

Policy Papers: Iraq Reconstruction

The 'Construction Council' Bill 2019 - A Critique. By Dr Amer K. Hirmis*

The nearly year-old cabinet of Adel Abdul-Mahdi, the prime minister, has, in its regular weekly meeting on Tuesday, September 17, 2019, “approved the draft ‘Construction Council’ Bill [**Miswadat Qānūn ‘Majlis al-I’ mār’ - 2019**] and forwarded it to the Council of Representatives”- the Iraqi Parliament for approval (<https://gds.gov.iq/ar/cabinet-approves-the-draft-construction-council-bill/>). The establishment of a ‘Construction Council’¹ (henceforth **Council**) was promised in the 2018-22 Ministerial Programme presented to parliament in October 2018 by the Prime Minister (henceforth PM).

The “Mandating Reasons” for enacting the Council Bill include “implementing the large projects effectively, adopting good planning, administration, monitoring and operation as well as creating new jobs, upskilling the employees, with (active) involvement of the domestic and foreign private sector, as primary financiers of projects, in accordance with international norms and standards.”

Like the 2018-22 Ministerial Programme, the Council Bill has its strengths and flaws. Its key strengths lie in Council being given the opportunity to be successful in designing, prioritising and implementing major projects (upwards of IQD 250 billion/US\$ 210 billion, each) that have passed financial feasibility test, and prioritised on the basis of positive socio-economic outcomes for the country. Implemented on basis of *good governance*, and supervised by an *independent regulator*, these projects would create new jobs, and lead to skills development, and ultimately diversify Iraq’s GDP structure away from its damaging excessive dependence on crude oil production.

Some of the major risks, however, lie in the *absence* of an independent regulator, whose remit ought to include scrutinising the operations of the Council, ensuring its independence, following good governance principles and the rule of law in its financial transactions, appointing staff and experts on strictly professional basis. No



Policy Papers: Iraq Reconstruction

appointments should be made on sectarian/ethnic or political quota (*mahasasa*) basis. Another potential risk is that the PM, as the president of the Council, together with three ministers as members might, in practice, mean steering the Council on political lines (political interference) rather than on *independent* professional basis, attempting to initiate economic development, as distinct from economic growth, in Iraq.

The Purpose

This note touches on some of the opportunities the Council could seize to initiate economic development in Iraq. It also provides a few observations on addressing potential challenges which if not addressed might hinder the Council's performance.

This note begins by setting out the key elements of the Bill, then it touches on a couple of recent commentaries made by fellow economists, moving to aims of The Bill, how it might be implemented, the technical and administrative supports the Bill provides for the Construction Council, and finally the risks the Council might face in carrying out its remit, as defined by the Bill itself.

The 'Construction Council' Bill – opportunities and challenges

The Bill comprises seven Chapters and 34 Articles, covering definitions, objectives of Council, the organisational structure, Council's remit/duties, financial provisions, general provisions and closing provisions. The lack of precision and clarity in some Articles of the Bill open the door for speculative interpretations, let alone that these Articles might be used as loopholes to circumvent the Law if the Bill is promulgated as is.

The establishment of the Council would create a number of ***new opportunities*** that, in the long run, might alter the economic structure of Iraq away from its heavy dependence on crude oil production, at present. These are:

1. Council would become *the* authority for executing major projects by drawing together under one umbrella, responsibilities currently dispersed amongst various ministries (e.g. Ministry of Planning), municipal councils and the National Investment Commission (NIC). Article eight of the Bill, for example, gives the Council the

Policy Papers: Iraq Reconstruction

authority of NIC (established by Law 13 of 2006) in regard to issuing investment licences, based on system to be designed by Council. As both Nabeel J. al-Marsoumi (2019) and Ibrahim al-Mašhadani (2019) note ², this will concentrate economic development activities under one organisation, and reduce wastage;

