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# The BOT Contract as a Mechanism for Partnership between the Public and Private Sectors, and the Extent of Its Application in Algerian Legislation

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**Abstract:**
To implement the public-private partnership (PPP) system for long-term infrastructure projects, Build-Operate-Transfer (BOT) contracts are considered the optimal mechanism for enhancing the contribution of the private sector to advancing development levels in various countries across their economic, social, and environmental dimensions. They also help alleviate the burden on the state budget, reduce financing risks, and secure the investments required in various sectors, particularly those that require substantial financial resources for their implementation.
The concept of the BOT contract has generated considerable jurisprudential and legal debate regarding its definition, scope, and legal characterization due to the variation in its legal framework from one country to another, the broad scope of its application, and its similarity to other contracts used in this field. However, by examining the various definitions of BOT contracts, as well as their characteristics and stages, it is possible to determine their legal nature. As for Algerian legislation, it does not explicitly provide for BOT contracts; nevertheless, several legal provisions contain contracts that share the same characteristics as BOT contracts, and certain models of their application have emerged. Furthermore, this type of contract gives rise to legal effects for its two parties, namely the State and the project company.
**Keywords:** Build-Operate-Transfer (BOT) Contract, Public and Private Sectors, Legal Nature, Algerian Legislation.

## Introduction:

For a long time, the State monopolized the establishment, operation, and management of public utilities, particularly those related to basic infrastructure, as part of its responsibility to provide the necessary needs and services to its citizens and to promote and develop its economy. This placed a significant financial burden on many countries, resulting in budgetary deficits in financing such projects.
This situation compelled States to seek alternative solutions to support the construction of infrastructure projects and to diversify their financing mechanisms in order to reduce the burden on the public budget. Among the most prominent of these alternatives is the

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involvement of the private sector whether domestic, foreign, or both in the implementation, construction, operation, and investment of these development projects as a contributor to meeting the country's needs for airports, seaports, road networks, electricity, and other essential public facilities. Public-private partnerships (PPPs) take several forms, the most important of which is the Build-Operate-Transfer (BOT) contract, an acronym for *Build, Operate, Transfer*, whereby a private entity builds a project, operates it for a specified period, and subsequently transfers ownership to the State.

Following the concession contract system, which has been in use since the nineteenth century and continues to be applied today, particularly in Western countries, foremost among them France, BOT contracts emerged in the early 1980s as a new concept of partnership between the public and private sectors, despite their similarity to concession contracts. Credit for introducing this concept is attributed to the late former Turkish Prime Minister Turgut Özal, who, after winning the parliamentary elections, met with businessmen, investors, and private-sector construction companies and presented his new strategy for development and economic reform. His approach involved assigning new infrastructure projects to the private sector under a new system that he was the first to designate as the Build-Operate-Transfer (BOT) system,[1] alongside the privatization of public-sector enterprises. Consequently, the BOT system became a hallmark of Turkey's economic approach. Since then, the BOT model has been widely adopted in many countries around the world and has not been confined exclusively to either developing or developed countries.

Accordingly, the research problem may be formulated as follows:

What is the concept of the Build-Operate-Transfer (BOT) contract, and how have national legislation and practical application in Algeria incorporated this concept?

To answer this research problem, this study adopts the descriptive method, through which the BOT contract mechanism will be examined as a modern approach to organizing public-private partnerships with the aim of achieving financial balance in the State budget. In addition, the analytical method will be employed by analyzing the relevant legal provisions and deriving the legal rules therefrom, particularly with regard to the position of the Algerian legislator on BOT contracts.

This study is divided into two main sections:

**Section One:** The Concept of the BOT Contract as a Mechanism for Public-Private Partnership.

**Section Two:** Applications of the BOT Contract in Algerian Legislation and Its Legal Effects.

## Section One: The Concept of the BOT Contract as a Mechanism for Public-Private Partnership

Defining the concept of the BOT contract requires examining its doctrinal and legal definitions, as well as identifying its principal characteristics. In addition, it is necessary to discuss the main

[1] Arif Saleh Mukhlif and Alaa Hussein Ali, “The BOT Contract (A Study of the Legal Regulation of the Build-Operate-Transfer Contract),” Journal of Legal and Political Sciences, No. 1, University of Anbar, Iraq, 2010, p. 166.

stages through which a BOT contract passes (First Requirement), determine its legal nature (legal characterization), and distinguish it from certain similar contracts (Second Requirement).

**First Requirement: Definition of the BOT Contract (BOT)**

Defining the BOT contract requires clarifying and analyzing the principal elements that determine its nature. The first of these is identifying the meaning of this contract (First Branch), followed by highlighting its main characteristics (Second Branch).

**First Branch: The Meaning of the BOT Contract (BOT)**

Legal scholars have proposed several definitions of BOT contracts, as they constitute a relatively recent concept in public-private partnerships (First). The BOT contract has also been legally defined by the United Nations Commission on International Trade Law (UNCITRAL) (Second).

**First: The Doctrinal Definition of the BOT Contract**

The jurist Loncle defines BOT contracts as: "the association of a group of private-law persons in a project company authorized by the State, pursuant to the provisions of the contract concluded between them, to finance, construct, and operate projects for a period sufficient to Repay the obligations through investment revenues, while also enabling the investor to achieve its investment objectives."[1]

Professor Mohamed Bousmah considers it to be "another form of public utility concession, particularly well known in Anglo-Saxon countries, representing a specific system whereby a private enterprise is entrusted with the construction, operation, and equipping of a public utility for a specified period, after which it is returned free of charge to the public authority that concluded the contract."[2]

Although legal scholars have formulated various definitions of the BOT contract, they are substantially consistent in describing it as a contract under which the State or one of its public entities entrusts a national or foreign company, whether public or private, referred to as the project company, with the construction and operation of a public utility for its account for a specified period, after which ownership is transferred to the State or the public entity that entered into the contract.[3]

Accordingly, the BOT model is regarded as the legal model most closely resembling concession contracts. It is generally used to establish new and specific assets, while also allowing its application to the modernization of existing assets, making it an alternative to traditional public-sector projects. Under this contract, the public sector grants a private company the right to develop and operate a facility or system for a specified period, known as the **concession period**, during which the operator assumes responsibility for financing,

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[1] Walid Haidar Jaber, Delegation in the Management and Investment of Public Facilities (A Comparative Study), Al-Halabi Legal Publications, Lebanon, 2009, p. 473.

