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Law number 7/2008 "BOT law"

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The Government of Kuwait (GoK) owns more than 90% of the land through various entities namely the Ministry of Finance, The Ministry of Oil and The Ministry of Defense among others. In order to protect its interests and reduce costs on investors the GoK leases land to beneficiaries. Law number 07/08 commonly known as "The B.O.T Law" organizes the leasing structure regarding development projects, since the ratification of the law no new projects applied mainly due to the short leasing period of maximum 40 years which is deemed unprofitable by investors. Moreover the strict project financing guidelines in the law deterred new investments.

In this note we will discuss the major proposed amendments by law makers in parliament. The paper is divided into four parts. Duration, Financing, partnership projects and Regulations.

Duration

The new amendment alleviate pressures on old B.O.T law where the higher council now have the right to give extensions to old projects (prior to law 7/2008) and prolong the contract (look at article 3 in the appendix). The Majority of investors were vocal on the 40 year rule in which the leased land goes back to its owner within a maximum period of 40 years. The new amendment pushed the leasing period to 50 years. (Article 4 in the appendix)

The new amendment reduces the documentation cycle for advertising new projects. In law 7/08 the project was advertised in the paper at least two months prior to the date of investors' invitation and then a 90 day period is set for bidding before offering the contract which adds 4 months just to attract bids for a certain project. The new amendment removed the 2 months advertisement clause. The new amendment also removed the 90 day period for bid submission and the new law allows the PTB to merge Announcement of the project and qualification of companies thereby reducing the cycle by 2 months. (Article 6 in the appendix)

When the project life cycle ends the Partnership technical bureau has the right to allocate management contracts of the named project to the private sector through an open bidding process. In the 'old' law the management contract had a maximum duration of 10 years while the amendment version increases the contract duration to 20 years (Article 16 Appendix)

Regulation-Partnership Projects

In the original law the role of the Partnership Technical Bureau (PTB) was merged with several articles in law 7/08. In the amendments the PTB role was explained in an explicit fashion in articles 9 and 10 of the new proposed law.

The updated Article 9 of the proposed law defines the legal system of the partnership project and determine how to tender and implement the project after the approval of the Supreme Council Moreover if the winning bidder was part of an alliance the partnership contract will only be signed if the alliance established a new company with an authorized capital no less than the tender amount

The updated article 10 of the proposed law sets a limit of KWD 60 mn for projects tendered directly to investors. If the cost exceeds this amount the government has the right to set up a company with 40% allocation to government entities 50% to Kuwaiti Citizens and 10% to winning bidder.

Financing

In law 7/2008 the winning bidder has limited financing options as per the <u>law the investor may not sell or mortgage the land or structures or buildings constructed thereon and those that shall pass to the State by the end of the project or create any real rights thereon.</u> The old law deterred financing for B.O.T projects although the new amendment might alleviate financing woes, without stepping rights financing option will remain limited. In the new amendment the investors could use the project as collateral (except the land) and use the revenues as collateral (based on the contract period of the project).

Regulations

The New amendment to law 7/2008 included several new articles that reduce excessive regulations. For example article 17 of the old law states that “**All project contracts shall be subject to the <u>pre and post control</u> of the State Audit Bureau”** in the new amendment the pre supervision control is removed and the state audit bureau could only perform supervision after the fact. Moreover the new amendments are more business friendly as it insure that intellectual property rights owned by the entrepreneur (article 18) insures that queries should be replied in a timely manner (article 17) and that affected entrepreneur could appeal before the supreme council against rejected proposals/projects.

The Bottom Line

The proposed amendments are a step in the right direction. On the one hand the private sector will be a key player in developing the country as mandated by the Kuwait development plan, and, on the other hand the success of PPP projects will hinge upon public sector governance due to the crucial linkages between the two.In other words, the issue of public sector governance need to be tackled simultaneously for an efficient delivery of BOT projects in Kuwait.

Appendix: Amendments to law 7/2008

Law number 7/2008 or B.O.T law as its commonly known is being reviewed for amendments. Since the passage of the law no new B.O.T projects were tendered. The following table lists the major amendments to the law. Please note that the parliament has yet to vote on the amendments

