

**YANGON UNIVERSITY OF ECONOMICS  
DEPARTMENT OF DEVELOPMENT STUDIES PROGRAMME**

**A STUDY ON PUBLIC-PRIVATE PARTNERSHIP (PPP) LEGAL  
FRAMEWORK OF SELECTED ASEAN COUNTRIES (LESSON  
LEARNED FOR MYANMAR)**

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## **Abstract**

Many countries around the world are now using the public-private partnership (PPP) model to implement infrastructure projects. Myanmar has had relatively some experience in PPP practice and administration though it is not structured. This thesis aims to examine the development of the legal and regulatory framework for PPP in three selected ASEAN countries those who are most actively promoting PPP in order to highlight the lessons that can be learned from the regulations of PPP in those jurisdictions. Moreover, regulatory background of Myanmar PPP process is learnt. Research method is descriptive method using secondary data from publications and Key Informative personal interview. This thesis suggests the development of PPP regulatory framework and implementation of some lessons learnt from selected ASEAN countries to improve the framework and performance of PPP arrangements in Myanmar. The study identified that PPP law alone cannot make success PPP projects, but the package of regulatory framework including related laws, enabling business environment and governments' strong will, can promote PPP to be successful.

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## **Abbreviations**

|       |  |
|-------|--|
| ADB   | Asian Development Bank                               |
| ASEAN | Association of Southeast Asian Nations               |
| BOO   | build–own–operate                                    |
| BOOT  | build–own–operate–transfer                           |
| BOT   | build–operate–transfer                               |
| BTO   | Build-Transfer-Operate                               |
| CBM   | Central Bank of Myanmar                              |
| CLMV  | Cambodia, Lao PDR, Myanmar and Vietnam               |
| DACU  | Development Assistance Coordination Unit             |
| DICA  | Directorate of Investment and Company Administration |
| EITI  | Extractive Industries Transparency Initiative        |
| EU    | European Union                                       |
| FDI   | Foreign Direct Investment                            |
| FIL   | Foreign Investment Law                               |
| GDP   | Gross Domestic Product                               |
| IFC   | International Finance Corporation                    |
| IFI   | international financial institution                  |
| IMF   | International Monetary Fund                          |
| ISDS  | Investor-State Dispute Settlement Mechanisms         |
| JICA  | Japan International Cooperation                      |
| JV    | Joint Venture  |
| LICs  | Low Income Countries                                 |
| MIC   | Myanmar Investment Commission                        |
| MICs  | Middle Income Countries                              |
| MIL   | Myanmar Investment Law                               |
| MoPF  | Ministry of Planning and Finance                     |

|       |   |
|-------|---|
| MSDP  | The Myanmar Sustainable Development Plan            |
| NGO   | nongovernment organization                          |
| NPT   | Nay Pyi Taw   |
| OBA   | Output-based aid                                    |
| ODA   | Official development assistance                     |
| PAPRD | Project Appraisal and Progress Reporting Department |
| PFM   | Public Financial Management                         |
| PIU   | project implementation unit                         |
| PPIAF | Public–Private Infrastructure Advisory Facility     |
| PPP   | public–private partnership                          |
| PSCs  | Production Sharing Contracts                        |
| PSP   | Private sector participation                        |
| SDGs  | Sustainable Development Goals                       |
| SEEs  | State Economic Enterprises                          |
| SPVs  | Special Purpose Vehicles                            |
| UKAS  | Unit Kerjasama Awam Swasta                          |

# **CHAPTER I**

## **INTRODUCTION**

### **1.1 Rationale of the Study**

Myanmar had opened up to foreign investors after several decades of shutting up itself by the military government and international sanctions as an outside reason. Since the installation of a civilian government in 2011, Myanmar has taken a set of reform processes to the democratization and to the overall development of the country, in which economic reform is aimed at increasing investment and re-engaging with the global economic community. However, one of the big constraints to economic advancement is the lack of quality infrastructure and also not enough income to commit to large scale investment in infrastructure. Therefore the government is reliant on foreign investment to develop its infrastructure and Public-Private Partnership becomes one of the alternatives. Public Private Partnership can augment public investment and improve the efficiency of infrastructure spending. Since the early 1990s, PPPs have increased in both middle (MICs) and low income countries (LICs) as an alternative source of financing to scale up public capital stock (IMF 2014a, b). Successful PPP projects are predicated on well-designed contracts, a stable economy, good governance and sound regulations, and a high level of institutional capacity to handle PPPs (Asian Development Outlook 2017).

For Di Lodovico (1998), Pongsiri (2002), and Zougari (2003), transparent and strong regulatory and legal frameworks are prerequisites for the private sector's participation in PPPs. Strong frameworks also help ensure that PPPs operate efficiently and optimize the use of public resources. Moreover ADB (2008) and Trebilcock and Rosenstock (2015) stress the importance of creating a PPP unit to help public partners to disseminate information on PPP projects, and to advise on procurement processes to put them on an equal footing with private partners in PPP negotiations. The World Bank (2007) finds that the efficiency of PPP units is highly correlated with the success of a country's PPP program. Reyes-Tagle and Garbacik (2016) find that

effective government institutions increase the chances of countries having active PPP programs, though this has no effect on the level of government spending on PPPs. In many countries, PPPs have not always performed better than public procurement as they have functioned as ad-hoc, off-budget arrangements without robust process for risk assessments. The success of PPPs depends on the effective procurement decisions, the economic and financial feasibility, and their efficient management and oversight under strong fiscal and legal institutions (Sabol and Puentes, 2014).

All in all, PPPs in Southeast Asia face challenges on numerous fronts, including inadequate regulatory frameworks and institutional arrangements for their implementation. The problems often stem from incomplete or unclear regulations, the lack of a champion in government to promote PPPs, and not enough or incompatible support. Public stakeholders also lack the capacity to use PPPs. The lack of credible pipelines for infrastructure PPPs has resulted in an inefficient PPP market in Southeast Asia and high uncertainty over the sustainability of offered projects (Zen, ADB 2019).

Myanmar has no separate PPP law and no specific PPP framework so far. However, the government recognized the importance of providing a certain legal regime to minimize the risks of investment in public infrastructure. IMF, ADB, IFC and JAIKA have spent significant time and resources to improve the capacity to technically support project evaluation and tendering and establish the institutional management capacity to administer PPP projects. This supports the introduction of a PPP legislative framework. In particular, the present study intends to examine the importance of the regulatory framework that hinders the successful adoption of PPP in selected ASEAN countries. The important question to be answered is whether Myanmar is in the right path towards PPP process with sound regulatory and institutional framework, which is aligned with the international best practices and or ASEAN countries' practices.

## **1.2 Objectives of the Study**

The objective of this study is to study the current regulatory framework; status of laws, rules and regulations of Public Private Partnership in selected ASEAN Countries: Thailand, Malaysia and Vietnam. Moreover the study examines the effect of regulatory frameworks on the performance of Public Private Partnerships Projects in the three intended countries and Myanmar.

### **1.3 Method of Study**

This study used descriptive method using secondary data from concerned country-wise literature, their governments' websites, official publications, historical timelines in websites, and analytical review on PPP by business firms, blogs of business circles and mainstream news media. For in-depth study of Myanmar case, Key Informant Interview was conducted for Primary information. Data utilized in this study are collected from Ministry of Planning and Finance, literature books, research papers, various business information Publications, Journals and relevant websites.