[2] Hajar Shamshema, The Build-Operate-Transfer Contract (BOT) and Its Applications in Algeria, Master's Thesis, Faculty of Law, University of Oum El Bouaghi, 2013–2014, p. 9.

[3] Mahmoud Amin Ben Kada, "The BOT Contract as a Form of Concession Contract," International Law and Development Journal, Vol. 7, No. 2, University of Mostaganem, 2019, p. 96.

construction, and commercial operation. Upon the expiry of this period, the facility is transferred to the supervising authority. It should be noted that the revenues generated during the operating period are not collected directly from consumers but through fees imposed by the public-sector entity (such as a public utility company or the government), with the aim of covering operating and maintenance expenses, repaying the principal debt and interest, covering development, construction, and financing costs, and ensuring an investment return for the operator or project executor.[1]

The Build-Operate-Transfer (BOT) system also represents the classical and standard model of project finance agreements. It is generally managed through a special-purpose project company established under a complex contractual structure linking the public authority granting the concession with the private operator.

This contractual framework extends to include several principal parties, including the private operator (under the operation and maintenance agreement), the construction contractor (bound by the construction contract), the output purchaser (the entity acquiring the project's outputs under a purchase agreement), the financial sponsor (responsible for financing the project inputs under a supply agreement), as well as the other project partners.[2]

**Second: The Legal Definition of the BOT Contract**

The United Nations Commission on International Trade Law (UNCITRAL) defines the BOT contract as: "a form of project financing whereby a government grants, for a specified period, a private financial consortium the right to implement a particular project. The project company, acting as the concessionaire, undertakes its construction, operation, and commercial exploitation, and at the end of the concession period, ownership of the project is transferred to the government."[3]

Most national legislations have not provided a definition of the BOT contract, as it is generally accepted that legislators rarely define legal concepts. Moreover, the term BOT is not exclusively a legal term but is also widely used in the economic field. Another reason for the absence of a legal definition is the lack of an international consensus on the concept of public-private partnership, owing to the customary nature of the Anglo-Saxon legal system and the predominance of the principle of freedom of contract, as opposed to the codified legal tradition prevailing in Francophone legal systems.[4]

**Second Branch: Characteristics of the BOT Contract (BOT)**

BOT contracts possess several characteristics, which may be summarized as follows:[5]

- The BOT contract is concluded between public law entities and private law entities.

[1] HERNANDEZ-SANCHO Francesc, Water Consumption, 1st edition, London, United Kingdom, 2019, p. 121.
[2] HERNANDEZ-SANCHO Francesc, ibid., p. 121.
[3] United Nations Commission on International Trade Law (UNCITRAL), Twenty-Ninth Session Report entitled Possible Future Work (Build-Operate-Transfer Projects), New York, United States of America, 1996.
[4] Yasmine Ladjal and Lydia Doufan, “Contracting through the BOT Method in Algerian and French Legislation,” International Journal of Legal and Political Research, Vol. 1, No. 2, University of El Oued, 2017, p. 114.
[5] Mohamed Daman Dhibeh, “The BOT Contract (Its Nature and Characteristics),” Al-Ahya Journal, Vol. 20, No. 25, University of Batna 1, June 2020, pp. 441–443.

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- The purpose of the BOT contract is to establish a public utility and provide a public service to the public.
- Private financing of the project constitutes one of the essential elements of the BOT contractual system.
- Ownership of the public utility remains vested in the contracting administrative authority. Accordingly, the project company cannot be regarded as the owner of the facility, whether such ownership is considered permanent or temporary, since the State or the contracting administrative authority relinquishes only the management and investment of the project, these being among the powers and rights granted to the project company.
- The contracting administrative authority retains a permanent right of supervision and oversight throughout the duration of the contract.

**Third Branch: Stages of the BOT Contract (BOT)**
The BOT contract passes through several stages, which may be summarized as follows: the project selection stage, the project implementation stage, and finally the transfer of ownership to the host State.[1]

**First: Project Selection Stage**
At the outset, the government must determine the necessity of the proposed project, assess the feasibility of its implementation, and evaluate the suitability of implementing it under the BOT system.

**Stage of Selecting the Concessionaire (Project Company):** In selecting its contracting party, the administration is required to follow the general rule by complying with the procedures prescribed by the laws governing public tenders and auctions applicable to administrative contracts.

**Second: BOT Contract Implementation Stage**
This stage consists of three main phases:
**a) Construction Phase:** This phase begins after the contract has been definitively concluded. It represents the stage that absorbs the largest share of the project's investment costs, at a time when the public utility project has not yet generated any revenue. Accordingly, it is considered the most important and most critical stage of the project, as the project's financial viability depends to a large extent on the successful completion of the construction phase.
**b) Operation Phase:** This phase constitutes the core of the BOT system from the perspective of the project company, since it is during this period that the company recovers its expenditures and realizes the profits it anticipated. It is also the longest phase in the life cycle of the BOT contract.

[1] Sabrine Mane‘ and Lilia Ben Mansour, “Contributions of Public-Private Partnership under the BOT System in Financing and Implementing Infrastructure Projects: Achieving the Optimal Balance between Advantages and Potential Risks,” Economic Researcher Journal, No. 7, University of Skikda, 2013, p. 169.