Law 7/2008	Notes on new Amendments
Article Three Unless otherwise provided in the respective contract, all projects and facilities constructed before the effective date hereof on the real state domains under a contract with or a license from the state according To BOT, BOOT or any other similar system shall pass to the state and become its own property without any compensation or consideration, with effect from the expiry date of the contract or license's initial or renewed term or from the date of contract revocation or termination for the public interest. Once this law comes into effect, no amendments, extension or renewal may be made to the contracts or licenses of these projects and any agreement otherwise shall be invalid. Offering these projects for third party management shall be according to the provisions hereof.	The new amendment gives the higher council the right to amend and prolong contracts that are based on the old law (prior to law 8/08)
Article Four As of the effective date hereof, no public authority or third party company managing the state real domains on its behalf may enter into contract with any investor in respect of projects set up on the real state domains on the basis of BOT, BOOT or any other similar system except after the project referral to and approval by the higher committee in terms of all technical, financial and environmental aspects or other matters set forth by the committee and its decision to offer the project for investment. The project shall be advertised at least two months prior to the date of investors' invitation to collect the project documents in different audio and video mass media as well as in the official gazette and in at least two Kuwaiti Arabic dailies. Such add shall contain a brief description of the project and its objectives, the contract conditions and term according to the provisions hereof. Then, the project shall be offered by public bidding or competition, as the case may be, and the bid submission period shall be at least ninety days from the project offering date, all according to the provisions of this law.	**Article 4 changed** The new amendment does not require 2 month grace period after announcing the project to invite investors The new amendment also removed the 90 day period for bid submission and the new law allows the PTB to merge Announcement of the project and qualification of companies

Article 5 If the estimated total cost as per the economic feasibility study of the project which the higher committee approved to offer for investment by virtue of the provisions of the fourth article hereof exceeds Kuwaiti Dinars sixty millions inclusive of the estimated market value of the project land or the usufruct market amount – whichever is less- which shall be assessed by at least two relevant approved assessment firms, the committee shall commission any government authority to make arrangements for the incorporation of a Kuwaiti public shareholding company for this project instead of offering it for public tender or competition. The shares of such company shall be allocated as follows: A)(40%) forty percent of shares shall be offered by the government authority authorized to incorporate such company for public bidding amongst the shareholding companies listed in Kuwait Stock Exchange Market and other companies approved by the committee for participation in such bidding. Bidding shall be awarded to the company offering the highest price per share above its par value in addition to the incorporation expenses, if any. B) (10%) ten percent of the shares to the holder of accepted initiative at a discount of (50%) fifty percent of the average total highest price of share at which the bidding stated in item (a) hereof was awarded above the share par value in addition to the incorporation expenses, if any- after finalization of the procedures of such biddings. If the holder of accepted initiative apologizes for not subscribing to this percentage in whole or part for whatever reason or there is no initiative submitted, the percentage not covered shall be offered for bidding according to the provisions of the preceding item. C) (50%) fifty percent of the shares shall be offered for public subscription by Kuwaitis to be allocated among them each pro rata his subscribed number of shares. If the number of subscribed shares exceeds the number of offered shares, all offered shares shall be allocated equally among all subscribers. However, if the subscription does not cover all shares offered, the uncovered shares shall be offered by public auction according to the provisions of item (a) hereof. In all cases, the government shall always have the right to allocate to the government authorities no more than (20%) twenty percent of shares equally deducted from the percentages stated in items a and c hereof. The increase resulting from the sale of these shares by public auction shall be transferred to the state's general reserve.	The old law stated that any remaining shares goes back to the government and the government has the right to sell the shares based on priorities which start with the public sector, the winning bidder, re-bid to the public if the winning bidder refuses to purchase the rest of the share. In the new article there are no priorities on who could the government sell the shares to.

Article Six As an exception to the provisions of the two preceding articles, the Council of Ministers may, upon the proposal of the higher committee, make a justified decision to offer some development projects of specific nature whose total cost estimated in the economic feasibility study does not exceed Kuwaiti Dinars two hundred and fifty millions (K.D. 250 million) inclusive of the estimated market value of the project land or the usufruct market which shall be assessed by at least two relevant approved assessment firms, for competition among the companies listed in Kuwait Stock Exchange Market or the other companies which the committee approves their participation provided that the capital of each company shall not be less than the capital of companies permitted to be listed in Kuwait Stock Exchange Market. If the total cost exceeds this amount, a Kuwaiti public shareholding company may be incorporated for this project according to the provisions of the fifth article hereof In all cases, the contract term of the projects stated in the two preceding articles may not be more than thirty years. As an exception, the development projects of special nature as determined by the Council of Ministers may be extended to forty years maximum. In this case, the contract years should be stated in advance in the tender documents of these projects otherwise the contract term shall be twenty five years. Such contracts may not be amended, extended or renewed. Upon the contract expiry, the projects and facilities stated in this article and the two preceding articles shall pass to the state and become its own properties for no consideration or compensation. Any agreement to the contrary of the provisions hereof and its consequent effects shall be invalid.	The amendment to article six states that the BOT project has a maximum life of 50 year (40 in the old law) and the contract should differentiate between the assets owned by the government and the assets owned by the entrepreneur
Article Seven None of the authorities referred to in the fourth article hereof may address the Municipality or any other state authorities in connection with the allocation of lands and the issuance of appropriate licenses for BOT, BOOT or any other similar system projects constructed on the real state domains. Further, they may not dispose of the real state domains over which they have usufruct, by way of assignment of the relevant usufruct or the exchange of such properties for other properties or any other disposal to third parties. If they no longer need such properties, they should return them to the Ministry of Finance, State Domain Department. The Municipality may not allocate any lands for such projects including the projects managed by the Municipality except under the provisions of the decree law no. 105 of 1980 and the provisions hereof. Each disposal to a third party on these properties other than in accordance with the provisions hereof shall be absolutely invalid and its effect shall be void.	Article 7 removed from “New” BOT Law