### **1.4 Scope and Limitation of the Study**

The Public Private Partnership is a very broad area, has a complex and diversified nature as per country specific priorities. The studied three ASEAN Countries differs in political systems, stages of development and national economic policies. Myanmar also has its own different nature in these three areas. This study mainly focuses on comparing of Regulatory Framework which is concerned with Public Private Partnership. However other related laws are also unavoidable to check against to get the better picture. Some countries updated their PPP Law in English translation and some countries do not translate in English. Getting extracted information of the PPP Law from relevant publications is also a limitation for the study.

### **1.5 Organization of the Study**

This study is organized into five chapters. Chapter one is presenting the introduction of the subject matter, which describes the rationale, objectives, scope and limitations, method of the study and organization of the study. Chapter two is followed by chapter one, which presents the literature review and Chapter three contains regulatory body of each country, the National Economic Policies which connected to the PPP development, PPP Laws, Degrees, Rules and Regulations of each country. Chapter four is concerned with the Myanmar situation, its updates of PPP process and connected issues. And, Chapter five describes the empirical study of PPP regulatory framework, national policies and its connections to PPP projects, PPP related laws, inconsistent laws with PPP nature and enabling business environment in four ASEAN countries including Myanmar. Finally findings and suggestions drawn from the empirical study are presented in Chapter Five.

## **CHAPTER II**

### **LITERATURE REVIEW**

#### **2.1 Concept and Scope of Public Private Partnership**

According to the World Bank (2017), billions of people worldwide still lack access to clean water, electricity, and all-weather roads. To address this important issue, the Global Infrastructure Facility (GIF), cooperation among major multilateral development banks, private investors, and governments, was founded in 2014 to provide an open platform with integrated resources for developing complex international infrastructure PPP projects (World Bank 2017).

The OECD defined PPP as “A contractual agreement between the government and one or more private partners (which may include the operators and the financiers) according to which the private partners deliver the service in such a manner that the service delivery objectives of the government are aligned with the profit objectives of the private partners and where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners”. According to the Canadian Council for Public-Private Partnerships, a PPP is “a cooperative venture between the public and private sectors, built on the expertise of each partner that best meets clearly defined public needs through the appropriate allocation of resources, risks and rewards.” The defining characteristics of a PPP are three: bundled provision of construction and operation; private but temporary ownership of assets; and substantial inter-temporal risk bearing by the public sector. (Eagel, Fischer, Galetovic, 2009)

There is a general agreement that the state is responsible for the provision of public infrastructure and public services and that the state directly provides or facilitates the private sector (through subsidies, tax relaxation or by some other incentives). However, in the last four decades, public-private partnership (PPP) has evolved as new tool for the provision of public services (Yescombe, 2011). Private participation in public services has become a critical feature to help reducing infrastructure gaps

and improving the efficiency of public investment. Public-private partnerships (PPP) have been widely used by governments in both developed and developing countries as an instrument to manage public goods and services (Hall, 2008: TUAC Secretariat, 2010; World Bank, 2014: ADB, 2008).

In a typical PPP contract, the private sector has to design, finance, construct, and manage the infrastructure component, afford services (World Bank 2014), and transfer assets to the host government when the concession period expires (Yuan et al. 2015). The partnership arrangements can vary widely, from informal to strategic.

As per ADB, 2008, within the framework there are several types of developmental PPPs. On a scale from public to private, the types of PPPs are distinguished as Service Contract, Management Contract, Afterimage and Lease Contracts, Concession, Build–operate–transfer (BOT) and similar arrangements (including BTO, BOO, DBO, DBFO) and Joint venture or institutional PPPs.

A PPP project can be in the field of design, construction, financing, operations, and maintenance in which the full payment is made either by the government or the service user. In some cases, the government agency may only make partial payment(s). The key characteristics of a PPP are closely related to the duration and arrangement of the partnership, project financing, and risk allocation (Hall, 2008: Schiere et al., 2015; TUAC Secretariat, 2010; World Bank, 2014). A PPP shares some characteristics of privatization and of public, conventional provision. Regarding ownership and incentives to invest, a PPP is similar to standard regulated privatization. But on the fiscal side and risk bearing, it is similar to public conventional provision. (Eagel, Fischer, Galetovic, 2009)

## **2.2. Cost and Benefit of PPP**

PPPs can be implemented for (a combination of) financial, developmental, efficiency, ideological and political reasons. In the context of development assistance, PPPs play a significant role in promoting better performance and improving efficiency to deliver public goods and services in developing countries. The reason PPPs are becoming more and more important is based largely on the fact that they facilitate increased private engagement in development projects, in practice. Many governments consider PPPs as an advantageous option because they help reduce the cost of public

expenditure. However, the report by TUAC (2010) noted that governments should also be aware that the PPP option can lead to complex contract condition, and it can undermine government administration skills and capacities, which can lead to future risk for the government (commercial risks and regulatory risks).

Public-private partnerships (PPPs) have been widely used in emerging and developing countries, creating both opportunities and fiscal challenges. One of the main challenges is that while governments have increased commitments in guarantees and direct subsidies to promote PPPs. Among them, contractual disputes remain high with significant costs and disputes are more common for guaranteed contracts due to adverse selection and contingent liability effects (Nose, 2017). ADB suggests that a successful PPP must be built upon assessment of: technical issues; legal, regulatory, and policy framework; institutional and capacity status; and commercial, financial, and economic issues (ADB, 2008).

The current global development agenda has been pushed towards Sustainable Development Goals, or SDGs, which have expanded goals beyond poverty alleviation to tackle a broader policy agenda towards sustainable development, particularly in regard to climate change, migration, and social security. To achieve these ambitious goals, global partnership is important. The importance of the SDGs will be reflected in their universal applicability, which means these goals will apply to both developing and developed countries (Wannalak, 2018). Under the changing context and with the emergence of new actors, the arrangement of public-private partnerships (PPPs) has become more attractive for development assistance and aid delivery. In the short-term, drafting contracts with support from multilateral institutions could also help emerging and low income countries promote PPPs to fill infrastructure gap while ensuring fiscal and debt sustainability (Nose, 2017).

Sustainability in procurement can be achieved through an effective use of resources, improving quality and cost optimization (United Nations Global Marketplace, 2015). According to Burger and Hawkesworth (2011), there are a number of factors contributing to the success of PPP, among the significant one is competition amongst private parties. Unfortunately, despite awareness of the relevance of competition in PPP, current causes of PPP failure result from a lack of competition in the procurement process (Kwak et al., 2009). This lack of competition has led to: minimal

innovation (National Audit Office & Infrastructure UK, 2010); unethical decision making (Hassim, 2012); corruption (Anderson et al. 2011); and abuse of diplomatic and political power (Søreide, 2006). Unsolicited proposal is an example of global anti-competitive practice in PPP (Andersen et al., 2010; Verma, 2010) which affects the sustainable goals of procurement. In PPP, unsolicited proposal is an attempt by the private sector to submit a new idea or initiative, in return for an exclusive award behind closed doors from the contracting authority.

An unsolicited proposal is defined as a proposal initiated by the private sector pursuing business prospects and submitted to the relevant authority. The submission is neither requested by the authority nor is it an invitation to bid (Verma, 2010; Yun et al., 2015). Generally, projects proposed through unsolicited proposal are not included in government planning (World Bank Institute, 2012) although they might be feasible through PPP (Yun et al., 2015) in the case where public needs go unnoticed by government (Meyer, 2012; Verma, 2010). An unsolicited proposal is normally regarded as associated with corruption. The perception of the public regarding unsolicited proposal is that it only benefits certain parties (Hodges and Dellacha, 2007). This is not surprising since the proposer often expects the concession to be awarded to them without any competitive bidding process (Hodges and Dellacha, 2007; Søreide, 2006).

