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LEGAL IMPROVEMENT ON PUBLIC-PRIVATE PARTNERSHIP FOR SUSTAINABLE DEVELOPMENT OF BASIC INFRASTRUCTURES IN CLMV COUNTRIES

Abstract:

According to Master Plan on ASEAN Connectivity, the cooperation among the member countries leads ASEAN to Highly Competitive Economic Region. Therefore, development of basic infrastructures is one of the key factors for closing the gap and connecting the member countries together. In order to enhance people's quality of life, governments of member countries have a mission to improve basic infrastructures. Especially, the governments in CLMV region (Cambodia, Laos, Myanmar and Vietnam), wherein the population of the member countries is almost 170 million people and economic growth rate is 6-8%. Nowadays, investment policies are focusing more on the foreign investors to develop the basic infrastructure, which has resulted in a significant increase in the number of foreign investors in the period of the economic crisis in Asia.

The results revealed that to promote a policy significantly, private entities must be encouraged to invest in the government projects. Furthermore, promoting Public-Private Partnership can spur economic growth, resulting in a strong commitment between public and private sectors that will lead to the development in the country. However, the investment laws in the government projects and granting processes are different and constantly amended. Especially, investment patterns and requirements for each member state are vague and there is a lack of the laws for controlling investments of private entities. These problems as stated, thus, affect investors' confidence and incoming of investment funds from local and foreign investors.

Keywords:

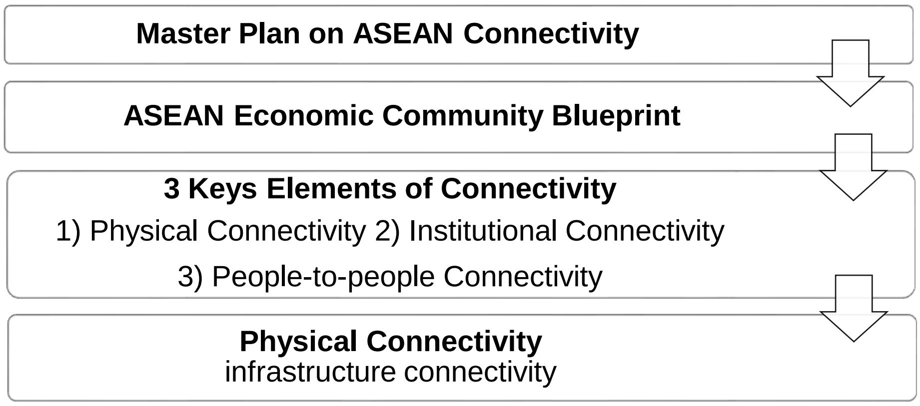
Public Service, Infrastructure, Private Investment, Foreign Investment Law, Public-Private Partnership (PPP), ASEAN community, CLMV countries

JEL Classification: K23, K40, K00

Introduction

ASEAN was established in 1967 to promote cooperation among countries in the region and to develop an economic framework for member countries. In 2007, the ASEAN Economic Community (AEC) Blueprint, which is ASEAN's economic development plan, was created with the objective of driving member countries to comprise a highly competitive economic region. Significant plans under the AEC Blueprint include developing and upholding standards for basic infrastructures, which is one of the important factors behind maximizing the ASEAN free trade area's efficiency. (Association of Southeast Asian Nations, 2008) Indeed, well-established basic infrastructures can better connect ASEAN to neighboring counties in Northeast and South Asia.

With these efforts, ASEAN has the agenda to develop basic infrastructures that serve the people of member countries and prepare them for readiness in economic development, as shown in the picture below (Bhattacharyay, 2009), illustrating the target infrastructure connectivity.



Presently, member countries in the CLMV group - Cambodian, Laos, Myanmar and Vietnam - are focusing on the development and expansion of their current basic infrastructures, covering all the important parts of their countries by connecting land, air and ship transportation, as well as on developing their technologies and enhancing their energy networks.

Analysis and Discussion of the Findings

The scope and status of the basic infrastructure development plans for CLMV countries are summarized below.

Royal Government of Cambodia

Cambodia National Strategic Development Plan 2014-2018 focuses mainly on increasing the country's potential social and economic development. The country's development plan is supported by the Asian Development Bank (ADB), the International Monetary Fund (IMF), the United Nations Development Program and other countries. The main action plans concerns enhancing the management of public sector systems, legislative amendments and the development of tax systems, and it includes establishing projects for the development of air and land transportation, power and waterworks (Asian Development Bank, 2014).

