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A COMPARATIVE LEGAL ANALYSIS ON PUBLIC-PRIVATE PARTNERSHIPS REGARDING ASEAN COMMUNITY

Abstract:

Since the establishment of the Association of Southeast Asian Nations (ASEAN), there have been continuous developments, especially the strengthening of cooperation between member countries in the development of measures to provide public services. Providing infrastructures that give citizens quality living standards and satisfaction in the country is a significant commitment that member countries are obliged to embrace. However, governments may not be able to provide all necessary public services due to limitations in technology, professional resources, and budgets. Accordingly, Public-Private Partnerships (PPPs) are key. With professional management plans, skilled resources, and advanced technology, these partnerships benefit the government by controlling budgets. Moreover, promoting PPPs stimulates economic growth, resulting in a strong commitment between public and private sectors to developing the country.

However, at present, the PPPs of ASEAN member countries are variable since the investment policies of each country may be vague or designed to address unique conditions, as described in “Master Plan on ASEAN Connectivity” (MPAC). Accordingly, requirements set by member countries should be standardized and their legal processes clarified so that private sectors can evaluate the efficiency of an investment and engage with the government's plan confidently. Doing so will enhance economic growth and become part of the sustainable development of ASEAN member countries.

Keywords:

Public-Private Partnership (PPP), public services, infrastructures, ASEAN community, sustainable development;

JEL Classification: K23, K40, L33

1. Research background:

Since ASEAN's establishment in 1967, the community has been promoting cooperation between member countries through the ASEAN Charter. With a focus on the development of all aspects of member countries, ASEAN has become an increasingly stable, prosperous Economic Region. In January 2007, ASEAN's Economic Community Blueprint was signed. The AEC Blueprint determined ASEAN's economic plans to be accomplished by 2015. The objectives of the AEC Blueprint were the establishment of a single market and production base, promoting dynamic competitiveness in the region, and integrating the region into the global economy (Piris, Woon, 2015, p. 54).

The development of basic infrastructures is one of the keys to making the ASEAN a Highly Competitive Economies Region. This is because a well-provided basic infrastructure can close the gaps between and connect ASEAN nations with neighboring countries in Northeast and South Asia (Kohama, 2004, p. 43). At the 15th ASEAN Summit, member countries all agreed with Thailand's recommendations to strengthen cooperation in the region by developing a Master Plan on ASEAN Connectivity and establishing a High Level Task Force on ASEAN Connectivity (Pipoppinyo, 2013, p. 166). The Master Plan on ASEAN Connectivity is considered a central strategic document for achieving the overall connectivity of countries in the region, with the ultimate goal of promoting the formation of an ASEAN Economic Community in 2015 (Das, 2015, p. 4). To ensure that member countries will be on the same path, the Master Plan on ASEAN Connectivity has three significant requirements: 1) the development of a physical infrastructure through "Physical Connectivity"; 2) enhancing the effectiveness of institutions, mechanisms, and processes through "Institutional Connectivity;" and, lastly, 3) empowering people and promoting free movement through "People-to-People Connectivity." (ASEAN, 2011, p. 3) However, these strategies will never be accomplished without support from the governments of each member country.

Therefore, providing public services is a significant commitment that member countries are obliged to manage, ensuring that people are well provided with quality living standards, which ultimately leads to economic growth, closing the gap between countries, and promoting the competitiveness of ASEAN. Generally, governments conduct a public service, investment, management, and fee collection by themselves. In other words, the government of each country is responsible for providing public services and ensuring that the standards of such services meet the requirements of the people. However, the government may not be able to provide all public services required for rapid economic development due to limitations of technology, professional resources, and budgets. For this reason, private participation is needed for the development of public services, especially public utilities, facilities, and infrastructures. Hence, government delegates who are competent to operate a public service on behalf of the government facilitate and encourage private participation in public services. Such a legal framework is required to support the government and private operations of public services with such processes as public procurement and creating concession contracts.

Hence, various forms of government-private sector cooperation have emerged in ASEAN countries.

2. Public-Private Partnerships legal framework:

Public-Private Partnerships (PPPs) are one of the formats for providing public services with a professional management plan and skilled resources plus advanced technology and innovation provided by private sector actors. At present, the PPP format has been involved mostly in projects regarding basic infrastructure such as public utilities (gas, electricity, water, and waste disposal) and transportation (air, train, bus, and taxi transport). These partnerships greatly benefit government by allowing them to focus on other important or high priority tasks. Moreover, promoting Public-Private Partnerships can encourage economic growth. However, the criteria for PPPs in each country is related to the different branches of its legal system, its economic and political situation, the size of its investment assets, and the amount of cooperation between the private sector and local and national governments. (Lall, 2011, p. 322)

In this research study, the legal system for Public-Private Partnerships in ASEAN countries were divided into two groups of countries: 1) those where specific laws concerning Public-Private Partnerships have been adopted and 2) those relying on international trade and investment regimes. The details of each country's legal system are described below.