The OECD Policy Framework for Investment recognizes that predictability is a key concern for investors. Regulatory change imposes costs and frequent changes can cause uncertainties and compliance costs. Regulatory stability has a value in itself and should be included in the cost/benefit analysis for new regulation. Laws and other legal normative documents are revised rapidly, with little clarity about which requirements are invalidated by later revisions. Uncertainty is increased when implementing regulations are delayed (OECD, 2011).

PPP's are complicated long term transactions that are affected by many areas of law and any one area of law may cause insuperable problems for the implementation of PPP's in a country so that any investor have to carry out a full due diligence of the existing legal framework of a country to ensure that the legal environment is sufficiently attractive for it to bid for a project. Successful PPPs depend on the

effectiveness of the national and municipal legislative and regulatory structures (Smith, 2012).

The Public Private Partnerships (PPPs) are a procurement method used in ASEAN and around the world, the use of PPP procurement is becoming increasingly common method for satisfying the increasing need of infrastructure. PPP projects are found in all sectors of infrastructure procurement including transportation (roads and rail), utilities (electricity and water), social (hospitals and prisons) and information technology. Lack of rule of law alters the choice between conventional provision and PPPs in favor of the former, as there is less risk of regulatory takings in a short term construction contract than in a long lived PPP. (Eagle, Fisher, Galetovic, 2009) Regulation is important when the service involved is a natural monopoly which has significant market power. Whereas the rights and obligations in a PPP concession agreement rely on regulatory interpretation, typically, the functions of a regulator becomes very important to establish standards for the terms and conditions for supply of services, regulate rates (tariffs) and other service charges, establish market rules for the sector (issue, review and cancel licenses), monitor performance of the regulated entities, arbitrate and settle disputes within the sector. Some areas of common concern are clarity of responsibilities: which department is responsible, who should deal with the private sector deal, and tariffs are too low to be economically viable, how to be reviewed/regulated (Smith, 2012).

### **2.3 Establishing PPP Regulatory Framework**

For a successful PPP, it is important that there are sound, well-functioning, and transparent legal and regulatory frameworks. Countries may or may not have specific PPP laws(s), and in many cases, there could be other enabling legislation relating to specific sectors, procurement, or private sector participation in projects. The idea is to assess the level of clarity to carry out PPPs under the existing law and to gauge if there are features that would need to be incorporated into the framework through amendments in existing legislation/ regulations / rules, or through new new/additional legislation or adequate guidelines (World Bank, 2016). Some countries enact special PPP laws with the reasons that the existing legal framework may not be clear or comprehensive, or constrains the Government's ability to structure and manage PPPs well. The same can be achieved by adapting existing laws to accommodate PPPs. A

PPP-specific law can help raise the profile and demonstrate political commitment to the PPP program although care is needed. The nature of the legal framework for PPP depends heavily on the type of legal system in place. There are two main types of legal systems in the world: common law, and civil law. Some common law countries also adopt PPP laws, as a more binding commitment by government than a PPP policy (Yescombe, 2013).

Pongsiri (2002) emphasizes the establishment of a transparent and sound regulatory framework as a necessary precursor to private sector participation in a PPP. Regulation provides assurance to the private partner that the regulatory system includes protection from expropriation, arbitration of commercial disputes, respect for contract agreements, and legitimate recovery of costs and profit proportional to the risks undertaken. A sound regulatory framework can also increase benefits to the government by ensuring that essential partnerships operate efficiently and optimizing the resources available to them in line with broader policy objectives (Lodovico, 1998; Zougari, 2003).

PPPs can be implemented on a one-off basis without any specific supporting legal and institutional framework. However, most countries with successful PPP programs rely on a sound PPP framework (PPP Reference Guide Ver.3). Establishing PPP framework is to avoid conflict with any other existing relevant laws (Yescombe, 2013). Establishing a PPP framework communicates government's commitment to PPPs and it fosters efficiency in the governance of the PPP program—that is, it promotes accountability, transparency, and integrity. It ensures that selected projects are aligned with the government's development strategy, generate the greatest economic returns for society as a whole, and do not expose the government to excessive fiscal risks. It also guarantees that consultation with stakeholders will be systematically undertaken and fair compensation awarded to those that are entitled to receive it. This generates greater private sector interest and public acceptance of PPP programs. These core principles are described in Good Governance for PPPs (World Bank, 2016).

**Regulation by Contract:** Many governments implement PPPs without creating an overall sector regulatory regime. A common approach to sector regulation is to address tariff and service standards directly through the contract with a private service

provider. In this approach, no special tools or regulatory bodies are required. The contract itself sets out the service standards to be reached. In the case of a concession contract, the contract will also sets out what the tariff is, and rules and processes for adjusting the tariff from time to time. In a lease or afterimage contract, tariff setting powers may be retained by the government, but the payment to the operator—which is also linked to the amount of the service supplied—is set in the contract. (Public-PPP Guide Book, Ver.2.0)

As per PPP Guide Book, Ver.2.0, the components of a comprehensive PPP framework typically include the following:

**PPP Policy:** The first step in establishing a PPP framework is often for the government to articulate its PPP policy. PPP policy is difficult to define, and is used in different ways in different countries. Public Private Guide Book, Version 2.0 defines PPP Policy as a course of action to deliver public services, and the guiding principles for that course of action. A PPP policy would typically include:

- PPP program objectives—why the government is pursuing a PPP program
- PPP program scope—what types of projects will be pursued under the PPP policy

Implementing principles—how PPP projects will be implemented, to ensure the PPP program meets its objectives. PPP policies often set out implementing principles—the guiding rules, or code of conduct under which PPP projects will be implemented. These principles set out the standards against which those responsible for implementing PPPs should be held accountable. Principles are often supported by regulations and processes, detailing how the principles will be put into practice. For example, PPP Implementing Principles in Peru lists the implementing principles established in Peru’s national PPP law.

- **Legal framework**—the laws and regulations that underpin the PPP program—enabling the government to enter into PPPs, and setting the rules and boundaries for how PPPs are implemented. This can include PPP-specific legislation, other public financial management laws and regulations, or sector-specific laws and regulations.
- **Processes and institutional responsibilities**—the steps by which PPP projects are identified, developed, appraised, implemented, and managed, ideally within the Public Investment Management system; and the roles of different entities in that process. A

sound PPP process is efficient, transparent, and is followed consistently to effectively control the quality of PPP projects.

- **Public financial management approach**—how fiscal commitments under PPPs are controlled, reported, and budgeted for, to ensure PPPs provide value for money, without placing undue burden on future generations, and to manage the associated fiscal risk.
- **Other arrangements**—how other entities such as auditing entities, the legislature, and the public participate in the PPP program, and hold those responsible for implementing PPPs accountable for their decisions and actions. The sections of this module describe each of these elements of a PPP framework, providing examples and guidance for practitioners.

In practice, these elements are closely interrelated. For example, a well-controlled process for developing PPPs requires assessing their fiscal consequences, which implies some Finance Ministry control at different stages of the project cycle. This is essential for sound public financial management of the PPP program. Comprehensive public reporting of fiscal commitments to PPPs in turn enables effective oversight of the PPP program (PPP Guide Book Ver.2.0).

Anthony Smiths mentioned that the policy should contain, overall Policy, objectives, direction, benefits, costs, etc., legal and regulatory framework, risk management framework, procurement guidelines and model PPP contracts, financial guidelines including tolls and public sector support, the project cycle and the role of advisors, technical design and service standards and procedure for approval of projects (Smith, 2012).

