

Allocation of Investment Lands for BOT Projects Under Iraqi Law: Problem and Solution

^{1,2}Aqeel K. Zghair, ³Rohana Abdul Rahman and ⁴Nor Anita Abdullah
^{1,3,4}School of Law, Universiti Utara Malaysia, UUM, Kedah, Malaysia.
²Karbala University-Iraq

Abstract: Iraq is a developing country. It is lacking of the vital infrastructure such as water supply, power plant, railways, bridges, sewage and oil and gas transportation networks etc. The governments are unable to start such mega-projects to develop their infrastructure, due to lack of financial resources. To counter the paucity of funds in public sector, many governments have engaged the private sector to meet the increasing demands upon the public services. These public-private partnerships have different forms of contracts, the most famous and important is Build-Operate-Transfer (BOT) contract. In developing countries like Iraq these types of contracts can play important role in infrastructure development. But, unfortunately this concept is not very popular in Iraq. For that purpose, this paper is geared toward understanding the legal challenges that impede application of the BOT contracts into Iraq. This paper reviews the most important legal challenge which is the problem of allocation of lands for BOT projects. This study utilized qualitative and descriptive research methods, to describe the problem of allocation of the investment land which impede or obstruct the performance of the BOT contract in Iraq. "Descriptive research is suitable with this study for it describes the state of affairs as it exists at present. Qualitative method is also suitable when there is a need for exploring and understanding the interpretations of individuals or certain groups given to a particular phenomenon or problem".[1] This study has attempted to interview participants to get their perception on problem of allocation of land as a negative factor prevents the application of BOT contracts in the country.

Keywords: BOT Contract; Iraqi Investment Act; Allocation of Lands; Infrastructure Projects; Iraq.

I. INTRODUCTION

Build - Operate - Transfer (BOT) is a relatively new approach to infrastructure development that enables the private sector to invest in large-scale projects (infrastructure projects) such as roads, irrigation, telecommunication, bridges, airports, and power plants.[2] Normally, States finance infrastructure projects, through the treasury or by internal lending (the issuance of the loan bonds), or external lending from global institutions such as the World Bank and the International Development Association.[3] The states can also resort to increase the proportion of taxes and fees to provide the necessary funds to finance these projects.[4] In recent times, many states, especially developing ones, realize the difficulty of relying on previous methods to finance infrastructure projects and the implementation of their development plans.[5] One of the hardship is the inability of their treasury to provide the necessary funds to finance these projects.[6] Moreover, internal lending may not have the support of the citizens. However, external lending from international institutions is more difficult because the loan received from these institutions is governed by severe terms and considerations which could deter developing countries from getting such loans.[7]

All these things have motivated states to think about finding alternative ways to avoid these problems,[8] therefore, have resorted to privatization which means the participation of the private sector in the implementation, management, and operation of infrastructure projects.[9]

One of alternative way is the financing of infrastructure projects according to the BOT model with support from the World Bank and the United Nations Commission on International Trade Law (UNCITRAL). The BOT contracts can be the optimal solution to development problems in developing countries to avoid permanent disruption in their budget.[10] BOT contracts have been said not to cause the state treasury any financial burdens and do not entail any indebtedness as well as providing a huge financial capability and high technical specialization which is monopolized by competent foreign enterprises. Moreover, the state remains as an observer to these projects during the period of the contract.[11] This one reason why states choose BOT to attract these foreign investors in order to achieve prosperity in the social and economic sectors.[12]

It is widely acknowledged that Iraq's infrastructure has been devastated by wars and successive political crises. In addition, it has been suffering for many years from the poor utilization of the resources available to modernize and develop the country as infrastructure projects need huge funding to be implemented. While several government agencies acknowledge the depth of the infrastructure problems facing the country,[13] for instance, the Central Bank of Iraq stressed, internal funds can be difficult to source from due to the weakness in the state budget, Iraq's external and internal debt have reached almost USD 92.3 billion in 2010.[14] While the government estimated that Iraq needed \$ 186 billion for development for 2010-2014, of \$ 100 billion was financed by the federal budget, while \$ 86 billion was financed by the private sector, both local and foreign. The ratio of the contribution of the private sector was about 46 % of the total investment fund needed by Iraq.[15]