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**Third: Transfer of Ownership Stage**

This stage commences immediately upon the expiration of the contract term. The project company is required to transfer the public utility to the administrative authority in good condition. Upon the termination of the BOT contract, the government has several options: it may operate the facility itself, appoint a new company to operate it, or renew the contract for an additional period with the same project company.

**Second Requirement: Legal Characterization of the BOT Contract and Its Distinction from Certain Similar Contracts**

The BOT contract, as a modern legal arrangement, varies in its application from one country to another and is associated with several fields, each having its own particular characteristics. This necessitates determining its legal characterization and identifying its legal nature (First Branch). In order to eliminate any ambiguity arising from its similarity to other closely related contractual concepts, it is also necessary to distinguish it from similar contracts (Second Branch).

**First Branch: The Legal Nature of the BOT Contract (BOT)**

The legal characterization or legal nature of a contract refers to its classification within a specific legal framework in order to determine the nature of the rights and obligations arising from it, the law governing the contract, and the judicial system having jurisdiction over disputes that may arise from its execution. Accordingly, legal scholars have differed regarding the legal nature of BOT contracts. Some consider them administrative contracts (First), while others classify them as private law contracts (Second). A third doctrinal view regards them as contracts of a special nature (Third). The position of the Algerian legislator regarding the legal nature of the BOT contract will also be examined (Fourth).

**First: The BOT Contract as an Administrative Contract**

A segment of legal scholarship considers BOT contracts concluded by the State or one of its competent public authorities with other persons, particularly private law entities, to be administrative contracts subject to the public law of the State in which the project is to be implemented. This characterization is based on the fulfillment of the criteria of an administrative contract,[1] namely that one of the contracting parties is a public law entity, that the subject matter of the contract concerns a public utility, and that the contract contains exceptional clauses not ordinarily found in private law contracts. In other words, the contract is concluded and performed in accordance with the rules and methods of public law.

Accordingly, the BOT contract closely resembles the public utility concession contract, which is regarded as one of the principal administrative contracts, since it allows for the establishment and operation of a public utility in a manner similar to that of the BOT contract[2]. The BOT

[1] Ali Abdel Amir Qablan, The Impact of Private Law on the Administrative Contract, Part Two, 1st edition, Zain Legal and Administrative Library, Beirut, Lebanon, 2011, p. 386.

[2] Mahmoud Khalil Khudair, "The Legal System of Administrative BOT Contracts," Iraqi University Journal, Vol. 62, No. 54, Iraqi University, Iraq, 2022, p. 367.

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contract is also considered an administrative contract of an international character, subject to the same legal regime despite the fact that its constituent elements may be connected with more than one State. The criterion for distinguishing a domestic administrative contract from an administrative contract of an international character lies in the latter's connection with the interests of international trade and the cross-border movement of capital and services, commonly referred to as the economic criterion.[1]

However, the doctrinal opinions that characterize the BOT contract as an administrative contract have been criticized on the grounds that they rely on the formal criterion namely, that the administration is a party to the contract while overlooking the substantive criterion, which requires the contract to contain exceptional clauses that are not ordinarily found in private law contracts. Such exceptional clauses cannot be presumed merely because the administration is a party to a BOT contract; therefore, this fact alone is insufficient to classify the BOT contract as an administrative contract.[2]

**Second: The BOT Contract as a Private Law Contract**

Another doctrinal view considers the BOT contract to be a private law contract and, consequently, subject to the rules of civil or commercial law. Under this view, the BOT contract is regarded as a form of investment contract that cannot contain exceptional clauses of the kind found in administrative contracts.[3] Rather, it is governed by the fundamental principles of private law, namely the principle of party autonomy, the principle of equality between the contracting parties, and the principle that the contract constitutes the law of the parties.[4]

This doctrinal approach has also been criticized from several perspectives. The most significant criticism is that, although investment contracts of which BOT contracts are considered one form appear to pursue profit for the contracting parties, the primary objective of the other contracting party, namely the State or one of its public entities, is to achieve the public interest through the establishment of public utilities, which cannot be characterized otherwise[5]. Moreover, although the State may resort to private law mechanisms and grant facilities to the contracting party in order to ensure the proper functioning of the public utility, it does not thereby relinquish its public authority, as it remains responsible for protecting the public interest. Accordingly, it may impose exceptional conditions and retains the right to terminate the BOT contract without referring to the other contracting party, as well as the right to assume responsibility for the operation and management of the public utility.[6]

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[1] Basem Mohammed Saleh, Commercial Law, 2nd edition, Baghdad University Press, Iraq, 1992, p. 121.
[2] Essam Ahmed El-Bahgi, Arbitration in BOT Contracts, Dar Al-Jami‘a Al-Jadida, Alexandria, Egypt, 2008, p. 96.
[3] Wael Mohamed El-Sayed Ismail, Legal Problems Raised by BOT Contracts and Similar Contracts, 1st edition, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2009, pp. 36–37.
[4] Abu Bakr Ahmed Othman, “BOT Contracts and Requirements for Their Application in Iraq,” Al-Rafidain Journal of Law, Vol. 10, No. 38, Iraq, 2008, p. 363.
[5] Khaled bin Mohammed Abdullah Al-Attiyah, The Legal System of Construction, Operation, and Transfer of Ownership Contracts, Master’s Thesis, Faculty of Law, Cairo University, Egypt, 2000, p. 62.
[6] Mahmoud Amin Ben Kada, op. cit., p. 98.

**Third: The BOT Contract as a Contract of a Special Legal Nature**

A further doctrinal trend classifies BOT contracts as contracts of a special legal nature. This view is based on the premise that BOT contracts are concluded through specific mechanisms and that each contract is governed by its own particular circumstances.