Also importance is the presence of strong structure at the level of central administration to steer and guide policy implementation. PPPs indeed often falter because of hastily prepared tender documents and contracts and the negotiations taking place between unequally qualified and experienced professionals, mainly to the disadvantage of the representative from the public sector (Zougari, 2003). PPPs should not be expected to substitute for action nor responsibilities that properly rest elsewhere. In particular, the public sector should continue to set standards and monitor product safety, efficacy and quality and establish systems whereby citizens have adequate access to the products and services they need. In other words, PPPs do

not imply “less government” but a different governmental role. Because of the stronger position of the private partner, more skilled government participation is often needed (Scharle, 2002).

Anthony Smith highlighted that a Policy Framework is necessary to encourage PPP Investment, inform widely within Government, give Government officials the confidence to use PPP and inform widely Stakeholders including consumers/users. Benefits are earned not only to facilitate planning and implementations, instill confidence and understanding by the private sector, but also to provide an enabling environment for PPP which defines the role of the Government in the implementation of PPPs (Smith, 2012).

Many developing countries have made reforms in economic regulation systems within the last decade, significant challenges have risen due to increasing globalization of trade, finance and technology. Most economies have witnessed the swift growth of private sectors, a dramatic increase in foreign capital flows and rapid evolution of financial markets and instruments; however, some have found it difficult to align economic governance strategies to the changing global realities. Economic regulatory frameworks have not come out as it is formulated in economic development activities. To put the regulatory burden into perspective, it is important to measure the policy and institutional constraints on the overall "enabling environment" which are an important determinant of the efficient functioning of the markets. In doing so, it identifies key areas where states need to design high-quality regulation. Most developing countries have undertaken liberalization and privatization as a first step toward free market regimes, though progress has been uneven (PPP Guide Book Ver.2). The importance of competitiveness and competition in the global market place has led to a need for establishing the incentive and regulatory framework which would provide the enabling environment for the market forces to thrive. Whereas the cornerstone of the new development paradigm is a private-sector led growth strategy, the challenge to deregulate and reform becomes unique in developing countries which may have a lack of a rule of law and property rights, weak judicial institutions and ineffective or non-existent commercial codes and bankruptcy laws. Moreover state management of the regulatory reform process is not always free of political constraints. Government interference and corruption impact on private sector firms by increasing business risk and costs. However extent and form of regulation has differed

from country to country. Moreover, where successful, regulation has been complemented by other reforms aimed at enhancing the efficiency of the private sector, and overseen by the regulatory body.

According to the PPP Knowledge Lab, in both civil and common law jurisdictions there may also be specific laws that apply to aspects of the PPP process. These can include:

- Procurement law—the transaction process for a PPP must typically comply with public procurement law and regulations, unless PPPs are specifically exempt
- Public financial management law—institutional responsibilities, processes, and rules established in public financial management laws and regulations can contribute to the PPP framework. For example, this could include project approval requirements, fiscal limits, budgeting processes, and reporting requirements
- Sector laws and regulatory frameworks—PPPs are often implemented in sectors that are already governed by sector-level law and regulatory frameworks. These may constrain the government’s ability to contract with the private sector, or provide rules for doing so
- Other laws affecting the operation of private firms, which also apply to PPP companies, and should be taken into consideration when defining PPP projects and processes. These can include:
  - Environmental law and regulations
  - Laws and regulations governing land acquisition and ownership
  - Licensing requirements, particularly for international firms
  - Tax rules
  - Employment law

These laws taken together may comprise the legal framework for implementing PPP—that is, there may be no need for PPP-specific legislation. (“PPP Knowledge Lab”)

Policy stability reduces the uncertainty and risk from business decisions; transparency and accountability. As a whole, the legal, institutional and policy framework provides the setting for the economic and social regulation to be effective. Legal regulation encompasses property and contractual regulations setting quality standards and

establishing criteria governing fraud and discrimination. The benefits of globalization and free trade are unlikely to trickle down unless de-regulation and regulatory reform are complemented by other policy and institutional reforms which together constitute the "enabling environment". Stable and outward-looking regimes air towards reducing the burden of regulation. The framework for economic regulation must be equally explicit. This may entail creating an independent regulator, a regulatory unit within a part of government, or another form of regulatory capacity. (PPP Handbook, ADB). Some governments establish teams aggregating staff with specific knowledge on PPPs and these dedicated teams are often called 'PPP Units'. Gatekeeping PPP framework units may be departments within ministries or agencies, units with some kind of special status but reporting to ministries, autonomous government entities, or even government-owned or public-private corporations (Yescombe, 2013).

Enabling legal, regulatory, and policy environments are critical to a sustainable PPP. At a baseline level, a legal environment that can support private sector involvement in critical services is needed. The legal environment has to minimize the likelihood of corruption and must be sufficiently reliable as to encourage private participation and investment. To the degree that the legal and judicial environment is not defined, investors and project participants will see the project as unpredictable and highly risky. Equally, possible investors must have confidence that the laws and the contract will be respected and can be enforced in the courts or through arbitration, if necessary (ADB, 2008).

World Bank Support Mechanisms guides for institutional framework that although legal and regulatory frameworks enable PPPs, it is important that there is a second tier of institutions and processes, which facilitates the implementation of the law, regulations, rules, and policies. In the absence of institutionalization, it is likely that PPPs will not happen or the pipeline will be very slow to develop. In addition, the entities entrusted with specific roles and responsibilities under legislation will be unable to fulfill their responsibilities appropriately. Institutionalization means verifying the existence of institutions in the first place, followed by an assessment of the influence, authority, and maturity of the institutions and processes and the level of standardization, as well as an evaluation of the government communication and stakeholder engagement strategy (World Bank, 2016).

**Good Governance for PPPs:** The United Nations Economic Commission for Europe (UNECE) Guidebook on Promoting Good Governance in PPPs defines governance *as* the processes in government actions and how things are done, not just what is done. All elements of the PPP Framework described in Module 2 of the Reference Guide contribute to the governance of the PPP program. UNECE describes good governance as encompassing the following six core principles:

- Efficiency—use of resources without waste, delay, corruption, or undue burden on future generations
- Accountability—the extent to which political actors are responsible to society for their actions
- Transparency—clarity and openness in decision-making
- Decency—development and implementation of rules without harming people
- Fairness—equal application of rules to all members of society
- Participation—involvement of all stakeholders

One of the aims of establishing a sound PPP framework is to ensure these principles of good governance are followed in the implementation of PPP projects (UNECE 2008).

OECD sets out guiding principles for governments on managing PPPs. The recommendations cover three areas: (1) establishing a clear, predictable, and legitimate institutional framework supported by competent and well-resourced authorities; (2) grounding the selection of PPPs in value for money; and (3) using the budget process transparently to minimize fiscal risks and ensure the integrity of the procurement process. These built on earlier OECD principles for private sector participation in infrastructure (OECD 2007b).

To this end, many governments define processes and institutional responsibilities for PPPs—that is, the steps that must be followed when developing and implementing a PPP project, and the entities responsible for each step. It provides examples and resources for practitioners on:

- Establishing the PPP process. There are several steps that a government must usually take to implement a PPP project successfully. Defining a standard PPP process, with approvals required at key points, helps ensure these necessary steps are taken consistently and efficiently. PPP Process describes a typical PPP process, and gives examples from different countries' PPP programs

- Defining institutional responsibilities for PPPs—that is, which entity will play what role at each step. Institutional arrangements and the allocation of functions differ from place to place—depending on the particular needs of the PPP program and the existing institutional responsibilities and capacities (OECD 2007b).