Article Nine No area of the real state domains may be sold or allocated to any investor for constructing any project thereon in accordance with BOT, BOOT or any other similar system in consideration for the investor execution of the infrastructure of the same or another project or the execution of any other work such as land reclamation or environmental rehabilitation or otherwise. In all cases, the infrastructure, land reclamation, environmental rehabilitation or other works shall be offered for public tenders according to the provisions of law no. 37 of 1964.	Article 9 Removed from BOT Law
	New Article (Article 9) Defines the legal system of the partnership project, and determine how to tender and implement the project after the approval of the Supreme Council and in accordance with the provisions of this law. In case the investor is the winner of an alliance the partnership contract is signed only after setting up his own company of coalition, and devolve rights and obligations of the investor to the newly established company. The authorized capital will be set based on the tender
	New Article (Article 10) The Authority in collaboration with the public sector offers partnership projects, not exceeding a total cost of sixty million dinars (60 million KWD.) In competition among investors wishing to invest in the project, and is committed to the implementation of the provisions of this law. The winner is responsible to establish the company
	New Article (Article 12) Introduced a new article explaining the process for establishing the company, in the old law it was part

	of article 5
Article Thirteen The contract may not be assigned in whole or in part to a third party and the legal status of the investor may not be changed except upon approval of the higher committee, the expiry of design and execution period and the passage of an appropriate period after operation as determined by the higher committee which shall not be less than three years. Such third party shall substitute the investor with respect to all conditions, rights, and liabilities contained herein. The investor may not sell or mortgage the land or structures or buildings constructed thereon and those that shall pass to the State by the end of the project or create any real rights thereon.	Article 13 amended financing the project, the investors could use the project as collateral (except the land) and use the revenues as collateral (based on the contract period of the project)
Article Sixteen Under the mandate made by the competent pubic authority, The higher committee shall offer the management of the projects passing to the State in accordance with the provisions hereof, one year before transfer thereof to it, for a public bidding to be advertised in the audio and video mass media as well as in the official gazette and at least two Kuwaiti Arabic dailies, provided that the deadline for purchasing the project documents and submitting the bids shall not be less than ninety days form the date of publishing in the official gazette. The project documents should include its last three years audited balance sheets. The project management term under the new contract may not exceed ten years. One year before the expiry of the contract, the project management shall be re-offered for bidding in accordance with the Provisions of the first paragraph hereof. The provisions of this article do not affect the State's right to manage the project itself. The Minister of Finance shall make a decision showing the details of bidding and awarding procedures. Preference of awarding shall be given to the investor who offers the highest return for the State subject to observation of all requirements of the Minister of Finance's decision. The investor whose contract has expired shall have preference in terms of awarding if he participates in the bidding and	**Amendment to article 16** The higher council re-tender the management contract 1 year before expiry and the new contract shall have a maximum life of 20 years (10 years in the old law) the council allocate the contract to the highest bidder

his offer is equal to the best offer in connection with the projects referred to in the fourth and fifth articles hereof. Regarding the projects referred to in the sixth article hereof, the investor whose contract has expired shall have preference if he participates in the bidding at no more than 10% over the best bid. In all cases, the investor shall term return the project in good and investable condition upon expiry of his contract.	
Article Seventeen All project contracts shall be subject to the pre and post control of the State Audit Bureau.	**Article 17** amendment the Audit bureau shall only exercise post control on project contracts
	New Article (17) New article added to the new law stating that the executive summary should assign a time period for replying to the relevant entities and also set a time period for entities to reply back to the authority. The Authority studies the documents and issue recommendations to the higher council within 20 days, moreover the Authority must inform the entrepreneur with 5 working days of the decision that comes from the supreme council
	New Article (18) New article Added the entrepreneur has the intellectual and property rights and/or patents moreover confidentiality of financials, technical information will be secured based on the relevant law of the land
Article Twenty The executive bylaw hereof shall be issued under a decree upon the Minister of Finance submission within six months from the date of publishing this law in the official gazette.	Article 20 amended executive regulation shall completed within 3 months (6 months in the previous law)

