THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

A Survey of the Contracts of Build, Operate and Transfer (B.O.T.) in Free Trade Zones of Iran

Reza Nikkhah Sarnaghi
Assistant Professor, Urmia University, Urmia, Iran
Mahdi Sheydaei Govarchin-ghale
Ph.D. Candidate, Urmia University, Urmia, Iran
Mohammad Hassan Javadi
Assistant Professor, Urmia University, Urmia, Iran

Abstract:
Build – operate – Transfers (B.O.T.) contract is a contract in which one part of the contract (investee government) gives the right of construction and operation of an infrastructural project to a consortium including several private entities. In this contract, after constructing and operating the project, the consortium is obliged to transfer the project to the investee government after a specific time. Different governments especially in the underdeveloped countries consider this contract as an effective tool in attracting foreign investment in order to get an effective management to run infrastructural projects. In order to succeed in this method, the investee government should provide legal, economic and political bases for the private investors to operate. In the Iranian legal system, the only existing rule is the rule of encouraging and supporting foreign investors legislated in 2002 in the Expediency Council in which this contract is briefly noted. Due to the particular position of the free trade zones, this kind of contract can be advantageous for the government in Iran in order to attract foreign investment and have access to the modern technologies. This study conceptually explores B.O.T. contracts and the role of such pacts in attracting foreign investment. Moreover, the dispossessions of the international investors as well as the ways of solving their problems are investigated through this study.

Keywords: *The contract of Build, Operate and Transfer, free trade zones, project financing ،dispossession and problem solving.*

1. Introduction

The new global needs of the nations have made the governments establish institutions and legal frames according to the everyday changes. This issue will help them get closer to their original goals via restoring order in the relationships among individuals and provide justice in the society. This trend in the area of international trade based on its own characteristics and nature is more obvious. Accordingly, the appearance of the new commercial contracts is considered as one of its particular features. In most of these contracts, two real persons from two different countries provide legal relationship with one another. However, nowadays we witness the active presence of the governments as well as the governmental organizations in the area of the free commercial and industrial zones as well as the particular economic areas. In the majority of the cases, the governments that lack sufficient technique, specialty and capital are seeking to carry out the necessary fundamental projects required for their countries try to attract the international and even domestic investments to flourish their countries via the use of the technical knowledge and the capital of the foreigners (Maddison, 1999). However, through having vigilance in their activities they leave them behind having learnt the technical knowledge they have used in conducting their projects. In this group of the countries, the contracts of build, operate, and transfer (B.O.T.) is referred to as the most appropriate legal frame in this aspect (Huang, & Huijbregts, 1999). Hence, the developing countries attempt to apply the B.O.T. contracts and share the private sects in the governmental ones in particular in the economic zones as well as the free industrial and commercial areas in order to take advantages of such activities (Blakeney, 1989).
Iran is not an exception in this aspect. A B.O.T. contract is a type of project in which a patent is awarded by the government to the international or domestic investors in order to build up their projects. After conducting the project, the international investor, that is mainly in the form of company or consortium, uses and makes use of the products of the investment for a limited time. After that limited time in which the investor used the profits of the project, the project is transferred to the country of the origin.

2. The Concept of Free Trade Zone

According to international definitions, free trade zone is a port and port security range exempted from the inclusion of some of the regulations of the country. These zones contribute to the development of the mainland by taking advantage of benefits such as tax

breaks, exemptions profits and customs duties, absence of foreign exchange formalities, administrative and cumbersome regulations besides facilitation and expedition of the import and export processes by attracting foreign investment and technology transfer.
According to the United Nations' definition, free trade zones are seen as "the driving force" in order to encourage industrial exports (Brownlie, 2006). In addition, the new definition of the free trde zone, known as the Export Processing Free Zone, is a special industrial zone outside the customs border that manufactures export-oriented products. The philosophy of this term could be traced in the change in import strategy to export development strategy. Moreover, a special free trade zone might be defined as a specific geographical area that is run based on the country's customs rules for the purpose of absorption of new technologies in production and development of regional customs offices at ports and border points.
There are two types of Free Trade Zones in Iran that are supervised under two types of legal systems. The first one is called Free Trade- Industrial Zones that include 6 free zones as follows: Kish, Qeshm, Arvand and Aras, Chabahar, Anzali, and Makoo. The second one is known as Special Economic Zones that consist of 16 different cities.
Free trade zones are run based on "Law on Administration of Free Trade- Industrial Zones" that was passed by parliament on August 28, 1993. Article No. 1 states that the purpose ofsuch zones are as follows: "In order to expedite infrastructure, construction and development, economic development, public investment and increase revenue, healthy and productive employment creation, labor and product market regulation, active participation in global and regional markets, production and export of industrial and converted production, and providing public services, the government is allowed to handle the following areas as commercial and industrial free zones on the basis of legal standards and this law."
Special economic zones follow "Law establishing and managing special economic zones of Islamic Republic of Iran" and its bylaw passed in 2005 and 2007, accordingly. Based on Article No. 14 of this law, the acceptance, entry and exit of foreign investments and profits to the region are administered according to the Foreign Investment Promotion and Protection Act (FIPPA) adopted on March 10, 2002. This article states that foreign investment in special economic zones is subject to the provisions prevailing in mainland unlike commercial-industrial free zones.