The government of Cambodia has a mission to improve the quality of life of the Cambodian people, especially those living in remote areas. For the purposes of building sustainable development and promoting international trade and investment in Cambodia and increasing the movement of funds from other countries, especially investment from the local and overseas private sectors, Cambodia's Millennium Development Goals (CMDG) were adopted (Asian Development Bank, 2014). To make Cambodia one of the most economically significant emerging countries, the government of Cambodia has established several plans, such as offering tax benefits for investors, developing special economic zones, providing special measures for trades and investment and amending regulations in order to enhance the business environment.

In 1998, Cambodian Prime Minister Hun Sen addressed the Triangle Strategy, focusing on four aspects of sustainable development: (1) agriculture, (2) basic infrastructures, (3) private sectors and (4) human resources (Kim-Yeat, 2006). With the expectation of increased employment and higher incomes, the government of Cambodia has been working on amending its investment regulations to grant more benefits to foreign investors. Its amended policies, for example, offer foreign investors the right to own all types of property, except land, and allow them to sign long-term lease contracts up to 99 years. In some types of businesses, foreign investors are allowed to own 100% of the shares when incorporating (World Trade Organization, 2003). In addition, the government is moving to make current regulations more precise and to reduce the difficulty of applying for business licenses.

In 1994, the Investment Promotion Law was passed to ensure that investors would be granted the same rights and protections as the Cambodian people. The law not only states that the government will not impose prices on goods and services to businesses under the investment promotion project, but it also offers special benefits to investors, such as tax holidays and import duty exemptions on tools, machinery and construction materials (World Bank, 2016). For projects focusing on import replacement, especially, companies are allowed to employ foreign workers as technical managers or professional craftsmen. In addition, the Investment Promotion Law grants investors concessions on lands, and they can use those lands as collateral for loan agreements.

However, there are no specific regulations on private-public partnerships for providing public services. Therefore, under the general law on concessions, which was established in 2007, private-public partnerships apply to these agreements. The general law on concessions is a regulation for monitoring the construction of Cambodia's public service projects (Asian Development Bank, 2012). There are several types of concession agreements between the public and private sectors, including Build-Operate-Transfer (BOT), Build to Order (BTO) and Build-Lease-

Operate (BLO) agreements, which are monitored by three authorities: the Council for the Development of Cambodia (CDC), the Cambodia Investment Board (CIB) and the Ministry of Economy and Finance (Public-Private Infrastructure Advisory Facility, 2002).

The Cambodia Investment Board has approved a project promoting the development of the country's energy network, with budget of USD 20 Million invested in transmission line systems, 338 kWh power plants and factories producing Biodiesel and Gas. The investors in this project are from China, South Korea, Hong Kong, Malaysia and the United States. In addition, there are two projects for developing Cambodia's transportation systems, with the government providing a budget of USD 3 Million for constructing the new Siem Reap Airport and developing a train system. Siem Reap Airport has investors from South Korea who are funding approximately 1,000 Million USD (Vadehra & Sarheim, 2015). The railway transportation system has co-investors from Cambodia and Australia. The government's railway plan is to develop a new railway transportation system by refurbishing existing tracks and building 650 Kilometers of north-south lines. The Asian Development Bank (ADB) has contributed USD 84 Million, the Organization of the Petroleum Exporting Countries (OPEC) USD 13 Million, the Government of Cambodia 15.2 Million and the Government of Malaysia USD 2.8 Million to the development of the railway transportation project. This project includes renovating Phnom Pehn train station with a budget of USD 73 Million. When the railway system has been developed, Cambodia will be a hub connecting Singapore to Yunnan province in China: the "Singapore-Kunming Railway Link (SKRL)". The total track distance of this line will be 5,382 Kilometers (Council for the Development of Cambodia, 2016).

Lao People's Democratic Republic

Lao People's Democratic Republic (Lao PDR) became a socialist-administration economy in 1975 and was reformed into a free market economy in 1986. Its New Economic System focuses on market pricing, strategic management and promoting economic relationships with other countries (Fukase & Martin, 2001). The National Economic and Social Development Plan of Lao PDR aims to develop the country's economy sustainably, with a focus on social and culture progress, natural resources and environmental conservation and the country's basic infrastructures (OECD Development Centre, 2016). There are three forms of investment in Laos: Joint Venture, Enterprise Consortium and Foreign Invested Enterprise. The most significant basic investment infrastructures in Lao PDR are energy and telecommunications, including the Nam Ngum 2 hydroelectric power plant, which was developed with a concession to Tad Salen Power Co., Ltd. (Anthony, et al., 2012).

