

# **BOT Law**

RA 6957, amended by RA 7718

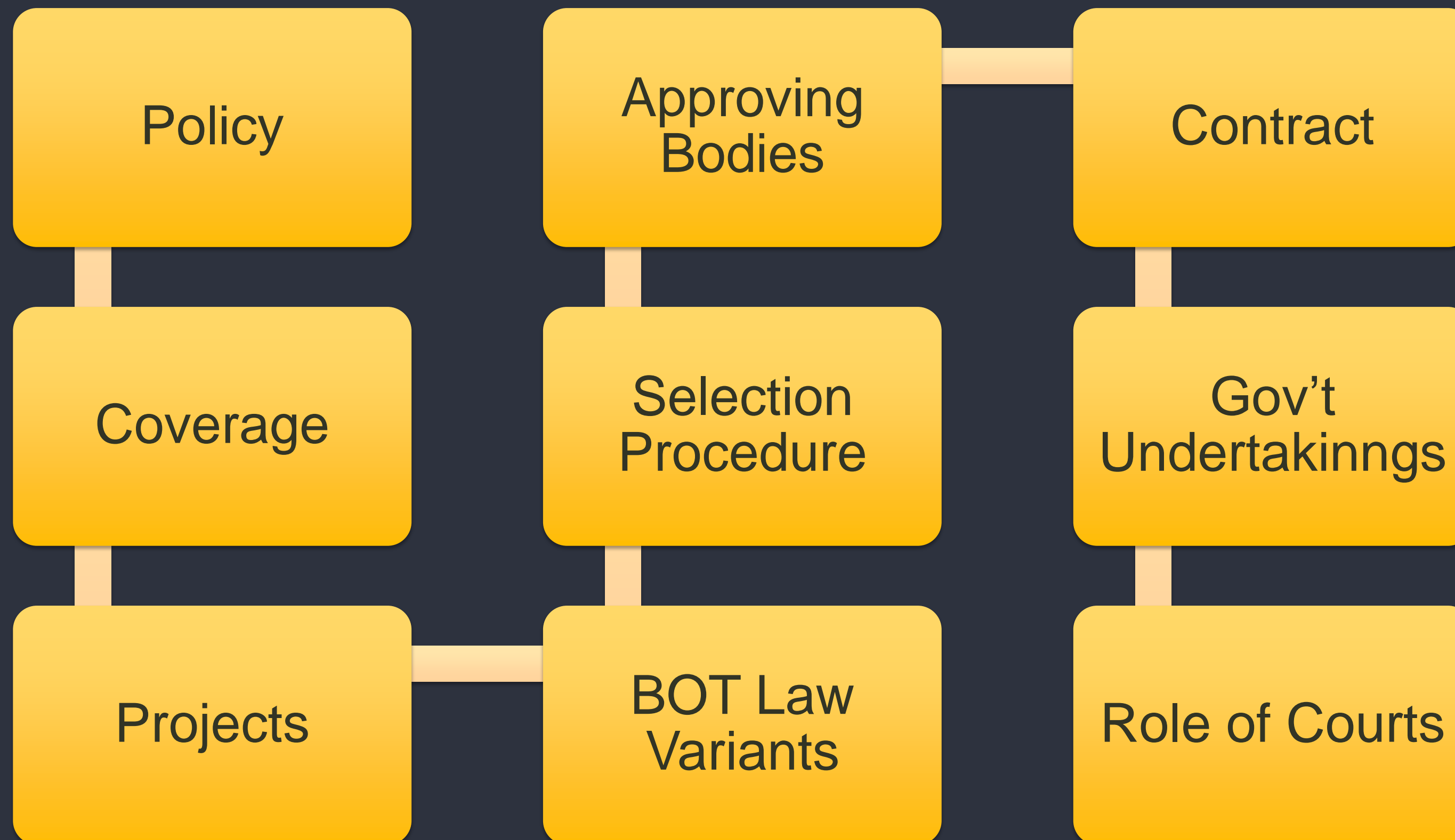
## **Alberto C. Agra**

Certified PPP and Regulation Specialist™

PPP Law Professor, Ateneo Law School

PhD Candidate, Leadership Studies

# Flow of Presentation



# Policy

It is the declared policy of the State to recognize the indispensable role of the private sector as the main engine for national growth and development and provide the most appropriate incentives to mobilize private resources for the purpose of financing the construction, operation and maintenance of infrastructure and development projects normally financed and undertaken by the Government.