Consequently, it is difficult to establish a general rule classifying all BOT contracts either as administrative contracts or as private law contracts. Instead, this approach rejects assigning a fixed legal status to BOT contracts and requires that the elements of each individual contract be examined and analyzed separately in order to determine whether its legal nature is that of an administrative contract or a private law contract.[1]

**Fourth: The Position of the Algerian Legislator on the Legal Nature of the BOT Contract**

The Algerian legislator has not enacted a specific legal framework expressly regulating the BOT contract. However, an examination of certain legislative and regulatory texts reveals that many of them refer to the characteristics of this type of contract, while classifying it under concession contracts, which are regarded as administrative contracts under the Algerian legal system.

In the field of motorways, for example, Executive Decree No. 96-308 of 18 September 1996 concerning the granting of motorway concessions[2] provides in Article 2 that: "A motorway concession may be granted to any legal person governed by public law or private law that submits an application for that purpose, in accordance with the terms and conditions set out in the standard specifications attached to this Decree."

This Decree is accompanied by a model concession agreement. Articles 2, 4, and 5 thereof respectively provide that:

"The concessionaire company shall, at its own expense and responsibility, carry out all studies, procedures, works, and financial operations relating to the concession, and shall comply with the conditions of the specifications and the documents annexed thereto with regard to construction, maintenance, and operation alike."

"The concessionaire company shall, in particular, undertake to finance all the operations provided for in this agreement and in the specifications, in accordance with the conditions laid down therein."

"The concessionaire company shall be authorized to collect motorway tolls and charges for ancillary facilities under the conditions specified in the specifications and in accordance with the procedures prescribed by the applicable regulations."

**Second Branch: Distinguishing the BOT Contract from Certain Similar Contracts**

Although public-private partnerships rely extensively on the BOT contract as a mechanism for constructing and modernizing public utilities, the particular nature of this field has contributed

[1] Muti‘ Ali Hamoud Jubeir, The Administrative Contract between Legislation and Judiciary (A Comparative Study between the French, Egyptian, and Yemeni Legal Systems), Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2006, pp. 183–184.

[2] Executive Decree No. 96-308 of 18 September 1996 relating to the granting of motorway concessions, Official Journal, No. 55, issued on 25 September 1996.

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to the emergence of several contracts that share certain similarities with the BOT contract while differing from it in many respects.

Accordingly, these contracts will be distinguished from the BOT contract by examining each of them separately.

**First: The Build-Own-Operate-Transfer (BOOT) Contract**

BOOT is an acronym for Build, Own, Operate, Transfer. Under this contract, the government grants the project company a concession to construct, own, and operate a specific public utility for a fixed period, after which ownership is transferred to the government. It is important not to confuse this contract with the BOT contract. Under the latter, ownership is not transferred to the project company; rather, its role is limited to the construction, operation, and transfer of the project.[1]

**Second: The Build-Own-Operate (BOO) Contract**

Under the Build-Own-Operate (BOO) contract, the project company assumes responsibility for financing, constructing, and operating the project with the objective of acquiring ownership. The company retains ownership of the project and operates it for an indefinite period while collecting the revenues generated from it. Most governments are reluctant to conclude this type of contract for the construction of major public utilities, such as large airports, due to the increased likelihood of risks associated with the contractual arrangements governing such projects. This is often attributed to the project company's inability to cope with the costs of these large-scale projects.[2]

Accordingly, the BOO contract differs from the BOT contract in that it lacks the element of transferring ownership of the public utility to the government, with the project company retaining ownership for an indefinite period.

**Third: The Design-Build-Finance-Operate (DBFO) Contract**

DBFO is an acronym for Design, Build, Finance, Operate. Under this contract, the design component is incorporated from the outset, particularly where the project requires a specific design, such as the design of a bridge, tunnel, or airport[3]. The project company undertakes the financing of the project and provides the necessary equipment, machinery, and materials, while arranging financing through domestic or foreign banks.

However, ownership of the project is not transferred to the State. Instead, the lease agreement is renewed either in favor of the same project company or another private-sector company. In return, the State receives financial compensation for the land on which the project is

[1] ABEYRATNE Ruwantissa, Law and Regulation of Aerodromes, Springer International Publishing, Switzerland, 2014, p. 156.
[2] ABEYRATNE Ruwantissa, ibid., p. 121.
[3] AMMARI Zohir and GUEMMAZ Souhil, “Le financement des projets en Algérie à travers le mode BOT, Cas du dossier dessalement de l'eau de mer,” Revue des études humaines et sociales – A/ Sciences économiques et droit, No. 20, June 2018, Hassiba Benbouali University, Chlef, Algeria, pp. 32–33.

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established, as well as a share of the revenues in consideration for granting the concession to the project company.[1]

Accordingly, there are two fundamental differences between the Design-Build-Finance-Operate (DBFO) contract and the Build-Operate-Transfer (BOT) contract. First, the design component is incorporated at the outset of the project and is undertaken by the project company. Second, ownership of the project is not transferred to the State.

**Fourth: The Build-Lease-Transfer (BLT) Contract**

Under the Build-Lease-Transfer (BLT) contract, the project company constructs and finances the project but leases it to the government or the State for operation in return for financial consideration paid to the project company in accordance with the terms of the contract. Ownership of the project is then transferred to the government upon the expiration of the contract.[2]

It follows from the characteristics of the BLT contract that it differs from the BOT contract in that the project company does not operate the project itself but instead leases it to the original public entity that owns the project.