2. The Council will focus on large scale (e.g. infrastructure, industrial and irrigation) projects that will inevitably have significant impacts on the supply chain, and would hopefully induce investment by the private sector in those economic activities that support the major projects, thus gradually changing the GDP structure;
3. The allocation of 5% of the total proceeds of the ‘Annual General Federal Budget’ to finance Council’s projects, after discounting due expenditures (Section 16.2 of the Bill) is a positive move. Hopefully this percentage will increase, should the Council prove to be an efficient and effective body, increasing wealth and new jobs in productive sectors of the economy – e.g. manufacturing and agriculture;
4. Other sources of finance, if not most, are expected to materialise from the domestic and foreign private sector through BOT and BOOT business models/contracts with Council (Sections 10.3 and 10.7 of the Bill). International experience ³ in Public and Private sectors Partnership (PPP) appears to suggest that if *properly regulated and scrutinised*, Build-Operate-Transfer (BOT) and Build-Own-Operate-Transfer (BOOT) business model could have the advantages of minimizing public cost for infrastructure development, reducing public debt, allowing for innovation, improving productivity (especially via FDI – Foreign Direct Investment), and, improve good governance, transparency etc.;
5. It is encouraging that the Bill states that Council will negotiate and enter contracts based on achieving *maximum profit/development value*, based on norms set out by the Council (Section 7.1) and that *annual* plans for projects/programmes, financing methods and appropriate implementation mechanisms will be set out by Council based on *economic or development returns*, or both (Section 14.1). It is encouraging because perhaps most of the possibly 3000 or so projects included in the 2018-22 NDP lack rigorous socio-economic feasibility study based on internationally

Policy Papers: Iraq Reconstruction

accepted norms, e.g. Social Cost Benefit Analysis (SCBA), Net Present Value (NPV) or Internal Rate of Return (IRR) techniques (see <http://iraqieconomists.net/ar/2018/12/02/-د-عامر-كور-كيس-هرمز-مجلس-التنمية-الاقت>) There is no doubt that the Council's projects should be profitable as well as serving economic and social development in Iraq. Taking account of the environmental impacts of major projects should also be a criterion for approving projects by Council; and

6. Finally, the last part of the Bill – ‘the mandating reasons’ – explicitly states that the Bill aims to make the domestic and foreign private sector a principal sources of financing major projects, so as to lessen dependence on the state's investment budget. Hopefully, the Iraqi government also has in mind the *objective conditions* that should prevail in Iraq to make this happen (on which more below).

Alongside the potential opportunities that the establishment of the Council might open, and hopefully seize when established, the Bill, as it stands, contains **serious flaws**, which, if not amended during the readings of the Bill in parliament, could cause further damage to the Iraqi economy. Key examples of the flaws in the Bill include:

1. The Bill does not explicitly state that the work of the Council will receive *oversight and scrutiny from an independent regulator*, which would report to the appropriate government ministry, parliament or ‘The Federal Court,’ incidences where Council has broken any laws currently in force. In the interest of transparency and good governance, it is good practice for institutions, such as the Construction Council, to be scrutinised so as to ensure that proper conduct is being strictly followed by Council;
2. The Bill does not clearly delineate beyond doubt the *duties and responsibilities* of the Council, in a way that these are distinct from those of other government ministries. Any overlap could cause potential disputes with other ministries (e.g. ministry of municipalities, industry, and planning). Whilst Article 2 of the Bill states that the Council is a corporate body (*šakhsia ma'nawiya*), having financial and administrative independence, and is represented by the President of the Council (the Prime Minister). Section 3.7 states that Council “will contribute in reforming organisations, and financial, industrial and commercial sectors of

Policy Papers: Iraq Reconstruction

the state.” Arguably, serious friction might arise with those organisations/sectors which might construed Council’s actions “to reform them” as intrusive. The deliberations within parliament in reading this Bill should iron out this potential conflict within government/the state, before it becomes Law;

3. A key challenge to the legislators and the operators is the top tier of the organisational structure of the Council. The named ministers in Section 4.1 are, arguably, politicians with affiliations to sectarian/ethnic political parties, and were appointed on this basis. Indeed, some have ‘academic qualifications’ and work experience that has no resonance whatsoever with the ministry they head. Notwithstanding the fact that these ministers have their own technical advisors, their own technical input would be minimal, if useful at all. In such a situation, their presence as Board Members might *risk* the politicisation of Council’s technical decisions. The fact that the PM is the President of the Council is, arguably, sufficient to provide political advice to Council, if such advice is needed. It is perhaps prudent, especially in the case of Iraq, where corruption is allegedly so pervasive, that no politician should reside at the Board of the Council; it should comprise well-qualified, multi-disciplinary professionals, tasked with carrying out technical duties, though they should be accountable to cabinet and parliament;
4. Another risk is the appointment of the private sector representatives in the way set out in the Bill, which suggests five members (Section 4.1.G). It would perhaps be prudent to appoint a representative from the Iraqi Federation of Industry and one from Iraqi Federation of Chambers of Commerce, who have relevant experience and professional standing in major projects’ initiation, investment and successful operation;
5. Section 10.6 and Article 19 need to be explained in the Bill, otherwise they might be misconstrued as a political stunt aimed at appeasing dissatisfied Iraqis with the current regime. Section 10.6 states that “The profits of the shares owned by the Council in its own projects will be distributed free (at no cost) to Iraqi citizens, once the projects are successfully operating commercially, according to a system to be published by the Council...” Article 19 reiterates the same sentiment. It would be prudent to make such pronouncements once the Council begins to make significant