# Policy

- ▶ Provision for incentives and support
- ▶ Climate of minimum Government regulations
- ▶ Reasonable returns of investments
- ▶ Transparency and Competition
- ▶ Appropriate risk-sharing mechanisms
- ▶ Closer collaboration between national and local governments
- ▶ Compliance with obligations and undertakings

# Coverage

- ▶ Department, Bureau, Office, Commission, Authority or Agency of National Government
- ▶ Local Government Units
- ▶ Government-Owned and/ or -Controlled Corporations
- ▶ Government Financial Institutions
- ▶ State Universities and Colleges

authorized by law or charters to undertake infrastructure or development projects  
*(2012 IRR)*

# Projects (Infrastructure or Development Projects)

- Highways, including expressway, roads, bridges, interchanges, tunnels, and related facilities;
- Railways or rail-based projects that may or may not be packaged with commercial development opportunities;
- Non-rail based mass transit facilities, navigable inland waterways and related facilities;
- Port infrastructures like piers, wharves, quays, storage, handling, ferry services and related facilities;
- Airports, air navigation, and related facilities;
- Power generation, transmission, sub-transmission, distribution, and related facilities;
- Telecommunications, backbone network, terrestrial and satellite facilities and related service facilities;
- Information technology (IT) and data base infrastructure, including modernization of IT, geo-spatial resource mapping and cadastral survey for resource accounting and planning;
- Irrigation and related facilities;
- Water supply, sewerage, drainage, and related facilities;

# Projects

- Education and health infrastructure;
- Land reclamation, dredging and other related development facilities;
- Industrial and tourism estates or townships, including ecotourism projects such as terrestrial and coastal/marine nature parks, among others and related infrastructure facilities and utilities;
- Government buildings, housing projects;
- Markets, slaughterhouses, and related facilities;
- Warehouses and post-harvest facilities;
- Public fish ports and fishponds, including storage and processing facilities;
- Environmental and solid waste management related facilities such as but not limited to collection equipment, composting plants, landfill and tidal barriers, among others; and
- Climate change mitigation and adaptation infrastructure projects and related facilities.

# BOT Law Variants

- ▶ Build-and-transfer (BT)
- ▶ Build-lease-and-transfer (BLT)
- ▶ Build-operate-and-transfer (BOT)
- ▶ Build-own-and-operate (BOO)
- ▶ Build-transfer-and-operate (BTO)
- ▶ Contract-add-and-operate (CAO)
- ▶ Develop-operate-and-transfer (DOT)
- ▶ Rehabilitate-operate-and-transfer (ROT)
- ▶ Rehabilitate-own-and-operate (ROO)
- ▶ Others approved by President



# Build-and-Transfer

*Undertaking:* financing and construction of an infrastructure or development facility

*Payment of Fees:* paid on an agreed schedule the total investments expended on the project, plus a reasonable rate of return

*Legal Title to Facilities:* turned over to the government agency or local government unit concerned after completion

# Build-Lease-and-Transfer

*Undertaking:* financing and construction of an infrastructure or development facility; government leases from private sector

*Payment of Fees:* lease payment

*Legal Title to Facilities:* ownership of the facility is automatically transferred to the government agency or local government unit concerned after the lease period

# Build-Operate-and-Transfer

*Undertaking:* financing and construction of an infrastructure facility, and its operation and maintenance

*Payment of Fees:* charge on facility users of tolls, fees, rentals, and charges

*Legal Title to Facilities:* during operation period, the facility belongs to the project proponent, who then transfers the facility to the government agency or local government unit concerned at the end of the fixed term

# Build-Own-and-Operate

*Undertaking:* financing, construction, ownership, operation and maintenance of an infrastructure or development facility

*Payment of Fees:* collection of tolls, fees, rentals or other charges from facility users

*Legal Title to Facilities:* ownership is retained by the project proponent

# Build-Transfer-and-Operate

*Undertaking:* construction, including financing, of an infrastructure facility, and its operation and maintenance

*Payment of Fees:* as provided under the agreement

*Legal Title to Facilities:* once the facility is commissioned satisfactorily, title is transferred to the government agency or LGU concerned, with the project proponent assuming cost overrun, delay and specified performance risks; the private entity, however, operates the facility on behalf of the implementing agency/LGU under an agreement

# Contract-Add-and-Operate

*Undertaking:* addition to an existing infrastructure facility which it is renting from the government

*Payment of Fees:* as provided in the agreement

*Legal Title to Facilities:* there may or may not be a transfer arrangement in regard to the facility, but the project proponent operates the expanded project over an agreed franchise period

# Develop-Operate-and-Transfer

*Undertaking:* development of adjoining property is integrated into the agreement for new infrastructure project which is to be built by a private proponent

*Payment of Fees:* enjoyment of benefits that the investment creates such as higher property or rent values

# Rehabilitate-Operate-and-Transfer

*Undertaking:* refurbishing, operation and maintenance of an existing facility; or the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country

*Payment of Fees:* charge on facility users of tolls, fees, rentals, and charges; as provided in the agreement

*Legal Title to Facilities:* as long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity; no time limitation imposed on ownership



# Rehabilitate-Own-and-Operate

*Undertaking:* refurbishing, operation and maintenance of an existing facility' private proponent will own the facility

*Payment of Fees:* collection of tolls, fees, rentals or other charges from facility users; as provided in agreement