This research found that the basic infrastructures in the country do not serve all people. There are, for example, water supply shortages, high water supply costs and telecommunications under coverage. Those problems challenge business operations since operational costs are considerably high. In addition, the country's logistical systems need to be improved. For instance, rough transport routes in Laos cause delays, increased lead-time and damaged goods. Trucks are in kept in poor maintenance conditions.

Since the government aims to promote international trade among ASEAN Countries, it has established a basic infrastructure development policy. The policy focuses mainly on the establishment of transportation systems, and its objective is to develop Lao PDR from a land-locked to a land-linked country via the Mekong River. At present, the development of the basic infrastructure of Lao PDR is underway, especially the Greater Mekong Subregion (GMS) project, which is supported financially by several international organizations (Asian Development Bank, 2013).

Although there is no specific regulation prescribing matters of law related to private investment in public services, the Law on Investment Promotion of 2009 and the Decree on Public Private Partnerships set specifies conditions for investments and the qualifications for investors, including determining PPP contract processes, timing, duties and rights (USA International Business Publications, 2015). Moreover, the investment promotion projects must align with the Public-Private Partnership Operational Plan. This operational plan, which is the ADB's strategic plan for 2012-2020, specifies three conditions for granting investment in Asia-Pacific countries' basic infrastructure projects: (1) the investment shall increase capital funds; (2) the funds are not included in the government's budget and (3) the funds shall be invested in mega projects that uplift the country (Asian Development Bank, 2012). In charge of managing PPP Projects is the Ministry of Planning and Investment (MPI). The Investment Promotion Department (IPD) is responsible for granting investment promotions.

Republic of the Union of Myanmar

Following Phase 2 of the National Comprehensive Development Plan established by President Thein Sein in 2012, the government of Myanmar has been focusing on developing the country's economy and lifting the quality of life of its people. Myanmar's Framework on Economic and Social Reform determines the most urgent projects for promoting the nation's economic growth and social development. To open new windows of trade and investment, the government has paid attention to the development of its telecommunication infrastructure and focused on the development of basic infrastructures such as public transportation and energy systems. The framework also includes legal reforms, especially to regulations regarding employment and public-private partnerships in public projects (OECD Development Centre, 2015).

For promoting private sector and foreign investment, the government of Myanmar announced its Foreign Direct Investment Policy and enacted its Myanmar Foreign Investment Law in 1988 (OECD, 2013). The law specifies nine categories of business qualified for special investment promotions, including energy, telecommunications and Private-Public Partnerships.

Since Myanmar has begun opening for business and overseas investment, its military government has been made aware of the importance of developing its basic infrastructures to support mega industrial projects. After Cyclone Nargis destroyed roads and bridges in the southern part of the country, transportation during monsoon season has become difficult and, in some parts, roads are unreachable. Therefore, new Private-Public Partnership projects have been established for developing Myanmar's basic infrastructure and transportation systems.

Even though the government has been promoting the Private-Public Partnership model, there is no regulation specifying measures on Private-Public Partnerships in the country. Myanmar only has the Companies Act 1914 and the Foreign Investment Law 2012 prescribing terms and conditions for foreign investment and controlling the scope and areas of investment. Additionally, the State-owned Economic Enterprises Law 1989 has determined that the scope of business is reserved only for the public sector (Global Investment & Business Center, 2016).

Several laws, regulations, principles and measures enacted when Myanmar was under British rule do not apply to recent social and economic situations. To promote a free economy, the government of Myanmar aims to reform the aforementioned laws and regulations, especially the Arbitration Act (1944), the Myanmar Citizens Investment Law (1994) and the Foreign Investment Law (2012) (OECD, 2014).

For foreign investments, although investors shall follow general rules and conditions set out under the Foreign Investment Act, such rules and conditions, in practice, provide fewer benefits to foreign investors compared with the benefits offered by other countries. For example, Article 29 of Myanmar's Foreign Investment Law 2012 states that a foreign business will be protected from the revocation of its legal status by the government "with sufficient cause". This vague and unclear condition implies that the government can revoke or suspend the business of foreign investors at any time. In addition, as noted earlier, the Foreign Investment Law reserves particular types of businesses - such as telecommunications, electricity aviation and maritime - for Myanmar nationals.

For Private-Public Partnership investment in basic infrastructures, private sector companies can apply to Myanmar's investment promotion regimes. The Myanmar Investment Commission, in particular, considers tax benefits as well as land use rights, with maximum land lease terms of 50 years, renewable twice for 10 years each time (OECD, 2014). In addition, the government established its Special Economic Zone Law 2014 for promoting investment from high net worth investors who invest in long-term special projects under Economic Policy agreements or other agreements made between the government of Myanmar and foreign governments.