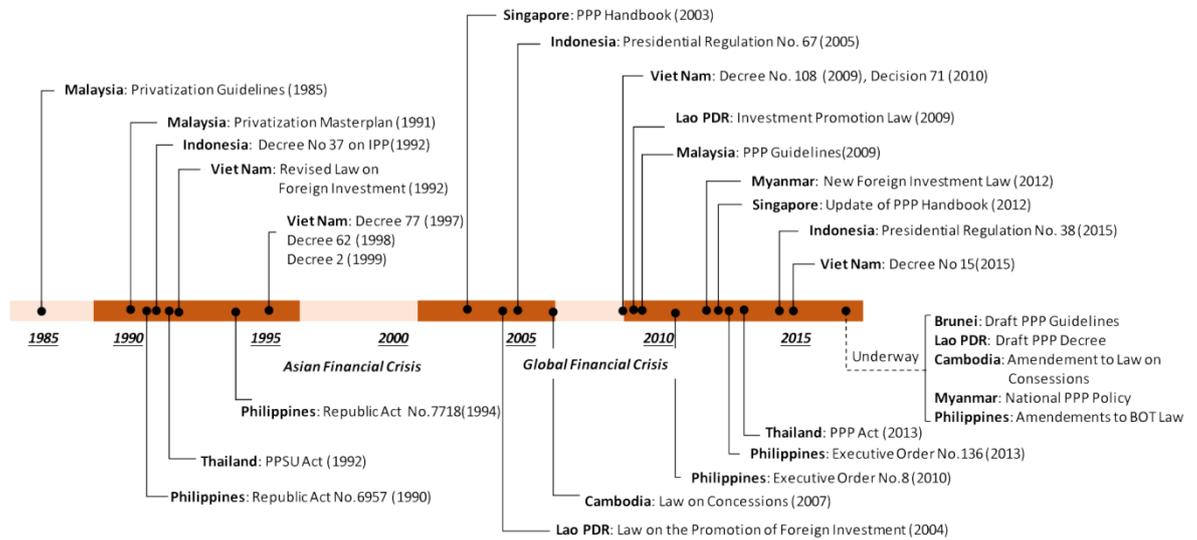
Examples of institutional responsibilities for:

- Implementing PPPs—that is, doing the day-to-day work to drive forward the PPP process through the steps defined below: from identifying potential projects, appraising, structuring, drafting the contract, bidding it out, and managing the contract after it is signed.
- Reviewing and approving PPPs—that is, overseeing the PPP process, typically through review and approvals at key stages, to ensure that the project represents a good investment decision for the government
- Establishing PPP units- Some governments establish teams aggregating staff with specific knowledge on PPPs. The functions of these PPP Units vary widely, as do their location within Government and structure—reflecting the variation in priorities and constraints facing PPP programs both between governments, and over time as the PPP program evolves (OECD 2007b).

ADB, 2019 highlights Public institutions to monitor PPPs carefully to ensure that performance targets are met and that risks are allocated to the party best suited to manage them. Having a dedicated PPP unit plays an important role in a country's PPP program and can promote better-performing projects. Setting up a dedicated PPP unit can significantly contribute to increased private participation and project success.

## 2.4 Regulatory Nature of PPP in Selected ASEAN Countries

Figure 1: History of Developments of Legal Frameworks in ASEAN PPP



BOT = build–operate–transfer, IPP = independent power producer, Lao PDR = Lao People’s Democratic Republic, PPP = public-private partnership, PPSU = Private Participation in State Undertakings.  
Source: Compiled by authors.

Source: National Public-Private Partnership Frameworks in ASEAN Member Countries, ERIA, 2015

ASEAN’s commitment to spend more on infrastructure is vital in order to boost economic and social development through the improvement of basic necessities such as power, water and transport throughout the region. The IMF estimates that each dollar spent on capital spending raises a country’s output threefold. The region will need to spend US\$950 billion by 2020, if its economies are to grow and develop, according to Stephen Groff; Regional Vice President of the Manila based Asian Development Bank (ADB, 2016).

Table (2.1): Summary of Major Risks and Mitigation Measures in ASEAN Public–Private Partnership

| Risk Category            | Examples of Mitigation Measures that Private Sector Expects   |
|--------------------------|---|
| 1. Revenue Risk          | Offtaking contract by a state-owned utility company, availability or lease payment, minimum revenue guarantees, viability gap funding                               |
| 2. Currency Mismatch     | Access to long-term local currency bond or infrastructure fund, availability of cross-currency derivatives, hard currency denominated offtaking contract            |
| 3. Political Risk        | The government’s supporting letter, guarantees through a contingent liability fund by the central government, political risk guarantees by ECAs or MLAs             |
| 4. Land Acquisition Risk | Overall responsibility assumed by the government, funding support from Land Funds, clarification of timeframe or compensation/ dispute resolution mechanisms by Law |

Source: National Public-Private Partnership Frameworks in ASEAN Member Countries, 2015.

ASEAN as whole, major risks of PPP implementation are most similar as revenue risk, currency mismatch, political risk and land acquisition risk. Then mitigation measures that private sector expects are more or less the same, but some degree differs in each country.

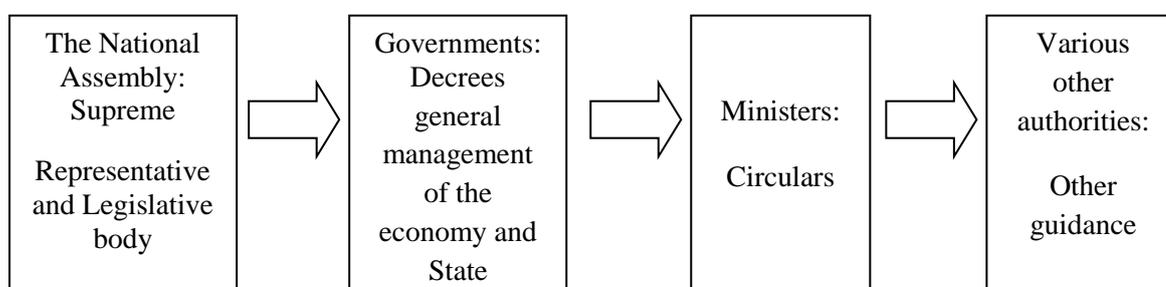
#### 2.4.1 Vietnam

Vietnam is a unitary Marxist-Leninist one-party socialist republic, situated in the easternmost on the Indochina Peninsula. It is the 14<sup>th</sup> most populous country in the world and the 3<sup>rd</sup> largest in Southeast Asia. The Communist party initiated a series of economic and political reform that facilitated Vietnamese integration into world politics and the global economy since 1986. As a result of the successful reforms, Vietnam has enjoyed a high GDP growth rate, 6% in 2018, consistently ranks among the fastest-growing countries in the world (“Vietnam country profile”). .

**Regulatory Environment in Vietnam:** Vietnam is a one-party communist state. The National Assembly is the supreme representative and legislative body, determining both domestic and foreign policy. It is elected by universal suffrage every five years,

with the last election held in 2016. The Vietnamese legal system consists of a constitution, codes, laws, ordinances, decrees, decisions, circulars, directives and official letters (Lam, 2015).

Table (2.2) Hierarchy of political/legal system in Vietnam



Source: ADB, 2012

**PPP Regulations:** Vietnam has been undertaking public/private infrastructure projects since the Doi Moi era of the late 1980’s. References to special concessions for BOT projects have been found in early versions of the Foreign Investment Law. The first Decree on BOT was published in 1993 and revised in 1998 and 2007. The latest enactment, in 2015, Decree No. 15/2015/ND-CP (Decree 15) unified Decree 108/2009/ND-CP (relating to the BOT regime) and Decision 71/2010/QD-TTg (relating to the pilot PPP scheme). Decree 15 effectively streamlined investment decision making by combining the concepts under the previous legislation (“Financier worldwide”). Under Decree 15, a Public Private Partnership is defined as “an investment form to be implemented based on a contract between an authorized state agency and (an) investor(s) and the project enterprise to implement, manage and operate an infrastructure project and to provide public services”.