*Legal Title of Facilities:* as long as the operator is not in violation of its Franchise, it can continue to operate the facility in perpetuity; no time limitation imposed on ownership

# Requirements/ Others

- ▶ Nationality Requirement if Public Utility
- ▶ Joint and Several Liability if Consortium
- ▶ Reasonable Rate of Return on Investments and O&M - reflect prevailing cost of capital (maximum of 12% if negotiated contract, public utility project which are monopolies)
- ▶ Risk Allocation (Retention, Transfer and Sharing)

# Winning Bidder/ Financial Aspect

- ▶ Lowest proposed toll, fee, rental or charge at the start of project operation, if a pre- agreed parametric tariff adjustment formula is prescribed in the bid document
- ▶ Lowest present value of government subsidy to be provided for the period covered by the contract
- ▶ Highest present value of proposed payments to Government, such as: concession fees, lease/rental payments, fixed/guaranteed payments, and/or variable payments/percentage shares of revenue for the period covered by the contract
- ▶ Any other appropriate financial bid parameter as may be approved by the Approving Body

# Contract Provisions

- specific contractual arrangement, term, and scope of work
- project technical specifications and system features
- implementation milestones including those for securing other approvals, project completion date
- cost recovery scheme via proposed tolls, fees, rentals and charges, as the case may be
- liquidated damages
- performance and warranty bonds
- minimum insurance coverage as may be required for the project
- acceptance tests and procedures
- warranty period and procedures (after transfer);
- grounds for and effects of contract termination including modes for settling disputes
- the manner and procedures for the resolution of warranty against corruption
- compliance with all other applicable laws, rules, and regulations

# Government Undertakings

- ▶ Direct Government Guarantee
- ▶ Cost-sharing
- ▶ Credit Enhancement
- ▶ Direct Government Subsidy
- ▶ Direct Government Equity
- ▶ Performance Undertaking
- ▶ Legal Assistance
- ▶ Security Assistance

# Direct Government Guarantee

An agreement whereby the government or any of its agencies or local government units assume responsibility for the repayment of debt directly incurred by the project proponent in implementing the project in case of a loan default.

# Cost-Sharing

This shall refer to the Agency/LGU concerned bearing a portion of capital expenses associated with the establishment of an infrastructure development facility, such as, the provision of access infrastructure, right-of-way, transfer of ownership over, or usufruct, or possession of land, building or any other real or personal property for direct use in the project and/or any partial financing of the project, or components thereof, Provided, that such shall not exceed fifty percent (50%) of the Project Cost, and the balance to be provided by the Project Proponent. Such government share may be financed from direct government appropriations and/or from Official Development Assistance (ODA) of foreign government or institutions.



# Credit Enhancement

This shall refer to support to a development facility by the Project Proponent and/or Agency/LGU concerned, the provision of which is contingent upon the occurrence of certain events and/or risks, as stipulated in the contract. Credit enhancements are allocated to the party that is best able to manage and assume the consequences of the risk involved. Credit enhancements may include, but are not limited to, government guarantees on the performance, or the obligation of the Agency/LGU under its contract with the Project Proponent.



# Direct Government Subsidy

This shall refer to an agreement whereby the Government, or any of its Agencies/LGUs will: (a) defray, pay for or shoulder a portion of the Project Cost or the expenses and costs in operating or maintaining the project; (b) contribute any property or assets to the project; (c) in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/or (d) waive charges or fees relative to business permits or licenses that are to be obtained for the Construction of the project, all without receiving payment or value from the Project Proponent and/or Facility operator for such payment, contribution or support.

# Direct Government Equity

This shall refer to the subscription by the Government or any of its agencies or Local Government Units of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.

# Performance Undertaking

This shall refer to an undertaking of a department, bureau, office, commission, authority, agency, GOCC, or LGU in assuming responsibility for the performance of the Agency's/LGU's obligations under the contractual arrangement including the payment of monetary obligations, in case of default. These undertakings may be subject to payment of risk premium to the Government or LGU, or any other authorized agency.

# Legal Assistance

This shall refer to the extension of representation by government lawyers to a Project Proponent but only in cases, hearings, or inquiries where the Agency/LGU and Project Proponent are party-defendants/respondents therein including the adoption by such government lawyers of positions and strategies consistent with upholding the validity of the approved contractual arrangement.

# Security Assistance

This shall refer to the deployment of government security forces, either from the Philippine National Police (PNP) or the Armed Forces of the Philippines (AFP) in the vicinity of the project site to provide security during the implementation of the project up to completion.

# Role of Courts: Contract Legality

- ▶ Subject Matter: beyond commerce of men
- ▶ Procedure: violated bidding rules
- ▶ Fundamentals: infringed on “fair competitive essence”
- ▶ Conditions: unsolicited proposal with direct government guarantee; government guarantee to pay private party for loss of revenues when no congressional appropriations
- ▶ Specifications: unrealistic

**Thank you**