

## The Legal Regime of the Build-Operate-Transfer (BOT) Contract

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### Abstract:

The Build-Operate-Transfer (BOT) contract is a relatively modern contractual mechanism adopted by states to address the increasing demand for public facilities and infrastructure among citizens. Based on a relationship between the state and private entities, it involves the state, acting as a public-law legal entity, entering into an agreement with a private investor governed by private law. Under this arrangement, the investor is responsible for financing, designing, constructing, operating and maintaining a public facility for a set period. The facility is then transferred to the state in accordance with the contract's terms and conditions.

The BOT mechanism is intended primarily to facilitate the development of major infrastructure and public facilities, such as roads, ports and airports, while alleviating the financial burden on the state and encouraging private-sector investment and expertise. Furthermore, the BOT contract has an international dimension, particularly given the frequent involvement of foreign investors and cross-border investment operations.

Despite doctrinal debates concerning its legal characterisation — particularly whether it should be regarded as a civil contract or an administrative contract — the BOT contract can be classified as an administrative contract when concluded by a public-law entity for the purpose of establishing, operating or managing a public service, and when it is subject to the rules governing administrative contracts. In this context, the BOT contract is one of the contemporary forms of public service concession arrangement, reflecting the growing role of public-private partnerships in the development and management of public infrastructure.

**Keywords:** Concession contract, public sector, private sector, public-private partnership (PPP), build-operate-transfer (BOT) contract, public infrastructure, administrative contract.

### Introduction:

The importance of administrative contracts has increased significantly in the modern era, at both the domestic and international levels. At the domestic level, this is largely due to the state's shift towards a liberal economic system and its growing dependence on the private sector. Within this framework, certain administrative contracts have emerged as instruments of privatisation. Rather than selling public-sector enterprises, the state can entrust their management to private entities through concession agreements and other service contracts, under a framework agreed by the parties involved. This approach also helps to bring different legal systems closer together and establish appropriate mechanisms for encouraging investment and facilitating the movement of capital between states. It is in this context that new contractual arrangements and modern legal mechanisms have emerged, including the Build-Operate-Transfer (BOT) contract.

The BOT contract is one of the contemporary contractual mechanisms used in both domestic and international transactions. It continues to be the subject of scholarly and legal research, particularly because of its ability to balance private and public interests. Under a BOT arrangement, the administrative authority grants a concession or authorisation to a private or public-sector company. The project company then undertakes to construct and develop the project using its own financial resources, after obtaining the necessary authorisation from the competent administrative authority. Upon completion of construction, the project company assumes responsibility for operating and managing the project for an agreed period.

During this period, the company covers the costs and expenses related to the project and collects the fees, charges or revenues generated from the facility's users, in accordance with the contract's terms. Upon the agreed contractual period expiring, ownership of the project is transferred from the project company to the administrative authority free of charge.

The fundamental objective of the BOT contract is therefore to serve the public interest and meet essential societal needs by enabling the state to develop and operate public infrastructure while benefiting from private-sector financing, expertise and management capabilities.

The following research problem therefore arises:

What does the Build-Operate-Transfer (BOT) contract entail, and what is its legal nature?

To address this issue, the study will be structured according to the following outline:

Part One: The Concept of the Build-Operate-Transfer (BOT) Contract

Section One: Definition of the BOT Contract

Section Two: Characteristics of the BOT Contract

Section Three: Types of BOT Contracts

Part Two: The Legal Nature of BOT Contracts and Their Advantages

Section One: BOT Contracts as Civil-Law Contracts (Private-Law Contracts)

Section Two: The BOT Contract as a Regulatory Arrangement

Section Three: BOT contracts as public-law contracts (administrative contracts)

Section Four: BOT contracts as contracts of a special legal nature

Section 5: Advantages of the Build-Operate-Transfer (BOT) Contract

### **Part One: The Concept of the Build-Operate-Transfer (BOT) Contract**

Build-Operate-Transfer (BOT) contracts are considered among the most important investment contracts adopted by States, particularly those facing financial or technical constraints in developing strategic projects and essential infrastructure facilities. Through such contracts, States establish partnerships with the private sector for the construction and operation of public facilities in various vital sectors, such as energy, electricity, highways, and other infrastructure projects. This mechanism contributes to reducing the financial burden on State budgets and enables States to avoid excessive borrowing and indebtedness<sup>1</sup>.