**Investment Sectors:** All PPP projects will be categorized into projects of national importance and Group A, B and C projects, as defined in the public investment legislation, Decree 12/2009/ND-CP (as amended) (“Vietnam Briefing”).

**Selection of PPP projects:** PPP projects are classified by way of importance, being (i) projects of national importance or (ii) into Groups A, B or C. Feasibility studies for those projects classified under (i) need to be approved by the Prime Minister.

**National Assembly:** For Group A, projects require the Prime Minister’s approval and, for Groups B and C, projects require approval by a relevant ministry or a provincial people’s committee (“Vietnam Briefing”). Decree 15 requires that the proposed PPP projects must meet all specific eligibility requirements.

**Lender’s step-in rights:** Article 33 of Decree 15 provides for Lender’s step-in rights, which gives lenders the right to step in and take over the PPP project (ASEAN PPP Guides).

**State capital participation, State Guarantees and Incentives:** There is no universal limited percentage of the state capital portion to the investment capital. It will be decided project-by-project based on project proposal and feasibility study (ERIA, 2015). ‘State investment capital’ includes capital from the state budget, Government Bonds, local government bonds, ODA sources and concessional foreign donor loans (“Vietnam Briefing”). Private initiated projects will not be eligible for State invested capital. Article 57 of Decree 15 expressly authorizes ‘the Prime Minister to appoint a State agency to act on behalf of the Government to provide a guarantee on the provision of raw materials, on the sale of products and services, and on other contractual obligations to the investors, the project company or other enterprises participating in project implementation, and a guarantee for the obligations of State owned enterprises selling fuel and raw materials to, and to purchase products and services of the investor or the project company’ (“Legal Guide to Investment in Vietnam “). The areas of investment incentive include tax incentives, rights to mortgage project assets, rights to use land, rights relating to the purchase of foreign currency and foreign currency balancing, rights to utilize public services and rights relating to ownership of assets in accordance with applicable law (ASEAN PPP Guides).

**Project Development Facility:** There is a concept of Project Development Facility (PDF). ADB and the French Development Agency (AFD) have provided about US\$30 million for PDF to the government.

**Ministry of Justice Opinions:** To support financing of PPP projects, the Ministry of Justice provides opinions on the project contracts and Government Guarantees. The MOJ legal opinion will cover the project agreements, any Government guarantee and any other Document related to the project (e.g. a land lease), which are signed by

State Agencies. A State owned enterprise is not necessarily included in the definition of State Agency (ASEAN PPP Guides).

Regulations on PPP was issued under decree No. 15/2015/ND-CP (the New PPP Regulations) and take effect from 10 April 2015 and is the replacement of the previously issued pilot PPP regulations (the pilot PPP Regulations-decision 71, dated November 9, 2010) and the existing regulations on build-operate-transfer (BOT) projects, build-transfer-operate (BTO) projects and build-transfer (BT) projects issued under decree No. 108 on 27 November 2009 (the BOT Decree) (Allen & Overy, 2015). Since these decrees became effective, one Prime Ministerial decision and eight implementing circulars have been issued, which contain wide ranging detailed regulations covering a number of issues ranging from the method of preparation of feasibility studies for PPP projects to PPP project registration procedures (“Vietnam Briefing”).

In addition to the PPP Decree and its guidelines, general laws (e.g. the Investment Law No. 67/2014/QH13 dated 26 November 2014, the Bidding Law No.43/2013/QH13 dated 26 November 2013, Decree No.30/2015/ND-CP dated 17 March 2015 guiding the Bidding Law on the investor selection (Decree No.30”); the Construction Law No.50/2014/QH13 dated 18 June 2014 and the Law on Public Debt Management No.29/2009/QH12 dated 17 June 2009) continue to be applicable to PPP projects.

**PPP Decree 63/2018 (Decree 63)** was issued with effect from June 19th, 2018 to replace Decree 15/2015 specifying the areas, investment conditions, and the procedures for public-private partnership (PPP) projects in Vietnam.

**Approval Authority:** For projects of national significance, the National Assembly is the sole approval authority, while the Prime Minister can authorize investments in certain types of Group A projects, which receive capital from the State budget, including Build-Transfer (BT) projects. In addition, the ministerial-level agencies can authorize projects that do not fall under the aforementioned cases (OECD, 2018).

**PPP Projects:** Vietnamese government encourages PPP projects in certain types and other areas outside of the pronounced types can be managed by the Prime Minister’s decision (OECD, 2018).

**PPP Promoting Institutions in Vietnam:** Ministry of Planning and Investment is the central coordinating ministry and provincial level people's committee for execution of PPP projects, including technical support and capacity building, formulation of the legal system for PPP and mobilization of capital for investment preparation costs, assisting the government to uniformly administer investment activities in the PPP form on a nationwide basis. Ministry of Planning and Investment is expected to be an advisor for investors preparing a PPP project (OECD,2018).

**PPP Steering Committee:** It was established in 2012. In addition, each ministry/ministry level agency/provincial people's committee may establish a PPP coordinating unit, responsible for management.

**Transferring projects:** An investor can transfer partial or entire rights and duties of a project to a lender or another investor only when the construction is complete or the project is operational (OECD, 2018).

**Incentives:** Investors in PPP projects will receive incentives such as preferential corporate income tax, and reduced or exempted land use fees during project implementation. In addition, the goods imported for the project will get preferential treatment with respect to import/export taxes. Contractors will also receive benefits in the form of tax incentives (ADB, 2018).

#### **2.4.2 Thailand**

Thailand is a country with a relatively well-developed infrastructure compared with neighboring ASEAN countries, a free-enterprise economy, and generally pro-investment policies. It is a middle-income country with GDP 3.8 for 2018 (World Bank, 2018).

**Regulatory Body in Thailand:** The Legislative Branch of the government is the Parliament, also called The National Assembly which consists of the two legislative bodies, the House of Representatives and the Senate (Walker, 2000) each with its own responsibilities. The House of Representatives consist of 400 members of parliament directly elected from single-member districts (constituencies) and 100 members selected from party lists with selection determined by the percentage of votes each of the major parties received in the elections (Walker, 2000). The Senate, the "upper

house of Parliament", under the new constitution, will consist of 200 members elected from Changwat (provincial) districts, but without any political party affiliation. Senators serve for a term of six years with the term of four years (Walker, 2000). The Senate has the duty to enact all of the required "organic laws" if the National Assembly fails to enact those laws within the time limits specified (Walker, 2000).

The House of Representatives is the first to consider most new legislation, proposed by the Cabinet or by a group of Members of Parliament. If the House approves a proposed bill, it is sent to the Senate for consideration. If the Senate approves the bill as submitted to it, and each house approves the bill on the third consideration by that house, the bill will be submitted to the Prime Minister for forwarding to the King for his approval.

Apart from that the Council of Ministries has the power to submit urgent legislation to the King for immediate implementation by Royal Decree, to be followed by consideration by the Parliament within one year (Walker, 2000).

**Private Participation in State Undertakings Act, B.E.2535 (1992) (PPSU Act):**

The first legal framework for PPP regulation in Thailand is the Act of Private Participation in State Undertakings, B.E.2535 (1992) (PPSU Act), which was originally enacted by the government as legislation that would ensure transparency in the undertaking of large-scale PPP projects (especially, those valued at over 1 billion baht) (ADB, 2017).