Socialist Republic of Vietnam

The Socialist Republic of Vietnam, which has followed a 10 year Economic and Social Development plan (during 2011-2020) set by the Communist Party, is one of the world's fastest-growth emerging countries, with an annual economic growth rate of 15%. The purpose of the development plan is to promote Vietnam as a new and leading industrial country by 2020 (OECD, 2014). To meet this goal, the government of Vietnam plans three significant accomplishments, which are (1) developing a socialist-oriented market economy, (2) enhancing the country's human resources and (3) improving its basic infrastructures and facilities, especially large scale infrastructure projects in cities and expanding transportation systems that link all regions of the country (Lim, 2014). These are the fundamental areas for economic and social development in Vietnam.

Over the past few years, foreign investment in Vietnam has increased significantly, especially investment in the production of imported goods and the construction of mega projects. To date, foreign investors have been granted licenses for six mega projects under Build-Operate-Transfer, or BOT, Contracts (Asian Development Bank, 2012). These include, for example, water and power supply businesses. However, this research has uncovered many issues related to these public-private partnerships. For instance, while the government has been attempting to reform regulations concerning foreign trade and investment to make them equal and fair, local regulations are revised frequently. Investors, therefore, have to prepare for such changes in regulations. Additionally, customs regulations have been challenging issues for investors since the import duty rates of the provinces in Vietnam are not harmonized and custom forms and applications are different. These vague regulations and difficult customs application processes cause hesitation to invest in Vietnam.

Although the government of Vietnam makes fast-paced decisions and solves problems quickly, local political issues remain variable. In some parts of the country, local authorities work closely with the government and follow the main policies strictly, while, in some provinces, local authorities exercise their own discretion and rarely follow the government's policies. Therefore, investors have to follow all these changes and understand each situation clearly in order to invest in the country.

For laws and regulations regarding Private-Public Partnerships in Vietnam, the government passed the Law on Public Procurement in 2014, addressing issues related to cooperation between private and public sectors, and it published its decision on pilot projects involving Private-Public Partnerships for supervising BOO, BTO and BOT projects (Lan, 2016). The decision on pilot projects aims to initiate effective investment system and set guidelines for projects incorporated by the public and private sectors jointly.

Vietnam's recent regulations concerning foreign investment determine clear and precise processes. For example, the Ministry of Planning and Investment (MPI) participates in projects involving foreign investors from the first step and MPI acts as the coordinator between the private and public sectors.

Conclusion and Recommendations

It can be concluded from this research that the social and economic situations in CLMV countries are indifferent regarding foreign investment in public services and basic infrastructures. This may be reflective of the correlation between people, transportation, trade and investment in which development the plans of CLMV countries all originated. In the first phase, CLMV countries all focused on the development of basic infrastructures and promoting investment from local and foreign investors. Today, CLMV countries all face the same problem: current investment laws and regulations are obsolete and unclear and need to be reformed. Moreover, no authority for supervising projects and promoting investment has been determined. In some countries, the government even holds the right to suspend or terminate investment projects. These problems affect investors' confidence and halt investments from foreign investors, especially since the management of projects by the government is uncertain and lacks standardized measures.

Accordingly, OECD established a Private-Public Partnerships Framework offering non-binding recommendations on how to implement effective private-public partnerships. The recommendations aim to strengthen the efficiency of trade and investment competition and to link member countries more effectively. Their purpose is to persuade foreign investors to invest in the region. However, this Private-Public Partnerships framework is only in its beginning phase. Additional mechanisms are required to lead ASEAN to the next phase.

Based on this research, the researcher would like to propose the following four recommendations:

1. CLMV countries should determine their guidelines on the application of the ASEAN Private-Public Partnerships Framework so that the countries can walk in the same direction while developing their basic infrastructures and should set guidelines for reforming laws and regulations related to Private-Public Partnerships in individual members countries.

2. To strengthen the confidence of private investors, CLMV countries should amend unclear local laws and regulations, set principles for public-private partnerships in government projects and determine their dispute resolution procedures related to private-public partnership agreements. The courts, and alternative dispute resolution procedures, should be fast, fair and effective.

3. ASEAN should be a coordinator in negotiating and promoting co-operation and agreement between CLMV countries. Moreover, it should play an important role in linking high net worth investors in CLMV countries and promoting investment in basic infrastructures projects.

4. To facilitate financial and investment support, ASEAN should coordinate negotiations with ASEAN financial institutions or international financial organizations such as the Asian Development Bank (ADB), International Monetary Fund (IMF) and World Bank. In addition, ASEAN should act as an information clearing house on investment in CLMV countries.

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