#### **Section One: Definition of the Build-Operate-Transfer (BOT) Contract**

The concept of the BOT contract is examined from linguistic and terminological perspectives.

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<sup>1</sup>- Dalal Abdeljalil: "The BOT System as a Modern Contractual Mechanism in the Field of Investment and Public Facility Management," *Al-Mufakir Journal of Legal and Political Studies*, Vol. 03, No. 04, December 2020, p. 77.

## **1. Linguistic definition of the BOT contract**

The term 'BOT', which stands for 'Build-Operate-Transfer', is an acronym composed of three English words:

B: Build, corresponding to Construire in French, meaning construction and establishment of the project.

O: Operate, corresponding to the French term Exploiter, meaning the operation and exploitation of the project.

T: Transfer, corresponding to Transférer in French, meaning the transfer and handover of ownership of the project to the administrative authority that commissioned the establishment of the facility<sup>2</sup>.

The BOT logic therefore refers to a contractual arrangement whereby the government enters into an agreement with a natural or legal person from the private sector to establish a project at the latter's own expense. This entity is granted possession of the project and the right to operate it for a specified period. During this time, it runs the facility in order to recover the costs incurred in establishing and developing the project. Upon the contractual period's expiration, ownership of the project is transferred to the government<sup>3</sup>.

## **2. Terminological definition of the BOT contract**

In legal doctrine, a Build-Operate-Transfer (BOT) contract is defined as a contractual mechanism that brings together the public sector (represented by the state) and either a public or private entity (whether national or foreign) with the aim of financing and constructing a public facility, operating it for a specified period and then transferring ownership of it to the state<sup>4</sup>.

The United Nations Commission on International Trade Law (UNCITRAL) defines BOT contracts as follows:

'Build-Operate-Transfer (BOT) projects are essentially a form of project financing whereby a government grants a consortium of investors (hereinafter referred to as the "project consortium") a concession to develop, operate, manage, and commercially exploit a specific project.' The project consortium, or a company established by the consortium (hereinafter referred to as the 'concessionaire'), undertakes to develop the project and implement the concession in accordance with the agreement concluded between the government and the concessionaire (hereinafter referred to as the 'project agreement').<sup>5</sup>

The United Nations Industrial Development Organization (UNIDO) has defined the BOT contract as follows:

'A contractual arrangement whereby a private-law entity undertakes to establish one of the state's essential public facilities, including its design and financing, as well as its operation and maintenance. The entity then manages and operates the facility for a specified period, during which it is authorised

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<sup>2</sup>- Mohamed Daman Dhebi: "The BOT Contract: Its Nature and Advantages," *Al-Ihya Journal*, Vol. 20, No. 25, June 2020, p. 438.

<sup>3</sup>- Hamida Zineb Moulay: "The Legal Nature of Build-Operate-Transfer Contracts," *Al-Wahat Journal for Research and Studies*, Vol. 0, No. 02, 2017, p. 442.

<sup>4</sup>- Mebkhouta Ahmed: "Modern Methods of Constructing and Managing Public Facilities: The BOT Contract as a Model," *Algerian Journal of Law and Political Science*, No. 03, June 2017, p. 174.

<sup>5</sup>- Djamel Rahal: "The Legal Framework of the BOT Contract and Its Applications within the Algerian Legal System," *Dirassat wa Abhath: The Arab Journal for Research and Studies in the Humanities and Social Sciences*, Vol. 15, No. 03, 2023, pp. 287–288.

to charge beneficiaries appropriate fees, as well as any other applicable charges. However, these fees must not exceed those proposed in the tender and stipulated in the project agreement. This enables the entity to recover the capital invested, the costs of operation and maintenance, and an appropriate return on its investment. At the end of the specified period, the entity is required to return the facility to the government or a new private entity selected through a public, competitive procedure<sup>6</sup>.