Policy Papers: Iraq Reconstruction

profits, if it does, with clear mechanisms for so doing in place. Arguably, however, another way of looking at this issue is that Council should in fact re-invest profits to create more gainful employment, an indirect way to redistribute new wealth created by the new projects. It is not unusual for projects that seek to maximise profits to support charities and good causes, rather than randomly distribute profits amongst some nearly 40 million Iraqi people;

6. The Bill appears to adopt the Public-Private- Partnership (PPP) path in executing projects on a BOT/BOOT business model, as noted above. Whilst such a model has advantages, it also suffers from shortcomings, which if not well-regulated, Council's projects may not be as successful, let alone supporting the *raison d'être* of the Council. International experience shows that such a business model might involve higher transaction costs to the public sector; the model requires fund-raising to be successful, which is perhaps why Section 7.5 of the Bill stipulates that "council would agree to finance, or secure financing its projects against sovereign security agreed by ministerial cabinet." Typically, the model requires substantial operational revenues to be successful. The model also requires strong corporate governance, something that is reportedly in short supply in Iraq given the high level of corruption. Finally, this model could place Council at a disadvantage, given that Iraq has limited expertise in executing large projects, infrastructure or otherwise. In its readings of the Bill, Iraqi parliament must ensure that all these potential pitfalls are ironed out;
7. Section 20.2 states that "Council will not have permanent complement of staff." Council's staff will, apparently, comprise staff on limited-term secondment from other government ministries/public organisations. Whilst council ensures the security of payment, bonuses and pension contributions (as stated in Sections 21.1-2.24), the question remains one of balance to be struck between the extent of professional commitment seconded staff might have to Council, against the psychological issues, commitments and dedication to Council. Parliament will need to account for such balance in discussing the Bill. If the idea of having seconded staff paid by their original departments is to minimise costs to Council, perhaps Council should have a small number of staff to ensure total commitment



Policy Papers: Iraq Reconstruction

and dedication to Council's ethos and nature of work. Parliament should consider this balance carefully;

8. Sections 10.4 and 10.5 deal with issuing and selling shares via 'Initial Public Offering' (IPO) when starting a project, giving preference to Iraqi buyers first, before foreign bidders are considered. This constitutes an element of *bias* imputed in government intention, and this goes against the ethos of moving to an open market economy, which is an aim expressed in the October 2018 Ministerial Programme. Arguably, giving preferential treatment to Iraqis would also open the door to some of the richest and prominent families e.g. al-Maliki, Talabani, al-Hakim, al-Alak, Barazani, al-Sadr, al-Chalabi, to mention a few, capitalising on such a financial opportunity. If this were the case, they would wish to maximise dividends on their shares rather than agreeing to distributing profits to the public at no cost, as Section 10.6 advocates. These Sections in the Bill might deter foreign investors from participating in Council's contracts, as they might perceive such Sections in the Bill as routes to consolidate corruption; and
9. Annual plans for projects/programmes, financing methods and appropriate implementation mechanisms will be set out by Council based on economic or development returns, or both (Section 14.1); twelve types of major projects the Council will endeavour to execute are provided in Section 14.3, including housing projects, large industrial (military) complexes, new towns, industrial cities, and, *inter alia*, irrigation projects and dams. Section 14.4 states that Council will prepare the design specifications and "undertake feasibility studies" as well as assessing total costs; it will also prepare bids for potential contractors; robust international systems for contracting and measuring performance will be followed (Section 14.7). These provisions could be improved in two ways. First, Council should have a 3-year economic development programme, drawn within the context of an overarching strategy, integrated with a 3-year National Federal Budget, offering more certainty, and confidence, to potential investors that Council is not a short-termist institution. The programme and the budget should be approved by the Cabinet and Parliament. Second, an annual plan could be coordinated with the annual Federal Budget, for consistency, and

Policy Papers: Iraq Reconstruction

should also serve the purpose of a review presented to, and discussed by, parliament.