**Private Investment in State Undertaking Act 2013 (PISU Act):** PPPs in Thailand are regulated by "Public Participation in State Undertaking" BE 2556 (2013) (PPISU/PISU). PISU Act defines Public Private Partnership as "Public sector's investment with the private sector in any form or allowing private sector investment by issuing permit, granting of concession or of any form of right". This law applies to "private investments in state undertakings except for concessions under the law on petroleum and mining concessions under the law on minerals A private investment in state undertaking have specific principles. There is a Strategic Plan for Private Investments in State Undertakings and PPP Master Plan was approved by the Thai Government Cabinet ("SEPO"). The PPISU is supplemented by certain notifications.

**The Private Investment Promotion Fund** is established and funded from Government subsidy and the Government annual budget, official fees from the sale of auction documents, money or properties obtained from the operation of the Fund and interest of money or properties of the Fund to cover the cost of surveys and amendment of the Strategic Plan, hiring advisors and to cover management and operation expenses of the Fund (“SEPO”).

As Project Development, all projects with a project value of 1,000,000 Baht or a higher prescribed by the Minister, must comply with the procedures set out in the PISU. The Host Agency must hire external consultants to conduct a feasibility study, covering project costs and comparison of costs and values, PPP types and risk identification and management (“PPP Guidelines”).

Table (2.3) Main Features of Private Investment in State Undertaking Act 2013 (PISU Act)

| <b>STANDARDIZATION</b>                            | <b>FACILITATION</b>   | <b>TRANSPARENCY</b>   |
|---|---|---|
| PPP Master Plan (5 years)                         | Streamlined procedure   | Pool of Experts for Selection and Monitoring Committees         |
| PPP Committee (chaired by PM) and PPP Unit (SEPO) | Precise timeframe for project consideration and bidding processes | Prohibitions for Related person to serve private counterparties |
| Value for Money Concept                           | Project Development Fund  | Disqualification Criteria for Advisors and Bidders              |
| Standard Contracts                                |   |   |
| Guideline for Small Projects                      |   |   |
| PPP Project Database                              |   |   |

Source: State Enterprise Policy Office, Ministry of Finance, Thailand

**State Undertaking Policy Committee:** The PISU sought to revitalize the PPP sector by establishing the Private Investment in State Undertakings Policy Committee, chaired by the country's prime minister, to guide and oversee PPP activities and add clarity and controls to the process of proposing and conducting PPP projects. PPP Policy Committee is made up of about 19 members and the Prime Minister as

Chairman. It was tasked with working with the State Enterprise Policy Office (SEPO) to prepare a strategic plan establishing a policy framework for PPP investments in various state activities, including the designation and prioritization of projects, the targets for private investments, and implementation timeframes. The committee was directed to consider the opinions of state agencies and members of the public. The strategic plan was subject to approval by the Cabinet (“SEPO”).

According to the PISU Act, a government agency, state enterprise or other state agency or a local administrative organization can act as procuring authorities, either on their own or collectively. In addition to the PPP procuring authorities, there is a specialized government entry that facilitates the PPP program (PPP Unit) - State Enterprise Policy Office (SEPO) which is to act as the central PPP Unit, Secretariat to the PPP Committee and to be in charge of multi-agency coordination. The roles and responsibilities are to draft Strategic Plan for submission to the Committee, to study and analyze projects and submit opinions to the committee, to prepare draft monetary or fiscal measures for supporting private investments in state undertakings, to submit opinions to the committee in the case of a no application of the selection by bidding process, to draft rules and procedures for private and finally to engage in technical collaboration, research and development with state agencies and private agencies, both domestic and foreign for the development of personnel competencies to ensure knowledge and expertise for the efficient compliance of this Act (“SEPO”).

**PPP Master Plan 2017-2021:** First PPP Strategic Plan (2015-2019) was replaced by 2nd PPP Strategic Plan (2017-2021). The main purpose is to determine the direction for sectors and types of investment commercial and social in which private participation within 5 years. The 3 main compositions of the PPP Master Plan are Constitution (Directive Principles), National Economic and Social Development Plan and Ministerial Policies. There are three main benefits such as projects receiving support and close monitoring from the public sector, creating clarification for both private and public sector, subsectors that require private sector investment (Opt-out), subsectors that the government encourages participation and investment from Private sector (Opt-in) and generate interest and attract private investment in subsectors that require private sector investment (ADB, 2017).

**Eastern Economic Corridor (EEC):** The Eastern Economic Corridor ("EEC") Act, enacted on February 1, 2018, is to accelerate infrastructure development and encourage local and foreign investments in the three eastern provinces of Thailand including Rayong, Chon Buri and Chachoengsao– off the coast of the Gulf of Thailand and spans a total of 13,285 square kilometers. With the EEC, Thailand aims to develop its eastern provinces into a leading ASEAN economic zone. The EEC Act will govern all PPP projects within the three provinces and will have its own governing committee called the 'EEC Policy Committee' which will shorten the project approval process to eight months (ADB, 2017). It is the law for trade and investment in the Eastern Economic Corridor (EEC) identified four “core areas” essential in making the EEC a renowned economic zone: (1) increased and improved infrastructure; (2) business, industrial clusters, and innovation hubs; (3) tourism and; (4) the creation of new cities through smart urban planning (ADB, 2017).

**General Laws related to PPP:** Supporting regulations include the following:

- Notification of the Private Investments in State Undertakings Policy Committee Re: Required Details in a Project Agency’s Project Appraisal Report B.E. 2557 (2014)
- Details of invitation notice, document of proposal for investment participation, method for announcing the invitation, selection methods of the selection committee prescription of bidding security and performance security, B.E. 2558 (2015)
- Notification of the Public–Private Partnership in State Undertaking Policy Board Re: Strategic Plan for Public–Private Partnership in State Undertaking B.E. 2558–2562 (2015–2019)
- Notification of the Office of State Enterprise Policy Board Re: Standard Provisions of an Investment Partnership Contract B.E. 2558 (2015) (the Standard Provisions Notification)
- Announcement of the Public–Private Partnership in State Undertaking Policy Board Re: Characteristics of Amendment to Investment Partnership Contract in Material Content B.E. 2558 (2015)
- The rules and procedures for the private sector to invest in projects with a value of less than B1 billion (2016) (ADB, 2017)

### **2.4.3 Malaysia**

Malaysia is a multi-ethnic and multi-religious country in Southeast Asia and one of the wealthiest and the most developed countries in the region with annual GDP 3.3 in 2018. It is a middle-income country and attempting to achieve high-income status and to move farther up the value-added production chain by attracting investments in Islamic finance, high technology industries, biotechnology, and services (World Bank, 2018).

**General Regulatory Overview of Malaysia:** Malaysia has a parliamentary democracy that the Constitution establishes the Federation as a constitutional monarchy having the Yang di-Pertuan Agong as the Head of State whose roles are largely ceremonial. It provides for the establishment and the organization of three main branches of the government: the bicameral legislative branch called the Parliament, which consists of the House of Representatives (in Malay, Dewan Rakyat) and the Senate (Dewan Negara); the executive branch led by the Prime Minister and his Cabinet Ministers; and the judicial branch headed by the Federal Court (“Constitution of Malaysia”).

**Federal, state and concurrent legislative lists:** Parliament has the exclusive power to make laws over matters falling under the Federal List (such as citizenship, defense, internal security, civil and criminal law, finance, trade, commerce and industry, education, labor, and tourism) whereas each State, through its Legislative Assembly, has legislative power over matters under the State List (such as land, local government, Syariah law and Syariah courts, State holidays and State public works). Parliament and State legislatures share the power to make laws over matters under the Concurrent List (such as water supplies and housing) but Article 75 provides that in the event of conflict, Federal law will prevail over State law (“Constitution of Malaysia”).