In his work *Construction and Exploitation*, Dr. Mohamed Al-Rouibi defines the BOT contract as follows:

‘The BOT contract is an agreement between the state or one of its administrative authorities and a private party, usually a foreign company, for the construction of a public facility at the company’s expense. In return, the project company is entitled to operate and exploit the facility and receive the revenues generated from such exploitation throughout the contractual period. At the end of the period, the company must transfer the facility to the relevant administrative authority free from any liabilities or encumbrances and in good condition<sup>7</sup>.’

A BOT contract is an agreement between the government, one of its ministries or affiliated public authorities and a local, foreign or joint private enterprise. The enterprise is granted the right to use specific resources to build public facilities intended to meet a public need, such as roads, airports, ports and power plants. The enterprise constructs the project at its own expense and subsequently assumes responsibility for managing the facility and providing services to its beneficiaries for a specified period and under predetermined conditions, subject to the supervision and control of the contracting authority. After this period, the enterprise transfers the facility’s assets to the state or the contracting authority in good condition, allowing continued operation<sup>8</sup>.

Accordingly, the BOT contractual system is an agreement between a public legal entity and a private-sector entity (whether foreign, national or jointly owned) for the construction of a public facility within the state at the expense of the private entity, followed by the management and operation of the facility for a specified period and under predetermined conditions, subject to the supervision of the administrative authority that granted the contract. In return, the private entity is entitled to receive revenues generated from operating the project throughout the contractual period. However, ownership of the project is transferred to the State or the administrative authority granting the concession upon expiry of the agreed period. The project must be transferred in a condition that permits its continued operation and maintains the level of efficiency at which it was previously operated<sup>9</sup>.

Based on these definitions, the BOT contract can be defined as an agreement whereby the state grants a private entity a concession to construct and operate a public facility for a specified period. After this period, ownership of the facility is transferred back to the state.

## **Section Two: Characteristics of the Build-Operate-Transfer (BOT) Contract**

The BOT contract is characterised by several distinctive features, which can be summarised as follows:

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<sup>6</sup>- Boulakouas Sana: “Delegated Management of Public Facilities and Transformations in the Establishment and Management of Public Facilities: From the Concession Contract to the BOT Contract,” *Journal of North African Economics*, Vol. 15, No. 21, 2019, pp. 400–401.

<sup>7</sup>- Hamida Zineb, op. cit., p. 143.

<sup>8</sup>- Ibid., p. 144.

<sup>9</sup>- Djamel Rahal, op. cit., p. 288.

### **1. In terms of the parties:**

The BOT contract is concluded between two parties. The first party is the state or one of its entities, acting as the principal party to the contract in its capacity as the grantor of the concession and the supervisory and controlling authority. The second is the investor, commonly referred to as the ‘project company’, who may be a natural or legal person, whether domestic or foreign<sup>10</sup>.

### **2. In terms of the objective:**

The primary purpose of the BOT contract is to establish a public facility and provide a public service. A closer examination reveals that these contracts have primarily been applied to the development of major public economic facilities and the provision of essential public services required by the population, such as roads and transport infrastructure, airports, ports, electricity and gas facilities, drinking water infrastructure, telecommunications and similar facilities<sup>11</sup>.

### **3. In terms of the state’s powers of supervision and control:**

Supervision and control are among the most important rights that the State exercises vis-à-vis its contracting party, representing an expression of its sovereignty and authority. The purpose of such supervision is to ensure that the contractor performs the contract properly and in accordance with the established conditions, whether with regard to technical, administrative or financial aspects.

Given the importance of the public facilities covered by BOT contracts and their considerable duration, exercising this type of supervision and control is essential to ensure the proper performance of, and continued access to, the facility<sup>12</sup>.

### **4. In terms of ownership of the project during the contractual period:**

It cannot be said that the project company acquires ownership of the public facility, either permanently or temporarily. The state or the contracting administrative authority merely relinquishes management and exploitation of the project to the project company, within the powers and rights granted to it under the contract.

However, this does not alter the public nature of the facility constructed under a BOT arrangement. Accordingly, throughout the concession period, the administration retains ownership rights and regulatory authority, as well as the right to supervise the project’s implementation and operation. This is consistent with the fundamental principles governing public services, particularly those of continuity and regularity, and of equal access to public services<sup>13</sup>.