How this Bill might be implemented – concluding remarks

For the present, the establishment of the ‘Construction Council’ could usher a positive first step forward to initiating economic development in Iraq. For the Council to be effective in realising its objectives, one of the key conditions is having a *supportive legal framework* within which it could operate. This means that all the Bills that impact on the economic activity of people and business investment as well as the public sector should be co-ordinated, to avoid inconsistencies and contradictions. Examples of such laws include: The Labour Law (37) 2015; Investment Law 13 (2006); Company Law 21 (1997); Industrial Development Law 164 (1964); Implementation of large projects Law 157 (1973) and the Economic Establishment Law 98 (1964) ⁴.

Council must work on strictly professional basis, avoiding the politicisation of its work.

Critically, the new ‘Construction Council’ must be regulated by a new *independent* ‘Office for Economic Development Responsibility’ (OEDR) ⁵ ensuring that Council performs and delivers major projects *efficiently* and *effectively*, as set out in the Bill. This means that the operator *must not* be the regulator. Otherwise, the seeds of corruption will be easily sown.



(*) CEO of Capital Business Strategies Ltd. UK

© Amer Hirmis, Iraqi Economists Network, October 10, 2019

NOTES

¹ The name ‘Construction Council’ (Arabic - ‘Majlis al-I’ mār’) is a linguistic Arabic construct, which could easily be interchangeably used as ‘Development Board’; an English translation for the Arabic name (‘Majlis al-I’ mār’) adopted by the Iraqi government when ‘Majlis al-I’ mār’ was founded in 1950 to construct major infrastructure



Policy Papers: Iraq Reconstruction

projects. It was abolished in 1958, following the overthrow of the Monarchy in July of that year. Indeed Article 31 of the current draft 'Construction Council' Bill forwarded to the Parliament states that "the Development Board and Development Ministry Law 27 of 1953 shall be abolished."

² See Nabeel J. al-Marsoumi (2019) An Initial Reading of the Draft Construction Bill (posted at <http://iraqieconomists.net/ar/wp-content/uploads/sites/2/2019/09/Nabil-J.-Al-Marsoumi-Preliminary-notes-on-the-draft-law-for-establishing-the-Construction-Council.pdf>, accessed on September 28, 2019) and Ibrahim al-Mašhadani (2019) An Economic View .. Construction Council .. A Big Initiative in Need of Support (posted at <https://www.iraqicp.com/index.php/sections/tareeq-articles/25356-2019-09-29-19-42-14>, accessed on September 29, 2019)

³ See for example, HM Treasury (2003) PFI: Meeting the investment challenge. (Available at: www.hmtreasury.gov.uk) ; European Commission (2003) "Guidelines for Successful Public-Private Partnerships", European Commission Directorate General Regional Policy, March, Brussels; and World Bank (2018) Concession., BOT... (<https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>) and OECD (un-dated) <https://www.oecd.org> > gov > budgeting (accessed on Oct. 5, 2019)

⁴ Compare with Al-Zuhairi, Riad A. Isa (2018) the legal system for government economic activity in Iraq (Academic Voice, Association of Iraqi Academics – UK, No. 1 June 20, pp. 12-15)

⁴ See Amer K. Hirmis (2018) An 'Economic Development Board' for Iraq, *not* a 'Construction Board' (posted at <http://iraqieconomists.net/ar/2018/12/02/اد-عامر-كوركيس-هرمز-مجلس-التنمية-الاقت/>, in Arabic)

Editorial comments

1. It would be advisable for the law makers to explain in Article 1 (Definitions...) what is meant by BOT, BOOT... This is left to Section 10.7 in the Bill without mentioning the full English text for the acronyms?
2. Also, Section 4.6 in the Bill **is missing from the text**? The text of the Bill has presumably been proofread by the legal advisors to the President of the Iraq and the cabinet members, who approved the Bill and forwarded it to the parliament?
3. Unlike the rest of the Sections in Article 16, Section 16.6 lacks a colon mark, and should be written as Six: Other resources...consistent with punctuation in the Bill?