The Kingdom of Thailand determined the framework and processes for preparing Thailand to begin the establishment of the ASEAN Economic Community (AEC) in 2015. The Eleventh National Economic and Social Development Plan B.E. 2555-2559 (A.D. 2012-2016) focused on the development of basic infrastructures and logistical systems. (NESDB., 2012, p. 5) Since private sectors are involved in public service projects, the Private Investment in State Undertakings Act B.E. 2556 (A.D. 2013), which became effective in April 2013, was implemented to prescribe law regarding Public-Private Partnerships and to ensure that such cooperation would be in line with the necessities of the country. (IMF., 2013, p. 9) In other words, since Public-Private Partnerships affect the development of public services, their close monitoring is required. According to this Act, a project with a total value of more than THB 1 billion must comply with the rules and procedures prescribed by the Act. To propose a project, a host agency must submit a project appraisal report and total project budget. The Act also requires the host agency to hire a consultant to prepare a project appraisal report along with an independent report with details requested by the responsible government minister. After a contract is signed, a supervisory committee must be appointed to monitor and supervise the project and ensure that its operations are conducted in accordance with the investment contract and operational plan.

The Socialist Republic of Vietnam has set a clear path for the development of the country over the next decade in its Socio-Economic Development Strategy of Vietnam for the period 2011-2020, approved by the 11th Congress of Vietnam Communist Party.

With the aim to become a modern industrialized country by year 2020, the government has focused on the development of basic infrastructures and facilities. (USA International Business Publications, 2015, p. 82) This includes a plan to enhance transportation infrastructure facilities, which will be used to promote connectivity with neighboring countries. Nowadays, Vietnam has become more attractive to foreign investors. Its improved investment procedures and Customs System have invited foreign investors to start new projects. Investment law was developed with the issuance of Law 43/2013/QH13 on Public Procurement, effective from 1 July 2014. This law established a legal framework and requirements for Private-Public Partnerships. The ministry of planning and investment portal is the responsible authority, monitoring and advising private investors in cooperation with the government. The government of Vietnam has acknowledged the importance of high-quality basic infrastructures, as evidenced by budgets of more than USD 20 billion recently approved for that purpose. This tremendous budget was used for significant mega projects such as a high-speed train project connecting Hanoi and Ho Chi Minh and extending 5,000 kilometers of new roads. All of these projects are planned for completion by 2035.

Like Vietnam and other member countries, the government of ***The Republic of the Philippines*** has promoted cooperation between public and private sectors and continuously developed laws and regulations regarding investments in public service projects. In 1994, the government issued Republic Act No. 7718 (1994) and later, in 2012, Implementing Rules and Regulations followed. Both regulations specify the measures and requirements for investing in public projects based on the total amount of the budget for each particular project. (Asian Development Bank, 2013, p. 18) The requirements of each project are assumed to be different. For example, a project with a budget of less than PHP 200 million can be directly approved at the local administrative level, which reduces processing time and is in line with the concept of decentralizing administrative power. For a project with a total budget of between 200-300 million Pesos, the Minister of Finance will be the approval person. Lastly, for a project with a budget worth over 300 Million Pesos, approval from the National Economic and Development Authority, or NEDA Board, is required. The Board is composed of the President of the Philippines as chairman and the Secretary of Socio-Economic Planning and the NEDA Director-General as vice-chairman. The main mission of the NEDA Board is to formulate development plans and ensure that plan implementation achieves the goals of national development. Therefore, in a project relate to Public Private Partnership, NEDA will facilitate the private sector contract, provide advice, and monitor a contractor for compliance with laws and regulations. (Build-Operate-and-Transfer Center, n.d., p. 4)

The Republic of Indonesia is the last member country in which the local regulations regarding PPP have been developed. Presidential Regulation No. 13 specifies requirements and measures for private and public sector partnerships. The plans and agreements for such PPP projects must be approved through Indonesia's Ministry of National Development Planning (BAPPENAS), which acts as a facilitator and auditor.

For the private sectors, the Indonesia Investment Coordinating Board (BKPM) is assigned to provide collateral and tax benefits to investors. (BAPPENAS, 2015, p. vii)

Next, there are member countries in which local regulations regarding Public Private Partnerships have not been implemented. Even though there is no specific law prescribing regulations and measures for investments in PPP projects, these regimes' rules are guided by two sources: (1) general law regarding investments in private undertakings and (2) handbooks or guidelines determining investment formats and rules in general.