## **Section Three: Types of Build-Operate-Transfer (BOT) Contracts**

BOT contracts are characterised by private-sector financing of projects, the ownership of which is ultimately transferred to the state after a specified period. This contractual mechanism has given rise to several derivative models, which can be considered variations of the basic BOT structure, based on the sequence of ‘Build–Operate–Transfer’. The most important of these models are as follows:

### **1. Build, Own, Operate and Transfer (BOOT):**

In this model, the government is the first party and a private-sector entity is the second party. The private entity undertakes to construct and operate the project for a limited period. During this time, it

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<sup>10</sup>- Dalal Abdeljalil, p. 78.

<sup>11</sup>- Mohamed Daman Dhebih, op. cit., p. 441.

<sup>12</sup>- Dalal Abdeljalil, op. cit., p. 79.

<sup>13</sup>- Mohamed Daman Dhebih, op. cit., p. 443.

retains ownership of the project and receives the revenues generated by it. At the end of the agreed period, ownership and possession of the project are transferred to the first party, i.e. the government<sup>14</sup>.

## **2. Build, Own and Operate (BOO):**

In this model, the private sector makes an investment without a predetermined deadline for transferring ownership to the state. Instead, the private entity retains ownership of the project. However, upon the expiry of a specified period, the project may cease to have an independent purpose because its existence is linked to another underlying project.

For instance, the government might grant a specific investor the right to search for and extract petroleum. Exercising this concession may require the construction of specific roads or bridges to facilitate transportation and access. Once the original concession expires, these associated projects may also become redundant<sup>15</sup>.

## **3. Build, Own, Operate and Maintain (BOOM)**

Under this model, which represents full privatisation of infrastructure projects, the project company must provide the necessary financing to construct the infrastructure facility. Ownership of the facility is then permanently transferred to the project company, giving the private sector effective and ultimate control over the operation and management of the facility<sup>16</sup>.

## **4. Build, Lease and Transfer (BLT):**

In this arrangement, the project company provides the necessary financing for constructing the facility, while the administrative authority allows the company to manage and operate the facility<sup>17</sup>.

## **5. Build, Own, Lease and Transfer (BOLT):**

Under this model, the project is constructed and progressively owned by a private entity, who then leases it to third parties under a finance lease arrangement. Ownership is ultimately transferred to the state at the end of the concession period.

This model is one of the most important forms of privately financed infrastructure project and is particularly suitable for projects that require capital-intensive machinery and equipment for operation and management<sup>18</sup>.

## **6. Modernise, Own, Operate and Transfer (MOOT):**

In this case, the infrastructure project or public facility already exists and the project company is not responsible for its initial construction. Instead, the project company enters into an agreement with the state, the owner of the facility, to modernise, upgrade and develop the facility in return for acquiring ownership for a specified period stipulated in the contract.

During this period, the investor receives revenues and fees generated from the use of the facility's services. When the agreed period expires, ownership of the facility is transferred back to the state.

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<sup>14</sup>- Djamel Rahal, op. cit., p. 289.

<sup>15</sup>- Naziha Allal: "The Build-Operate-Transfer Contract as a Public-Private Partnership Scheme in Infrastructure Projects," *Journal of Legal and Political Research and Studies*, No. 08, January 2020, p. 101.

<sup>16</sup>- Hadjer Fakhar: "The Role of BOT Contracts in the Establishment and Management of Artificial Public National Property: The Application of BOT Contracts in Algeria," *Sawt Al-Qanun Journal*, Vol. 07, No. 01, May 2020, p. 600.

<sup>17</sup>- Mai Mohamed Ezzat Ali Sherbash: *The Legal Framework of Contracting under the BOOT System*, Egypt, Dar Al-Jami'a Al-Jadida, 2010, p. 16.

<sup>18</sup>- Mohamed Daman Dhebih, op. cit., p. 445.

## **7. Design, Build, Finance and Operate (DBFO)**

Under this type of contract, the state enters into an agreement with an investor to establish an infrastructure project or public facility, in accordance with conditions and requirements determined by the state. The project company is responsible for designing and constructing the project, and in return seeks the necessary financing from a bank, either within or outside the concession-granting state.