**Fifth: The Build-Transfer-Operate (BTO) Contract**

The Build-Transfer-Operate (BTO) contract is an arrangement under which the private sector or the project company constructs the public utility at its own expense. The facility is then transferred or handed over to the government in a second stage, after which the private sector is contracted to operate it, recover its costs, and generate a profit. Accordingly, the difference between the BTO contract and the BOT contract lies in the fact that the project company does not undertake the operation of the facility before its transfer but transfers it immediately after construction.[3]

**Sixth: The Modernize-Own-Operate-Transfer (MOOT) Contract**

Under the Modernize-Own-Operate-Transfer (MOOT) contract, the project company undertakes the modernization of an existing public utility or infrastructure project that already exists but is operating inefficiently. The company upgrades the facility through technological improvements and a modern administrative and service system. Ownership is vested in the private sector, represented by the project company, which operates the facility throughout the contract period to generate appropriate revenues.

At the end of the contract, ownership is transferred to the State.[4] Thus, the principal difference between the MOOT contract and the BOT contract is the absence of a construction phase in the former, since the project already exists.

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[1] Abdel Fattah Bayoumi Hegazy, BOT Contracts in Comparative Law, Dar Al-Fikr Al-Jami'i, Alexandria, Egypt, 2017, p. 66.

[2] AMMARI Zohir and GUEMMAZ Souhil, ibid., p. 32.

[3] Waddah Mahmoud Al-Hamoud, Build-Operate-Transfer (BOT) Contracts (Rights and Obligations of the Contracting Administration), Dar Al-Thaqafa, Amman, Jordan, 2010, p. 61.

[4] Abdel Fattah Bayoumi Hegazy, op. cit., p. 62.

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**Section Two: Applications of the BOT Contract in Algerian Legislation and Its Legal Effects**

Like other countries, Algeria seeks to develop its economy and identify mechanisms that support this objective, particularly following its adoption of the market economy system. BOT contracts constitute one of the principal sources of financing for national investments, given the large-scale projects they encompass. Within the Algerian legal system, legislation, regulations, and agreements reflect the indirect application of the BOT contract (First Requirement). Moreover, the BOT contract gives rise to several legal effects, both as a general legal concept and through its application under Algerian legislation (Second Requirement).

**First Requirement: Applications of the BOT Contract (BOT) in Algerian Legislation**

As previously noted, Algeria has not established a specific legal framework governing BOT contracts. Nevertheless, this type of contract has been applied in numerous fields (First Branch). Furthermore, the new Investment Law No. 22-18 has established and reinforced several principles and guarantees that generally serve investors and may also be interpreted and applied for the benefit of parties operating under the BOT contractual model (Second Branch).

**First Branch: Applications of the BOT Contract in Various Sectors in Algeria**

The application of BOT contracts in Algeria may be inferred from the legislation governing several vital sectors, in which certain concession contracts exhibit the characteristics of BOT contracts. Some examples are presented below.

With regard to the development of public industrial property, Law No. 08-14 of 20 July 2008, amending and supplementing Law No. 90-30 of 1 December 1990 containing the National Property Code[1], provides in Article 64 bis, paragraph 1, that:

"The granting of a concession for the use of public national property, as provided for in this Law and the applicable legislative provisions, constitutes the contract by virtue of which the public entity owning the property, referred to as the concession-granting authority, grants a legal or natural person, referred to as the concessionaire, the right to exploit an annex of the natural public domain or to finance, construct and/or operate a public facility for the purpose of providing a public service for a specified period, at the end of which the facility or equipment forming the subject of the concession shall revert to the concession-granting authority."

Paragraph 4 of the same Article further provides that:

"In the case of the operation of a public facility for the purpose of providing a public service, the concessionaire shall, in order to cover investment and operating costs and earn its remuneration, collect fees paid by the users of the facility and the service, in accordance with tariffs or maximum rates to be specified in an annex to the concession specifications."

It is evident from this provision that the essential characteristics of the BOT contract are present, distinguishing this type of concession from the traditional concession model. The stages of the BOT contract construction, operation, and transfer are reflected in this law. In

[1] Law No. 08-14 of 20 July 2008 amending and supplementing Law No. 90-30 of 1 December 1990 containing the National Property Code, Official Journal, No. 44, issued on 3 August 2008.

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addition, the project company or concessionaire is granted the right to recover its expenditures and earn profits during the operation or exploitation period specified in the contract.

The legal framework established by the National Property Code, as described above, may also be applied to certain agreements concluded in various sectors involving public industrial property, including the following:

In the field of seawater desalination, Article 81 of Law No. 05-12 of 4 August 2005 relating to Water [1]provides that:

"Pursuant to this Law, a concession may be granted for the construction and operation of seawater desalination facilities or installations for the extraction of salts and minerals from saline water for public benefit, in accordance with the provisions of Ordinance No. 01-03 of 20 August 2001 on the Development of Investment."

Article 17 of the aforementioned Law No. 05-12 further provides that:

"Artificial public water property shall also include facilities and installations that become the property of the State without compensation upon the expiry of a concession or delegation contract for construction and operation concluded with a natural or legal person governed by public or private law."

Within this framework, several agreements have been concluded, including an agreement between the National Agency for Investment Development and Hamma Water Desalination (HWD SPA), a joint-stock company governed by Algerian law, for the construction of a seawater desalination plant with a nominal production capacity of 200,000 m³ per day, located in Hamma, Algiers Province, at a total investment value of USD 256 million. The duration of the agreement was set at 30 years, commencing from its date of entry into force.[2]

Another agreement was concluded between the National Agency for Investment Development and Aguas de Skikda SPA (ADS), a joint-stock company governed by Algerian law, for the construction of a seawater desalination plant with a production capacity of 100,000 m³ per day, located in the Skikda Industrial Zone (DEV1), Skikda, Algeria. The plant was to be designed, constructed, and operated by or on behalf of the project company, with a total investment value of USD 105,604,167. The duration of this agreement was also fixed at 30 years from the date of its entry into force.[3]