3. The Concept of B.O.T. Contract

As previously noted, contracts to build, operate, and transfer is called B.O.T in the new law act. B.O.T is the abbreviation of the three words build, operate, and transfer and refers to contracts in which a project construction licensed by the government and the state apparatus is assigned to a private company. After construction, utilization rights are delegated to the manufacturer for some time and they are the owner of the project and its benefits. After the end of this period, the contract is transferred to state ownership. Accordingly, private companies, that are usually foreigners, undertake financing infrastructure projects, build them, and transfer its ownership, to the government freely or in an exchange which is the first case most of the times. As a result, the state as the owner might operate them in line with the public interest. There is no restriction in a B.O.T contract not to transfer a project from one private sector to the other, but due to the fact that in the majority of these contracts, government is considered one of the involved parties, it is taken as one of the main elements (Blasko, 1998). Besides, it is not necessary for the investor to be a foreign company and there are cases of B.O.T contracts in which the projects are delegated to private domestic sectors as well. Nonetheless, as the domestic sectors do not have the technical and financial capacity to execute projects, it is more often to see these projects go to private investors. B.O.T contracts are considered as a great way to attract foreign investment and utilization of efficient management of the private sector and this is now a special interest in developing countries.

4. Different Steps of the B.O.T. Contract

As mentioned above, the B.O.T. contract included three different steps: build, operate and transfer. In the following, each of these steps is very briefly explained.

4.1. Build Step

The first obligation that an investor is required to perform is administering the project and conducting the build step, because the lack of the build project or the suspension of it, and the inability to complete the project on time, or the inappropriate quality of the build project will have negative consequences on the operate period. For example, the project and selling the products as well as the services given to the customers and consumers may confront myriad problems. Besides, the repayment of the loan and their interests will also come across with many problems (Emmanuelle & Picard, 2011)

4.2. Operate Step

The second step of the B.O.T. contract is referred to as the operate step. Since the importance of rights and the obligations between the partners plays a phenomenal role in this step; hence, this step is considered as one of the most paramount steps of this contract. At this very step, an investee is looking for the benefits which they have invested at the operate stage. In the operate stage the investee government is willing to continue the project after the transfer project without any interruption. Accordingly, the investee government should transfer the contact to the investor after a definite time. In this period, the investor should give all the equipment and facilities at the proposal of the loan givers. This, in turn, would financially help the investors accordingly. This can help the nation financially grow to a large extent.

4.3. Transfer Step

In the B.O.T. contract the investor should transfer the project to the investee freely having completed the project. Besides, the investor should take into consideration some obligations in order to have the investee make optimum benefits of the project. They include: educating the local personnel, providing the necessary equipment and the spare parts, taking care of the spiritual rights, the guarantees for the equipment, designing the plans, etc.

5. The Advantages of using B.O.T. Contracts

The most important reason for using B.O.T contrasts in free trade and industrial zones of Iran is attracting private sector investment towards fundamental economic projects, transference of technology to country and benefiting from an efficient management of fundamental projects.

6. Expropriation in B.O.T. Contracts

One of important issues in B.O.T contracts is expropriation and nationalization. Chapter four of Foreign Investment Promotion and Protection ACT (FIPPA) and transference of investment deals with expropriation. Item 9 states that foreign investment will not be expropriated and nationalized unless for public benefits. According the legal process, objectively and for payment of indemnity with reference to real value of it in investing immediately before expropriation. And item 4 of the operative law states that foreign investment is guaranteed against nationalization and expropriation. And foreign investor has the right of recourse in these conditions. In interactive transaction like world interactive transitions promotion of foreign investment against expropriation and payment of indemnity, in case of necessity , is one of supporting and protective factors.