The project company then operates the project in accordance with the State's established rules and standards. The company receives revenues and returns generated from operating the facility, which enable it to cover the financing and operating costs incurred while obtaining an appropriate and reasonable profit<sup>19</sup>.

### **Part Two: The Legal Nature of the Build-Operate-Transfer Contract and Its Advantages**

Considerable doctrinal disagreement exists regarding the legal nature of the BOT contract. The debate has focused on whether it constitutes a regulatory arrangement, a private-law contract, a public-law contract or another type of contractual arrangement.

#### **Section One: BOT Contracts as Civil-Law Contracts (Private-Law Contracts)**

Proponents of this view argue that the BOT contract is a private-law contract, meaning it is governed by the rules of ordinary private law rather than public law.

According to one of the fundamental principles of private law, the conclusion of a BOT contract is governed by the principle of freedom of contract and party autonomy. This principle states that 'the contract is the law of the contracting parties and may not be amended except by agreement between them'. Accordingly, the state stands on an equal footing with its contracting party, acting in the same capacity as private individuals to achieve its objectives, particularly the financing of large-scale, capital-intensive projects or projects requiring advanced technologies that the state does not possess<sup>20</sup>. Consequently, the state may be required to relinquish prerogatives traditionally derived from public law. Furthermore, BOT contracts often include a clause explicitly stating that the contract is of a civil law nature.

BOT contracts, like investment contracts, do not, by their very nature, readily accommodate the inclusion by the administration of unilateral or exceptional clauses characteristic of administrative contracts. The requirements of international commerce require the State to contract with foreign parties on an equal footing, in the same manner as private persons. Such contracts do not readily permit the administration to exercise the special powers that distinguish it in administrative contractual relationships.

Accordingly, contracts concluded by the State for the establishment of public facilities under the BOT system may be regarded as contracts through which the administration acts under private-law rules. Neither the State nor one of its public entities may incorporate into such contracts exceptional clauses derived from public law. While the State or one of its administrative entities may, in domestic contracts, rely on public-law mechanisms that confer special powers upon the administration vis-à-vis its contracting party, such mechanisms cannot necessarily be applied in contracts involving a foreign party.

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<sup>19</sup>- Dalal Abdeljalil, op. cit., pp. 79–80.

<sup>20</sup>- Mohamed Amin Ben Kada, op. cit., p. 97.

This is based on the principle that state sovereignty is confined to its own geographical territory and does not extend to the territories of other states. Therefore, when a contracting party is subject to the jurisdiction of a foreign state, that state should treat the contracting party equally under the law<sup>21</sup>.

### **Section Two: The BOT Contract as a Regulatory Arrangement**

Some legal scholars argue that the Build-Operate-Transfer (BOT) arrangement is not a conventional agreement or contract, but rather an economic regulatory framework. This framework requires numerous separate agreements between parties with potentially conflicting interests, rather than merely between two contracting parties.

However, this view has been criticised for denying the contractual nature of the BOT arrangement on the grounds that it encompasses numerous agreements involving parties with potentially conflicting interests. These subsidiary agreements derive their existence from the main agreement between the administrative authority and the project company. Consequently, the existence of such ancillary agreements does not affect the contractual nature of the principal BOT agreement<sup>22</sup>.

### **Section Three: BOT Contracts as Public-Law Contracts (Administrative Contracts)**

Some legal scholars consider the BOT contract to be an administrative contract because one of its parties is the state, its purpose is to establish a public facility and it contains unusual clauses not usually found in private-law contracts. However, proponents of this view differ as to the precise legal classification of the BOT contract, particularly whether it should be considered a public works contract or a public-service concession contract.

#### **1. BOT contracts as public works contracts**

Proponents of this approach argue that BOT contracts should be classified as public works contracts rather than public service concession contracts for the following reasons:

BOT contracts involve the execution of public works, with the financing, construction, maintenance and operation of the project undertaken by the concessionaire for a specified period prior to transfer to the state. In contrast, the essential subject matter of a public-service concession contract is the management of a public service activity. The main obligation in public works contracts is to carry out the public works and construction activities entrusted to the project contractor. In BOT contracts, the main obligations are essentially to construct and operate/manage the project.