The investment can be the optimal solution to these problems by means of BOT contracts.[13] But, in Iraq, there are many legal challenges which impede or obstruct the foreign investment by BOT contracts, but the most important is the problem the allocation of the concession's land in a BOT contract.[16] This paper presents content analysis of the interview data by relevant stakeholders in relation to BOT projects in Iraq. The focus of analysis is their responses on the allocation of investment lands for BOT projects. This paper has also highlighted the suggested legal solutions for these challenges with an aim of creating an effective investment climate that fosters private investments in infrastructure projects.

II. RIGHT IN OWNERSHIP OF INVESTMENT PROJECT LAND

According to Jalal,[17] many countries have issued laws regarding investment as well as laws concerning BOT contracts

in order to attracting the foreign investors to the country. These laws are very important for attracting investments, because the investor will examine most of laws initially. Where, it will study constitution of country and other laws in particular the investment laws including the privileges and guarantees. Given to there is no law regulates BOT contracts in Iraq, so, it subject to provisions of Iraqi investment law No.13 for 2006 amended. The goal behind using BOT contracts is to granting the main role to the private sector in financing and exploitation the economic projects in country. In spite of the BOT contract is one of the investment contracts, but it has special features regarding infrastructure projects, these features are not available in other investment contracts which are still unable to regulation the provisions this contract. Therefore, the states have sought to regulation of BOT contracts through issuing special laws regulates their provisions being legal mechanism for encourage the

The Iraqi Investment Act No.13 for 2006 amended did not refer to the investment projects by BOT contracts. Where, that the investment through this contracts correspond with goals of this law, special regarding to encourage the investment and transferring the modern technology for the contribution in development in country. An article 23/third/a of Iraqi constitution has stated as:

"Every Iraqi shall have the right to own property anywhere in Iraq. No others may possess immovable assets, except as exempted by law".

In light of provisions this constitutional article, it is wondering about allowing to the investor in particular foreign investor to possess immovable assets in Iraq or not? Especially, in BOT contracts where shall transfer the ownership of project to the investor who may be foreigner. To answer this question, it should review the articles relevance of an investment act in order to know if the foreign investor has been exempted or not.

Under Article10[18] the investment law has equaled between the foreign and Iraqi investor in the privileges and guarantees, as well as in the right own the real estates which will be allocated of the investment projects. But Iraqi legislature has allowed to foreign investor owning the lands which are allocated to residential projects exclusively. Thus, the foreign investor cannot invest in projects which requiring possess the land of the investment project.[19]

This position is supported by interviewee No. 3[20] who opined that: although that the current Investment Act includes many privileges and guarantees but it is unsuitable with foreign investment requirements and it needs large amendments. Especially, regarding to allocation of lands that is a big obstacle. Therefore, the current investment act does not meet people's ambitions and it needs revision at most of its provisions. Due to the current investment act does not allow the investor to own the land of the investment project excepting the residential projects. Where, the investment act has not solved problem the allocation of land absolutely. One days in the university, we have been want to undertake the residential investment project for our university professors. But you did not imagine how was our suffering besides a lots of the obstacles and problems that we could not resolve them. Thus, all these problems have led to fail the project.