In addition, another agreement in the same field was concluded between the National Agency for Investment Development and KAHRAMA, a joint-stock company governed by Algerian law, for the construction of a seawater desalination plant with a production capacity of 88,888 m³ per day, located in the Arzew Industrial Zone, Oran Province, Algeria. The plant was to be designed, constructed, and operated by or on behalf of the project company, and the duration of the agreement was likewise set at 30 years from the date of its entry into force.[4]

[1] Law No. 05-12 of 4 August 2005 relating to water, Official Journal, No. 60, issued on 4 September 2005.
[2] Investment Agreement between the National Agency for Investment Development and Hamma Water Desalination, Official Journal, No. 07, issued on 28 January 2007.
[3] Investment Agreement between the National Agency for Investment Development and Aguas de Skikda (ADS), Official Journal, No. 07, issued on 28 January 2007.
[4] Investment Agreement between the National Agency for Investment Development and Kahrama (KAHRAMA), Official Journal, No. 07, issued on 28 January 2007.

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Another application relating to public industrial property concerns the construction, operation, and exploitation of airport terminals. Article 1 of Law No. 2000-05[1], amending Article 8 of Law No. 98-06 establishing the general rules relating to civil aviation, provides that:
"The State shall undertake the construction, development, and operation of airport terminals. Their construction and/or operation may, however, be granted under a concession to natural persons of Algerian nationality or legal persons governed by Algerian law, in accordance with the conditions prescribed by law."
Furthermore, Article 3 of Ordinance No. 03-10[2], amending Article 41 of Law No. 98-06, provides that:
"The construction and operation of an airport terminal, airport, or heliport intended to be opened for public air navigation may be the subject of a concession granted by the authority responsible for civil aviation. The conditions and procedures for the implementation of this Article shall be determined by regulation."

**Second Branch: Investment Principles and Guarantees under the BOT Contract in Light of Law No. 22-18**

The BOT contract is considered one of the most important mechanisms for attracting investment, particularly foreign investment. The existence of an excellent and effective investment climate enhances the opportunities for establishing partnerships between the public and private sectors through BOT contracts. Among the criteria for measuring the quality of this investment climate is the existence of effective principles and guarantees for investors, which Algeria has gradually sought to establish within its legal framework in this field. The latest of these was Law No. 22-18 relating to investment, whose provisions included several principles that support the implementation of BOT contracts (first), as well as numerous guarantees that make the application of BOT contracts more flexible and easier (second).

**First:** Investment Principles under Law No. 22-18:

Investment principles are considered the foundations that ensure the stability, security, and sustainability of these investments. Therefore, Law No. 22-18 of 24 July 2022 relating to investment expressly provided for three principles[3], namely: the principle of freedom of investment, the principle of equality between investors, and the principle of transparency. The latter is considered a newly introduced principle compared to the other principles that had already been previously established.
Article 3 of Law No. 22-18 included these three principles by stipulating that:
"This law establishes the following principles:"

- Freedom of investment: Every natural or legal person, whether national or foreign, resident or non-resident, wishing to invest, is free to choose their investment, while respecting the legislation and regulations in force.
- Transparency and equality in the treatment of investments.

[1] Law No. 2000-05 of 6 December 2000 amending and supplementing Law No. 98-06 of 27 June 1998 establishing general rules relating to civil aviation, Official Journal, No. 75, issued on 10 December 2000.
[2] Ordinance No. 03-10 of 13 August 2003 amending and supplementing Law No. 98-06 of 27 June 1998 establishing general rules relating to civil aviation, Official Journal, No. 48, issued on 13 August 2003.
[3] Law No. 22-18 relating to investment, dated 24 July 2022, Official Journal, No. 50, issued on 28 July 2022.

**Second:** Investment Guarantees under Law No. 22-18:

Law No. 22-18 established several guarantees for investors, including those that already existed but whose content or substance was amended to better serve the interests of investors, as well as others that were newly introduced for the same purpose. Among the guarantees that are particularly relevant to contracting through the BOT formula are the following:

- Protection of intellectual property rights: This is a right introduced by the new Investment Law, as it had not previously been provided for in previous investment laws. Article 9 of Law No. 22-18 stipulates that: "The State guarantees the protection of intellectual property rights in accordance with the legislation in force."
- Guarantee of legal security: One of the most important factors for investment stability is ensuring that legislation is not subject to changes. Therefore, Article 13 of the new Investment Law stipulates that: "The effects resulting from the revision or repeal of this law that may occur in the future shall not apply to investments carried out under this law, unless the investor expressly requests otherwise."
- Guarantee of the transfer of capital and profits: One of the most important outcomes of investment is the financial income obtained in addition to the investor's capital. Therefore, guaranteeing their transfer abroad is considered one of the most important guarantees granted to investors. This law has expanded the scope of transferring amounts to non-resident investors, as confirmed by Article 8 of Law No. 22-18.
- Establishment of a digital platform for investors: Article 23 of Law No. 22-18, as well as Articles 27 and 28 of Executive Decree No. 22-298 of 8 September 2022, which defines the organization and functioning of the Algerian Investment Promotion Agency, provided for its establishment[1]. This newly introduced tool constitutes an electronic platform for directing, supporting, and monitoring investments from their registration and throughout their exploitation period. It also ensures the removal of the physical nature of all procedures and their completion online, while allowing the procedures to be adapted according to the type of investment and the nature of requests. It is interconnected with the information systems of the bodies and administrations related to investment activities.
- Guarantee of recourse to international commercial arbitration: One of the most important guarantees granted by Law No. 22-18 to foreign investors is their right to resort to international commercial arbitration. The fundamental change introduced by the new law regarding this right is what was provided for in Article 12, which allows the Algerian Investment Promotion Agency to conclude an agreement with the foreign investor enabling the parties to resort to international commercial arbitration. Under previous investment laws, this possibility required the existence of a bilateral or multilateral agreement concluded by the Algerian State concerning conciliation, mediation, and arbitration.

