the partnership between the public and private sectors.

We therefore recommend :

- The need for explicit legislative details on the specific nature of BOT contracts in order to distinguish them from concession contracts.

- Following the leading international experience in the field of BOT contracts.

- Encouraging and developing partnerships between the public and private sectors in Algeria in various sectors related to projects of national importance, primarily aimed at absorbing unemployment.

- Simplify procedures and provide various guarantees for foreign investors working in this field of contracts.

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