Lao People's Democratic Republic is the first country with such a structure. Laos P.D.R has applied international and local regulations regarding investment to its Public Private Partnerships. All projects that are a joint development between the government and private entities are managed and monitored by the Investment Promotion Department of the Ministry of Planning and Investment (MPI) together with the Department of Investment Promotion (IPD), which is responsible for initiating policy, developing legislation, promoting investment, and providing benefits. (Asian Development Bank, 2014, p. 5) One example of a Public-Private Partnership project in Laos is the Nam Theun Hydropower Project, which was structured as a Build-Operate-Transfer Agreement (BOT) with the terms of agreement lasting for 31 years.

Similarly, in **The Republic of the Union of Myanmar**, Myanmar Investment Commission (MIC) is an independent authority in charge of assessing and making determinations on investment projects. Myanmar recently applied its 2012 Foreign Investment Law for determining and specifying requirements for Public-Private Partnerships with foreign investors. (ADB Technical Assistance Report, 2014, p. 5)

The Kingdom of Cambodia applied its 2007 Law on Concession for Public-Private Partnership projects as well as all concession agreements owned by the government. For monitoring projects, the government assigned the Council for the Development of Cambodia (CDC) and Cambodian Investment Board (CIB). One recent project, Sihanoukville International Airport, was also a Build-Operate-Transfer (BOT) format agreement. (Asian Development Bank, 2012, p. 31)

In **Brunei**, the Department of Economic Planning and Development has set a framework in line with that country's National Development Plan so that investment projects will move in the same direction as the development plan for the country. (DEDP, 2012, p. 10)

Malaysia and Singapore, meanwhile, have similar legal frameworks for Public-Private Partnerships. In the **Federation of Malaysia**, procedures are specified in Public-Private Partnership Guidelines and a PPP Unit was established to handle all responsibilities regarding PPP projects. It considers proposals from administrative authorities or private entities and conducts project assessments proposed to the Cabinet, which then considers and specifies the concession's requirements, such as its duration of contract

or profit management. The West Coast Expressway serves as one example of Malaysian's Public-Private investment projects. In this project, the Cabinet gave concessions for the duration of 60 years to private undertakings. The project is worth 1.9 Billion USD. (Public-Private Partnership Unit, 2009, p. 4)

Finally, *The Republic of Singapore* has specified requirements for Public-Private investments in its Handbook, which is used as a reference when commencing PPP agreements. There is also an authority established to facilitate investors and ensure that procedures meet the requirements of the Framework. According to the Handbook, a project with a total budget worth more than 396 USD must seek approval from the government at its outset. One example of a PPP project in Singapore is its Sports Hub, which was structured on a Design-Build-Operate (DBOF) model. (Ministry of Finance, 2012, p. 8)

From this research study, it can be seen that the formats of the Public-Private Partnerships of ASEAN member countries are diverse since the local economic stability, trade, and investments of each country are different. These differences could affect the government's operations and the confidence of private investors, especially when there is a lack of transparency in the selecting processes, the granting of special benefits, and the proceedings for dispute settlement. Moreover, no specific in-charge authority responsible for monitoring the operational processes of private undertakings current affects the standards for and continuity of public services provision. Given these concerns, during the 25th ASEAN Leadership Summit, ASEAN and OECD agreed to ASEAN Principles for Public-Private Partnership (PPP) Frameworks. (ASEAN, 2014, pp. 3-4) These ASEAN Principles are expected to provide ASEAN governments with guidance on the effective implementation of PPP frameworks to create a conventional and efficient PPP environment for infrastructure investment and to enhance connectivity between member countries in order to attract more foreign investors to the region.

3. Research recommendations:

Given the results of this study, the researcher would like to propose four recommendations regarding Public-Private Partnerships in the ASEAN Community:

1. ASEAN should improve its PPP Framework, especially for legislation development, as well as its regulations related to PPPs so that there will be a standard framework for member countries even where a specific local law has been adopted. Such framework should be drafted between member countries in order to align with AEC's development plan.
2. ASEAN should establish a federal institution to connect private investors and the government. This federal institution should be responsible for providing information and coordinating with local and international financial institutions such as the Asian Development Bank (ADB), the International Monetary Fund (IMF), and the World Bank. Federal institutions should also provide consultations to private investors who are deciding to invest in the region.

3. ASEAN should promote more investment within the region to enhance trade and commercial competitiveness by fostering foreign investment. In addition, ASEAN should develop a dispute settlement regime to manage disputes resulting from variable investment laws and regulations.
4. Lastly, apart from developing Public-Private Partnerships, ASEAN should develop principles of Good Governance for member countries to ensure that all processes are transparent and inspected. Furthermore, independent authorities should be more actively responsible for inspection and monitoring so that possibilities for misconduct or corruption are fewer and budgets well-spent. These, together, would strengthen confidence and cooperation between the public and private sectors.

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