Furthermore, a BOT contract may cover the construction of an airport, the exploitation of water resources for electricity generation, or the establishment of any other public facility, regardless of its nature. In contrast, a public-service concession typically relates to a public facility or economic service. The project company or concessionaire receiving remuneration from financial revenues generated through operating and exploiting the facility does not necessarily mean that the BOT contract is a public-service concession. In this respect, the project company is merely acting on behalf of the State in collecting the fees or charges payable by users of the public facility<sup>23</sup>.

#### **2. The BOT concession is one of the public utility service concession contracts.**

Advocates of this view argue that BOT (build–operate–transfer) contracts are a type of public utility concession contract. They further argue that the BOT contract is a modern term for public utility

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<sup>21</sup>- Djamel Rahal: "The Legal Framework of the BOT Contract and Its Applications within the Algerian Legal System," *Dirassat wa Abhath: The Arab Journal for Research in the Humanities and Social Sciences*, Vol. 15, No. 03, 2023, p. 289.

<sup>22</sup>- Dalal Abdeljalil, *op. cit.*, pp. 80–81.

<sup>23</sup>- Hamida Zineb Moulay, *op. cit.*, p. 448.

concession agreements. This is because one of the contracting parties in public utility concession contracts is a public law entity, and the objective of the contract is the operation and management of a public utility. Such contracts may also include exceptional (special) terms, which, according to this view, are also present in BOT contracts. Similarly, the state is one of the parties (or one of the public legal persons). Furthermore, BOT contracts contain numerous exceptional conditions and always relate to a public utility.

Accordingly, the rules governing the award of administrative contracts should be applied when this contract is concluded. This entails following the public tender and competitive bidding procedure, and subjecting disputes arising from the contract to the jurisdiction of the administrative courts, unless the contract contains a provision requiring that such disputes be referred to arbitration<sup>24</sup>.

This view has been criticised in scholarly literature on the grounds that BOT contracts are not administrative contracts, for the following reasons:

- BOT contracts are based on the principle of contractual freedom, i.e. *pacta sunt servanda*, or ‘the contract is the law of the contracting parties’. Therefore, the contract between the State and the project company may not be unilaterally modified by the State without the other party’s consent. Therefore, the state cannot invoke the notion of sovereignty in opposition to the investor.

Secondly, there are differences between BOT contracts and public utility concession contracts. In both cases, the investor is responsible for operating and managing the utility. However, in these two types of arrangement, risk allocation differs: it is the investor (or the project company) that bears the risks arising under BOT contracts.

The contracts also differ in terms of the investor’s role. In BOT contracts, the investor builds and constructs the project at their own expense, providing substantial financial sums. In contrast, the concessionaire is not burdened with the obligation to build the project in public utility concession contracts. Furthermore, ownership of the project remains with the State in BOT contracts, while the concessionaire/investor merely obtains possession under conditions set by the State. In BOT arrangements, however, ownership is transferred to the investor for the agreed period<sup>25</sup>.

#### **Section Four: BOT contracts are of a special nature.**

Advocates of this view argue that, although BOT contracts have historical roots in public utility concession contracts, they nevertheless have a special legal nature because they incorporate both public and private law mechanisms.

They also argue that these contracts are only concluded after difficult and prolonged negotiations, unlike administrative contracts. Furthermore, BOT contracts are presented as a means of financing arising from economic globalisation. In contrast, the public utility concession is said to be a financing mechanism for public utilities that is concluded within a national framework, so that globalisation has no significant impact on it. From this standpoint, contracts concluded by the state with foreign investors are not all the same, nor do they fall under a single legal regime. Rather, they require special legislation to govern them.

However, this view has been criticised on the basis that the legislation governing these contracts is essentially the same as that applicable to public utility concession contracts. For example, reference is

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<sup>24</sup>- Mohamed Amin Ben Kada: “The BOT Contract as a Form of Concession Contract,” *Journal of International Law and Development*, Vol. 07, No. 02, 2019, p. 97.