	Added Article (22) The higher council has the right to exempt the entrepreneur from taxes, tariffs and/or any other fees
	Added Article (26) new article Added, tenders have a right to appeal before the supreme council within 30 working days from the date of disapproval and the supreme council shall reply in a timely manner set in the executive regulation

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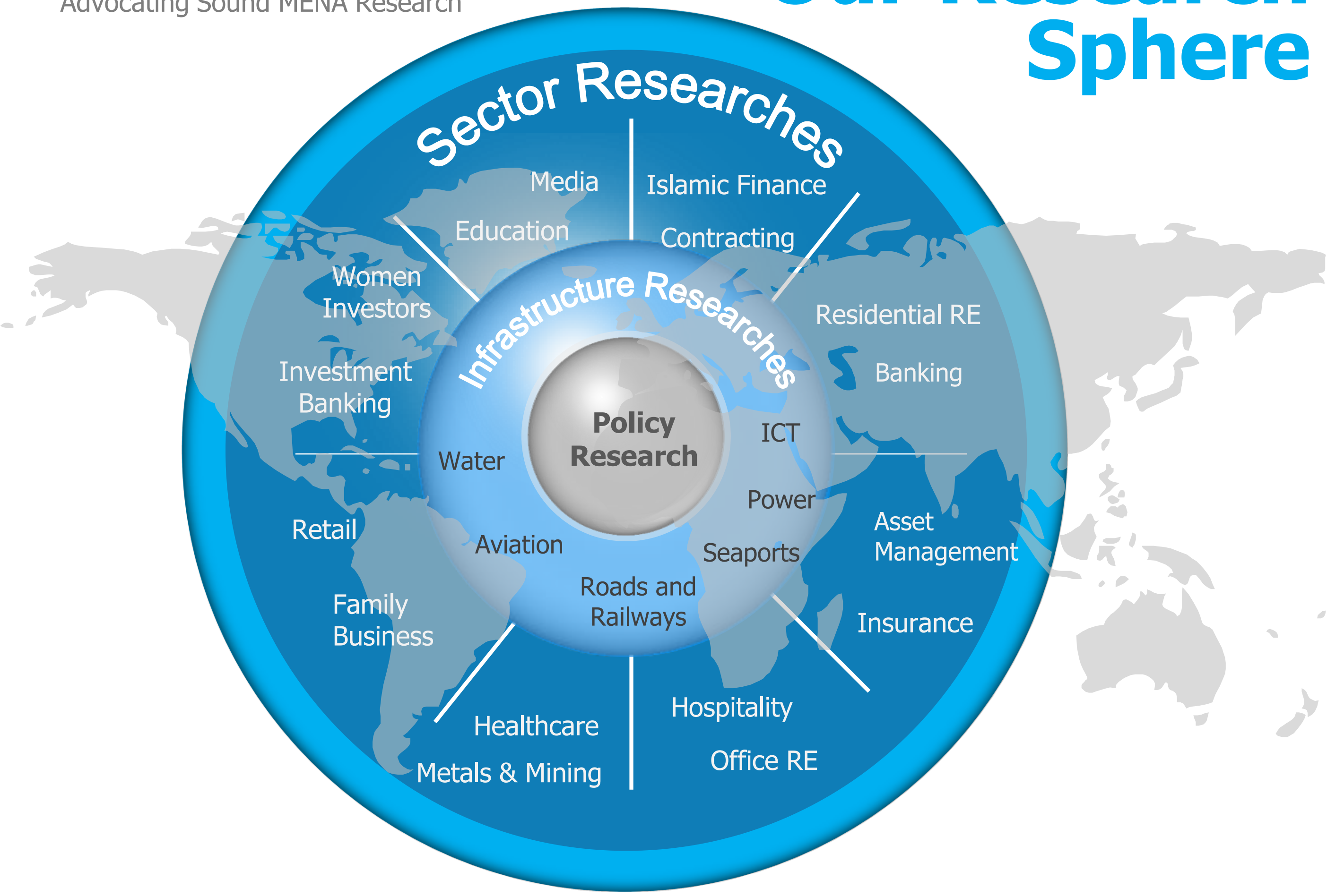

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