By investigating Iran's interactive transactions which is usually referred to as " requisition or compensation" it is clear that there is not a fixed procedure in determining its content. However, we can, in general, classify then into two different groups. In the firs type the regulations related to nationalization and expropriation and its procedure and payment of indemnity is detailed. This model is mostly signed by Western investing governments. In the second type the regulations related to expropriation are brief and not detailed. And it is used in Iran with investing governments.

7. Solving Disputes

Economic development requires specific methods. One of these methods is law-making with regard to investment. In these laws and regulations, mostly securities and promotions of foreign investment are discussed. Usually with regard to these rules, business contracts are drawn based on legal bases. In these contracts, responsibilities of the parties are determined. Usually a part of investment contracts is dedicated to solving disputes of investment.

In Iranian law, with regard to the existence of act No. 139 of Iranian Law and act 457 of Civil Law and act 19 of Foreign Investment Promotion and Protection Act (FIPPA) and International Business Law there are many different viewpoints with regard to judgement contract.

B.O.T. contract is made like other kinds of investment contracts between parties and is based on parties' agreement and freedom principle of contracts with regard to the project and legal laws of investing party and also condotions of bid/discussion (Okuma, 2004). In this contract the parties want to take advantage of the conditions mentioned in the contract. Rights and responsibilities of the parties are determined based on the conditions mentioned in the contract. The parties of the contract mention their ideas and, if accepted by the other party, they put it as an item of contract. One of these items is the method of solving disputes in most B.O.T. contracts. Because on the one hand the government or governmental organization likes to settle the dispute through speech or in country courts. While on the other hand, the foreign investor likes to settle the dispute through judging organization or alternative methods. Judging or alternative judging methods for foreign investor and even the investing county has special advantages which has caused them to refer to alternative judging methods instead of referring to the courts of the government .

8. Conclusion

In Buying, Operation, Transfer (B.O.T.) contracts, a foreign investor initiates to build the project by the privilege taken from government. These contracts cause government to absorb investment without paying costs. At the time of signing B.O.T. contract, the investing government and free trade and industrial zones prepare and sign contract after studying various aspects such as financial, operative, legal and political aspects. Regarding the fact that in international scope, B.O.T. method is one of important methods of absorbing foreign investment. The literature shows that B.O.T. is one of the important methods of absorbing foreign investment and guiding it to fundamental projects to develop free trade and industrial zones. Moreover, the use of B.O.T. contracts results in absorbing technology towards the country and free trade and industrial zones. Absorbing technology through signing B.O.T. contracts can take three forms of importing machinery, issuing (producing) licenses and transferring technology. While signing B.O.T. contracts, governments and free trade and industrial zones can take advantage of efficient management of private sector. Even after finishing project, free trade zone and the investing government may tend to transfer management to the government or investing business organizations. With regard to the fact that settling arguments in B.O.T. contracts is not clearly addressed in Foreign Investment Promotion and Protection Act (FIPPA) of 2002, it is necessary to consider that viewpoint according to world economy necessities and modern world trade through clear laws and joining to the convention of ICSID. In order to absorb foreign investment and to transfer technology, legal support from private sector and the right of possession by foreign investors seems to be necessary.

9. References

i. Blakeney, M., Legal aspects of the transfer of technology to developing countries, Oxford, 1989.
ii. Blasko, Overcoming the Legal and Historical Obstacles to Privatization, Western Reserve Journal of Interilational Law, 1998 .
iii. Brownlie, I.,Principles of International Law, 6th Ed., Oxford: Clarendon Press, 2006 .
iv. Emmanuelle, A. & Picard, P. M., A Theory of BOT concession Contracts, University of Luxembourg, 2011.
v. Foreign Investment Promotion and Protection Act (FIPPA), March 10, 2002
vi. Huang, J. &Huijbregts, R.,Information Technology for project Management in Build, Operate, and Transfer-Approach, Harvard Design School, 1999
vii. Law on Administration of Free Trade- Industrial Zones, 1993
viii. Okuma, K., Investment disputes settlement by focusing on ICSID Arbitration, the seinan law Review, vol. 34, 2-3, 2004
ix. Maddison, A.,Dynamic Forces in Capitalist Development, Oxford University Press, 1999.