<sup>25</sup>- Hamida Zineb Moulay, op. cit., p. 449.

made to Egyptian Law No. 3 of 1997 on granting public utility concessions for the establishment, operation and exploitation of airports and landing grounds. Thus, it is the legislature that has given these contracts this designation. The argument that BOT contracts are subject to their own special legislation does not, in principle, prevent them from being subject to the special rules applicable to public utility concession contracts in situations where no specific provision addresses the matter<sup>26</sup>.

Finally, it can be concluded that BOT contracts represent the rapid development of public utility concession contracts — a development that has produced this agreement in its modern form. Therefore, it is incorrect to claim that BOT contracts are entirely ‘different’ merely because of their terminology, or that they are inherently a special type of contract. Although BOT contracts contain new developments and include new conditions within public utility concession arrangements, they remain administrative contracts due to their connection with the public utility. The requirement for construction and operation of the utility is an exceptional element, and public works relating to the construction and maintenance of the facility do not mean that the contract is a public works contract, since public works contracts typically do not involve fixed time periods and end with the completion of construction.

#### **Section Five: Advantages of the Build–Operate–Transfer (BOT) Contract**

The BOT contract offers several advantages, which can be summarised as follows:

First, it reduces the economic burden on the state and provides an opportunity for the private sector to participate in building public economic projects and facilities. Consequently, the state can allocate its revenues to the most important social sectors, such as education and health, thereby enabling it to make optimal use of its economic resources.

Secondly, BOT contracts lead to the transfer of technology and the upgrading of public facilities. This is because such agreements typically require the investor to adopt the most advanced technology, maintain it and develop it to ensure it remains in working condition when transferred to the state. This supports scientific and technical progress without incurring exorbitant costs<sup>27</sup>.

Third, BOT contracts help to address the unemployment problem. Host countries have opened the door to investment through laws and policies that encourage it, with the aim of creating new job opportunities and the various associated benefits.

Fourthly, BOT contracts help to attract foreign investment. Indeed, these contracts are among the most important legal mechanisms for attracting foreign capital. Their association with large-scale projects offering high revenues, together with the long duration of the contract, acts as an incentive for both domestic and foreign investors<sup>28</sup>.

Moreover, BOT contracts encourage the private sector to invest in and participate in the management of public economic facilities, thereby supporting a policy of privatisation, which contributes to freeing the economy by removing unjustified restrictions and limiting excessive state intervention.

However, BOT contracts are not without drawbacks. When the state enters into such an agreement, it may commit to purchasing the service or product from the investor and then making it available to the public again. This product or service may be sold at a loss, but the state is still obliged to pay the

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<sup>26</sup>- Ibid., p. 450.

<sup>27</sup>- Mohamed Amin Ben Kada, op. cit., p. 99.

<sup>28</sup>- Mohamed Daman Dhebih, op. cit., p. 448.

project's costs and the investor's profits. In fact, these costs may be significantly higher than if the state were to build the project itself.

Furthermore, extending BOT contracts for long periods may make it difficult for the investor responsible for completing and operating the project to hand it over to the state after the exploitation period, either because it is no longer suitable for use or because there are no clear, tangible benefits to the national economy<sup>29</sup>.

**Conclusion:**

In conclusion, the Build–Operate–Transfer (BOT) contract is classified as an administrative contract between one party governed by public law and one party governed by private law. The latter, seeking to establish the project through the project company, undertakes the processes of construction, completion and operation, with the aim of obtaining the project's revenues by reverting/transferring the project back to the grantor authority or any other person designated by the administration.

The BOT contract is considered one of the modern investment tools in the international economic arena. Both developed and developing countries use it to establish public facilities and infrastructure, and to manage and maintain them — tasks that have long imposed a heavy financial and administrative burden.

BOT contracts and their variants are particularly suited to infrastructure projects that require financing from the private sector, which the state may be unable to provide. This is because the state is committed to providing other essential services that cannot be dispensed with. Moreover, projects executed using this model have assets that ultimately become state property.

Finally, BOT contracts are distinguished by a set of characteristics that set them apart from other contract forms. These include: (1) being concluded between parties governed by public and private law; (2) establishing a public utility and providing a public service; and (3) the administration having a continuing and fixed right to oversight and supervision throughout the entire duration of the contract.

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<sup>29</sup> - Mohamed Amin Ben Kada, op. cit., p. 100.

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