[1] Executive Decree No. 22-298 of 8 September 2022 defining the organization and functioning of the Algerian Investment Promotion Agency, Official Journal, No. 60, issued on 28 September 2022.

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**Section Two: The Legal Effects of the BOT Contract**

The conclusion of a BOT contract gives rise to several legal effects for the two original or principal parties to this contract, namely the project company, which generally belongs to the private sector, and the State, the government, or the national authority representing it. Like other contracts, the BOT contract grants both parties contractual rights in return for obligations imposed upon them. Therefore, we will examine the obligations and rights of the State (first), followed by the obligations and rights of the project company (second).

**First Subsection: The Obligations and Rights of the State in the BOT Contract:**

The State bears several obligations towards the project company (first); in return, it enjoys several rights (second).

**First: The Obligations of the State in the BOT Contract:**

**a) Providing an Appropriate Legislative and Institutional Framework:**

The desire of entrepreneurs, as well as the lending institutions that finance them, to resort to BOT agreements and undertake the risk of establishing investments depends largely on the availability of an appropriate legal environment in which they can conduct their activities. Providing such an environment is considered one of the responsibilities of the concession-granting State. Therefore, the absence of strict legislation protecting BOT contracts and their binding force, supported by an impartial and effective judicial system, constitutes an obstacle and a difficulty in the successful implementation of these contracts and leads to their reluctance to engage in such investments.[1]

**b) The Obligation to Provide Support for the Implementation of the BOT Contract:**

The implementation of the BOT contract means the beginning of its actual realization on the ground. This process requires support in several aspects, which falls under the responsibility of the concession-granting State that receives the establishment of the project or public facility within its territory. Accordingly, the State must create the necessary conditions for the project company, which is often a foreign private sector entity, and facilitate procedures and provide assistance through the competent authorities of the concerned State in order to enable its establishment.

**Second: The Rights of the State in the BOT Contract:**

**a) The Right of the State to Monitor the Implementation of the BOT Contract:**

The BOT contract grants the host State legal rights enabling it to subject the other party to the contract, or the foreign contracting party (the project company), to supervision and a degree of oversight that has been previously agreed upon, provided that such monitoring and supervision do not exceed the limits permitted by the BOT contract itself. This may extend, for example, to the management of the project.[2] Among the mechanisms used for State control over the

[1] C. Walker and A. J. Smith, Privatized Infrastructure: The Build Operate Transfer Approach, Thomas Telford Publications, London, 1999, p. 17.

[2] TAFOTIE Roger, "Redécouvrir la technique Build Operate Transfer (BOT) pour une réalisation optimale de projets publics et privés en Afrique," Revue de l'ERSUMA, Vol. 2, No. 3, Editions Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), 2013, p. 229.

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project company are the appointment of representatives of the State authority on the company's board of directors, as well as granting the competent ministries of the State the right to intervene for the purpose of monitoring and ensuring the safety of the project.[1]

**b) The Right of the State to Amend or Cancel the BOT Contract:**

The State or the authority representing it, as a party to the BOT contract, has the right to amend or even cancel this contract. This may be due to newly arising reasons that appear during the implementation phase of the contract, which may be beyond the control of both parties, or may be attributed to the project company, such as its failure to comply with the conditions stipulated therein. This must be carried out in order to preserve the requirements of public interest. The project company shall be compensated if the amendment or cancellation causes it harm in the first case; however, in the second case, where it is at fault, it shall not be entitled to compensation.

For example, Articles 86 and 87 respectively of Law No. 05-12 relating to water, previously mentioned, provide for the cases of amendment or cancellation of the concession right, stipulating that: "The license or concession for the use of water resources may, at any time, be amended, reduced, or cancelled for reasons of public interest, with compensation granted in the event that the holder of the license or concession suffers direct damage, according to the procedures defined in the license or the specifications document."

"The license or concession for the use of water resources shall be cancelled without compensation, after formal notice is sent to the holder of the license or concession, in the event of failure to comply with the conditions and obligations resulting from the provisions of this law and the regulatory texts adopted for its implementation, as well as the license or the specifications document."

**Second Subsection: The Obligations and Rights of the Project Company in the BOT Contract:**

The project company, as the second party to the BOT contract, is also subject to several obligations (first), while it is granted several rights within the framework of the implementation of this contract (second).

**First: The Obligations of the Project Company in the BOT Contract:**

**a) Construction and Operation of the Public Facility Subject to the Project:**

One of the fundamental elements of the BOT contract is the completion of the project, namely its construction and operation. It should be noted that the construction process may be carried out through a construction company affiliated with the concession holder,[2] i.e., the project company itself. The concession holder may also assign these activities to one or more contractors under a design and construction contract. The project company is also responsible

[1] Ghanem Mohamed Ahmed, Infrastructure Projects under the BOT System, Modern University Office, Alexandria, Egypt, 2009, p. 125.

[2] Singh Amarjit, Creative in Structural and Construction Engineering, Published by Balkema, Rotterdam, Netherlands, 2001, p. 242.

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for financing all these operations, either directly or through financiers under financing agreements.

In addition, one of the essential tasks of the project company within the BOT contract is the safe and smooth operation of the project, while ensuring the main operating requirements, including equipment and its maintenance, as well as providing high-quality services throughout the duration of the contract.

These conditions are included in the contract. [1]Furthermore, the project company must respect the general principles governing the operation of public facilities, namely: the principle of the regular and continuous functioning of the public facility, the principle of the adaptability and modification of the public facility, and the principle of equality of users before the public facility.