Therefore, under provisions of the Iraqi Investment Act cannot conclude some of the investment contracts regarding to infrastructure projects, in particular those which requires transferring ownership the land to the foreign investor initially, such as BOT contracts. Moreover, there is no application of

BOT contracts in respect of residential projects, because these contracts are used to infrastructure projects and other strategy projects.[17]

This was asserted by the interviewees No. 14[21] and No. 8[22] where stated that: it cannot conclude the BOT contract according to the current investment law, because it insufficient and unable to cover BOT contracts because, it is not allowed own the investment lands by the foreign investors. Where, if there is law regulates these contracts, the legal problems will be rare or does not exist. Besides, the contracting parties can review the law to know their rights and commitments. But, if a contract has been concluded without special legal cover, many problems will arise in particular after and during implementation phase. Because these problems have not been tackled by special act initially. Moreover, if there is no law, the contracting parties will resort the public rules in the different laws (like Civil Code and Commercial Law) for resolving these problems, which originally unsuitable for these contract and can have negative effect due to the difference in the interpretations and jurisprudence.

III. ALLOCATION OF INVESTMENT LANDS

As for the allocation of lands for the investment projects including the residential projects, that practical reality reveals us that allocation of lands for the investment projects is still a big problem impedes the investment, due to the competent authorities do not provide and allocate the public land and property for investment projects because of having overlapping at the existing laws. In addition to, the investment commission is unable to allocating the land for the investment project, because it does not own the investment land. [23]

Where, the Investment Commission grants the investment license of the investor initially, based on the preliminary approvals from the competent authorities without identifying the project land. And then, the land will be allocated for the investment project by the landlord entity, because the land of the investment project needs to field survey measures and scheme of secretion and approvals other which require a long time. These difficult procedures let to the investment commission grants investors the investment license as soon as possible, where it is feared loss the investment project chance, hoping of the completion of approvals for the allocation of the land of the project later. At the end, the landlord entity could that refuse the allocating of the land wholly or partially.[16]

That means the function of the Investment Commission is granting investment licenses only, so it cannot sign the investment contract because it does not own the land of an investment project. This is considered a big problem can be impeding the flow of investment projects to the country. For instance, the Karbala Commission Investment has granted an investment license No. 1 for establishing entertainment city in the Karbala on 13 / 4/ 2008 and even 2013, it has not been allocated the land of investment project.[24]Likewise, for the agricultural investment project the Ostrich, Palm and Olive groves, where, the Karbala Investment Commission have granted an investment license No. 31 on 15 / 7 / 2012, but it has not been signed the contract so far, where the Ministry of Agriculture has refused the delegation the Karbala investment commission of signing the contract in its letter No. 43296 dated 28 / 21/ 2014. Due to, the Ministry of Agriculture is own the investment project land.[25]

However, the legislature in the Kurdistan Region has empowered the Investment Commission own the lands and properties which belong to the government under Article

4/fourth of the Kurdistan Regional Investment Law No. 4 of 2004 that has provided as:

“To ensure achievement of its purposes, the Board may possess, free of charge, freehold titles over plots of land that are already property of the State and have a burden of disposal rights, after charging off such rights by paying fair and appropriate compensation in accordance with the applicable laws, regulations and directives”.

Thus, the Investment Commission in The Kurdistan Region got rid of problem possess and allocation the lands of the investment projects. Because the Investment Commission has already become own the lands which have been allocated for investment projects.[26]

CONCLUSION

In Iraq, the Success of public private partnership in the form of BOT mainly depends upon a having the sound legal structure, political stability, government structure and their long term policies.

Iraqi government should be solving the problem of allocation of investment land by means of transferring the ownership of these lands to the concerned investment commission, as the responsible entity upon the attracting the private sector investment for infrastructure development through facilitation of lengthy procedures and provides efficient services. As it is applicable in Kurdistan region.

BOT contracts cannot be applied according to the current laws in Iraq, for there are many legal challenges which impede or obstruct performance them. Amongst the problems is the allocation of investment lands. Thus, Iraqi legislature must resolve this legislative weakness in order to attract and encourage the foreign investment in to the country.

References

- [1] J. W. Creswell, "Educational research: Planning, conducting, and evaluating quantitative," New Jersey: Upper Saddle River, 2014.
- [2] R. Huijbregts, "Case studies on build operate transfer," Delft University of Technology, 1996.
- [3] L. A. Malinasky, "Rebuilding With Broken Tools: Build-Operate-Transfer Law in Vietnam," Berkeley J. Int'l L., vol. 14, p. 438, 1996.
- [4] G. M. Ahmed, Infrastructure Projects by BOT System. Alexandria: Almaktab Aljamiei Alhadith Press, 2009.
- [5] N. Lema, "An assessment of the Build-Operate-Transfer (BOT) model for infrastructure project financing in Tanzania," in Proceedings of the 2nd International Conference of CIB Task Group, 2000, pp. 431-440.
- [6] A. H. Khan, M. Jamil, and M. Sattar, "The trend of build operate and transfer (BOT) projects in Pakistan," Construction in Developing Countries, vol. 88, 2008.
- [7] A. Farouk, "Futuristic View For Operating Airports Projects In Egypt," International Journal of Academic Research, vol. 3, 2011.
- [8] S. Mubin and A. Ghaffar, "BOT Contracts: Applicability in Pakistan for infrastructure development," Pak. J. Engg. & Appl. Sci. Vol, pp. 33-46, 2008.
- [9] C. S. B. Daniel hendrawan, and Jeremiah, "Legal Aspect of cooperation agreement with build operate transfer principle," presented at the International Conference on Economics, Education and Humanities (ICEEH'14), Bali (Indonesia), 2014.
- [10] D. A. Levy, "BOT and Public Procurement: A Conceptual Framework," Ind. Int'l & Comp. L. Rev., vol. 7, p. 95, 1996.
- [11] W. Mahmoud, The Build, Operate and Transfer Contracts. Jordan, Amman: House of Culture for Publishing and Distribution, 2010.
- [12] E. Auriol and P. M. Picard, "A theory of BOT concession contracts," Journal of Economic Behavior & Organization, vol. 89, pp. 187-209, 2013.
- [13] A. S. a. A. Hussein, "BOT contract study in the legal regulation of the construction contract, Build, Operation and Transfer," Journal of Anbar University for Law and Political Sciences, vol. 1, pp. 164-189 2010.
- [14] C. B. o. Iraq. (July,1). Available: www.cib.iq
- [15] T. I. M. o. Planning. (2014, June,2). The National Development Plan 2010--2014," Ministry of Planning. Available: www.mop.gov.iq
- [16] M. I. F. a. B. K. Turki, "The Legal Regulation of Foreign Real Estate Investment," Rafidain of Law Journa, vol. 16, pp. 1-38, 2013.
- [17] N. K. Jalal, "BOT contract between the private and public law and its impact on attracting investment," presented at the Eighteenth Annual Scientific International Conference on " Building and construction contracts between the traditional legal rules and developed legal systems, United Arab Emirates, Dubai, 2010.
- [18] "Iraqi Investment Act," in 13, ed. Iraq, 2006.
- [19] H. R. Algazaary, "Motives and Guaranties of Investor in Iraqi Investment Law and Some Arabian Investment Laws," Economic Sciences Journal, vol. 6, pp. 47-81, 2009.
- [20] I. C. w. I. N. 3, ed. Al-Kufa University, April 4 ,2016.
- [21] I. c. w. I. N. 14, ed. Babylon Investment Commission, April 28, 2016.
- [22] I. C. w. I. N. 8, ed. Karbala Investment Commission, March 22, 2016.
- [23] B. A. Tema, "Iraqi Investment Law No. 13 of 2006, as amended in the balance," Risalat al-huquq JournaL, vol. 2, pp. 6-61, 2013.
- [24] A. Haliel, "Determinants of The Foreign Investment in Iraq," Master, University of Karbala, 2013.
- [25] I. C. w. I. N. 1, ed. Karbala Investment Commission, March 15, 2016.
- [26] N. A.-K. Hussein, "A comparative study between the federal investment law No. 13 of 2006 and the Investment Law Kurdistan No. 4 of 2006," Journal of Science For Law, vol. 25, pp. 334-388, 2010.