**b) The Obligation of the Project Company to Transfer Technology to the Host State:**

The BOT contract is currently considered one of the most important mechanisms used by various States for transferring modern and advanced technology to their countries. Therefore, the obligation of the project company to transfer and use advanced technology for the facility it establishes and operates under the BOT contract serves the interests of all parties to the contract. This includes the main parties, such as the host State, as it contributes to strengthening the growth of its economy. As for the project company, advanced technology assists it in managing the project and achieving the greatest possible profits, the effects of which extend to the secondary parties of the contract, such as project financiers.[2]

**c) The Obligation to Respect the Contract Period and Transfer Ownership:**

The concession period for the construction and operation of the project or public facility is determined in the BOT contract. This period is usually long due to the large scale of infrastructure projects included in these contracts. Therefore, the project company must respect these periods and then transfer ownership to the project owner, namely the government of the host country or the authority representing it. This is considered a form of integrated contracting.[3]

**Second: The Rights of the Project Company in the BOT Contract:**

**a) The Right of the Project Company to Obtain Financial Consideration:**

The concept of the BOT contract is based on enabling the project developer to obtain sufficient revenues to cover the costs of design, construction, financing, and operation, while achieving profits at the same time. Build-Operate-Transfer projects generally emerge in the public sector within the field of infrastructure,[4] as they are large-scale income-generating projects, especially when they are associated with long contract periods, which are sufficient to achieve this objective.

[1] Singh Amarjit, ibid., p. 243.
[2] Mahmoud Khalil Khudair, op. cit., p. 371.
[3] Cavusgil S. Tamer, International Business: The New Realities, 2nd edition, Pearson Australia, Melbourne, Australia, 2015, p. 475.
[4] Sidney M. Levy, Project Management in Construction, 5th edition, McGraw-Hill, New York, USA, 2007, p. 32.

**b) The Right of the Project Company to Incentives and Tax Exemptions:**

Among the incentives and facilities granted by the host State and its authorities to the project company is the exemption from certain percentages of the taxes imposed on it, as well as from some customs reductions. This strengthens the concept of contractual security for the company and reduces the overall cost of the project, thereby increasing its profit margin.

Among the examples that can be mentioned in this context, with regard to Algeria, are the exemptions of this type granted under the aforementioned agreement between the National Agency for Investment Development and "Hamma Water Desalination" (HWD SPA). Article 9, paragraph 1, of the agreement, entitled *"Privileges Granted to the Project Company", stipulates that: "Regarding the completion of the investment for a period of three (3) years, renewable by decision of the Agency:"

- Exemption from the payment of transfer rights for consideration concerning all real estate acquisitions carried out within the framework of the investment;
- Application of a fixed registration fee at a reduced rate (2%) concerning the company's incorporation deeds and capital increases;
- Exemption from value-added tax concerning goods or services directly involved in the completion of the investment, whether imported or acquired from the local market;
- Application of a reduced rate in terms of customs duties concerning imported goods directly involved in the completion of the investment, provided that the application of this reduced rate does not exempt the company from paying the additional temporary duty when it is applicable."

**Conclusion:**

The BOT contract, as a general concept, has recently become one of the most prominent mechanisms used by most countries, whether developing or developed, in concluding partnerships between the public and private sectors, due to the financial, structural, and technical support it provides for major projects or infrastructure projects. Through our study of this contract, we have reached a set of conclusions that can be summarized as follows:

Despite the multiplicity of definitions related to the BOT contract, they all follow the same approach. It is considered an agreement in which the wills of its two main parties, namely the State or the authority representing it and the project company, coincide on granting the task of building, operating, and transferring ownership of a public facility after its exploitation for a long period, enabling the latter to collect fees covering the costs of the construction and operation phases and generating profits. It should be noted that legal doctrine and Algerian legislation have allowed the possibility that the project company may belong to the public sector.

Regarding the legal nature of the BOT contract, due to the diversity of fields of application of this contract and the differences between the legal systems of States, it has been adapted according to several approaches: it is considered an administrative contract; according to some, it is a contract belonging to private law; while others consider it a contract with a special legal nature. These opinions are all acceptable and cannot be denied. As for the Algerian legislator, and given that it has not adopted a specific legal framework for the BOT contract, it appears

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from the legal provisions regulating this field that it has classified it as a public service concession contract, which is considered an administrative contract within the Algerian legal system.

As for the extent of the application of the BOT contract in Algerian legislation, as previously mentioned in this study, the Algerian legislator has not expressly provided for the BOT contract. However, a set of legal and regulatory provisions have demonstrated the existence of the practical application of this contract through the fulfilment of all its characteristics, in the form of a public service concession contract, despite the differences between them. It also differs from many similar contracts. Accordingly, the BOT contract produces several legal effects, whether in Algeria or in other countries that have adopted it, which are represented in the obligations and rights of the State or the host government, and the obligations and rights of the project company.

In light of these findings and the emergence of certain shortcomings in the regulation of the BOT contract in Algeria in particular, there is a need to present a set of recommendations, namely:

- The necessity of accelerating the integration of the BOT contract into the Algerian legal system through explicit, clear, and comprehensive legal and regulatory provisions that serve the implementation of this type of contract, especially since the need to apply this type of contract has emerged urgently, leading to its adoption and practical implementation indirectly. This has undoubtedly affected the quality of these contracts and generated ambiguity and errors within them.
- The adoption of an institutional framework within the administrative, financial, and judicial systems dedicated to managing partnerships between the private and public sectors in the field of BOT contracts, especially with the existence of practical implementation in the form of Investment Law No. 22-18, which provides for many principles and guarantees supporting this approach, with the possibility of updating it.
- Algeria is a State that has recently sought, with all its available capabilities, to increase the pace of its economic growth and diversification. This can certainly only be achieved through attracting investments that serve this objective, particularly foreign investments, as well as local investments to support domestic production. Therefore, concrete and courageous steps must be taken to activate the use of BOT contracts and exploit them to their fullest extent.

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