**State Islamic laws and Syariah courts:** States have legislative power over Islamic matters listed in item 1 of the State List (“Constitution of Malaysia”).

#### **Regulatory Background of PPP in Malaysia:**

The Prime Minister’s PPP Department of Malaysia defined PPP as a form of cooperation between the public-private partnership in which a standalone business is

created, funded and managed by the private sector as a package which includes the construction, management, maintenance, repair and replacement of public sector assets including buildings, infrastructure, equipment and facility (UKAS, 2017). In the Ninth Malaysia Plan (2006), Public Private Partnership was defined as: ‘the transfer to the private sector the responsibility to finance and manage a package of capital investment and services including the construction, management, maintenance, refurbishment and replacement of the public sector assets which creates a standalone business. The private sector will create the asset and deliver a service to the public sector client. In return, the private sector will receive payment commensurate with the levels, quality and timeliness of the service provision throughout the concession period’. (9<sup>th</sup> Malaysia Plan)

Malaysia has never had a legislative framework specifically for PPP projects, relying instead on the general law, specific industry legislation and policy and plan documentation to provide an overall PPP framework.

- From a policy perspective, Malaysia had encouraged private participation in public infrastructure since 1981. Then it came to Malaysian Incorporated Policy under the 4<sup>th</sup> Malaysia Plan, 1983 in which the concept of PPP was first introduced in Malaysia. This policy shifted the National Economic Plan (NEP) aims from promoting greater Malay involvement in the economy to strengthening state ties with a wider range of the country’s business community leaders (“4<sup>th</sup> Malaysia Plan”).
- The model was refined in 1985 under the 5<sup>th</sup> Malaysia Plan with the Privatization Policy, which sought to lessen the financial and administrative burden on the Government by initiating to rely on market forces by encouraging active participation from the private sector in delivering public services, followed by Guidelines on Privatization (1985) providing policy objectives, methods and implementation mechanisms. The concept of privatization applied equally to privatization of State owned businesses as it did to private participation in state sponsored projects (“5<sup>th</sup> Malaysia Plan”).
- Privatization Master Plan under 6<sup>th</sup> Malaysia Plan
- Public Private Partnership (PPP) in 8<sup>th</sup> Malaysia Plan, 2000, was official launching the theme

- PPP is considered as broader ownership structure rebranded as Public Finance Initiative (PFI) which aimed at facilitating greater participation of the private sector in infrastructure development under 9<sup>th</sup> Malaysia Plan, 2006.
- Malaysia Government developed a separate department under the direct supervision of Prime Minister named as the Unit Kerjasama Awam Swasta (UKAS) in 2009 in line with the economic transformation towards being more competitive. UKAS administers various guidelines, including the Public Private Partnership Guideline which sets out the framework, structure and procurement and implementation process of PPPs in Malaysia.
- In 10<sup>th</sup> Malaysia Plan, the government has continued to emphasize the use of PPP for providing public facilities and services. Enhanced plans of PPP project were the breakthrough in PPP development in Malaysia. To support PPP implementation, the government also introduced the Facilitation Fund, designed to provide government support in the form of grant or conditional adjustable grant to bridge project viability gap (“ASEAN PPP Guide”).

**Public Private Partnership Unit, Prime Minister’s Department:** In addition to the PPP procuring authorities, there is a specialized government entity that facilitates the PPP program (PPP Unit); Public Private Partnership Unit, Prime Minister’s Department. In 2009, the Privatization and Private Finance Initiative Unit was established, which is to be in line with the economic transformation towards being more competitive, which is now referred to as the Public-Private Partnership Unit (“3PU”), A government agency within the Prime Minister’s Department, otherwise known as the Unit Kerjasama Awam Swasta (“UKAS”). JKAS, which is a committee established by UKAS has central decision making powers on policy matters for proposed PPP projects. Before launching the procurement, the evaluation of the PPP projects is undertaken by the JKAS members (UKAS, 2011).

The contractual structure of PPP arrangement in Malaysia is between the private sector and the government. Specifically, the private sector is represented by a special purpose vehicle, comprising financiers, a construction contractor and facilities management operator, created mainly for a particular PPP project (PPP Guidelines, 2009).

#### **2.4.4 Review of Previous Study**

Suhaiza Ismail (2014), Challenges in Implementing Public Private Partnership (PPP) in Malaysia. The scope of study is 122 no of public and private sectors concerning the constraints of PPP implementation in Malaysia. The study found out that “Lengthy delays in negotiation;”, “lack of government guidelines and procedures on PPP”, “higher charge to direct users”, “lengthy delays because of political debate” and “confusion over government objectives and evaluation criteria” are the top five constraints for adopting PPP in Malaysia.

Suhaiz Ismail (2014), Rationales for PPP Implementation in Malaysia. The scope of the study is 122 responses of public and private sectors. The results show that “to enhance private sector involvement in economic development is the only rational that was rated as most important by all respondents.

Nor Suzila Binti Lop, Kharizam Ismail, Haryati Mohd Isa and Natasha Khalil, Factors affecting the Operational Performance of Public Private Partnership (PPP) Projects: Cases in Malaysia. The study was semi-structured interviews from selected case studies. It revealed eight factors contributed to the PPP projects performance namely; defects occurrence, lack of competency among staff or person in charge in PPP, service delivery failure, lack of strategy in assessing performance, lack of monitoring, lack of experience and understanding of PPP among stakeholders and poor management.

Riad Mahmud (2018), The Legal Regime of Public Private Partnership in Bangladesh: An Overview and Analysis. The scope of the study is the history, development and features of current PPP related laws and papers of Bangladesh. The study identifies that Bangladesh lacked a clear and consolidated legal regime regarding PPP till now to conduct PPP projects efficiently as supplementary laws are not yet enacted. However it highlights the recent enactment can be termed as the founding stone of such jurisprudence in Bangladesh.

Bhusal, N. (2016) Public Private Partnership as a Path to Development for Myanmar: A Review of the International Experience. The scope of the thesis is closely examining how Public-Private Partnership could be a solution to speed up Myanmar’s development, learning from international experience. The study suggests solutions

that are unique to Myanmar. Although hard infrastructure and soft infrastructure are assessed separately, the paper highlights the fact that, Myanmar's growth will not be sustainable unless soft infrastructure develops in line with hard infrastructure.

Nguyen, H.G., (2017), Making Public-Private Partnerships in Infrastructure Successful in Vietnam: A Need for a Better Procurement Legal Mechanism. The scope of the thesis is examining how Vietnamese laws should be improved to facilitate successful PPP projects. It focused on key PPP rules on project selection, land acquisition, major entities in procurement, capital and risk allocation of projects, procurement procedures and dispute resolution. The research utilized the regulatory regimes of Australia and the Philippines by way of comparison with that of Vietnam. This thesis concludes that although PPP laws are in force in Vietnam, there are many processes that could be improved.

## **CHAPTER III**

### **OVERVIEW OF PUBLIC PRIVATE PARTNERSHIP IN MYANMAR**

#### **3.1 PPP in Myanmar**

Myanmar is a lower middle income country in South East Asia with GDP Value US\$71,214.80 Million and GDP per capita growth (annual %) 5.6% as per the World Bank 2018.

Myanmar Infrastructure need is massive and it lags far behind, by various indicators comparing with neighboring countries. Investment for Infrastructure gap is very huge and not enough with Public investment and International Official Development Assistant (ODA). Therefore attracting private capital to investments in infrastructure projects is one of the main agendas of current government and PPP becomes popular as one of possible solutions among policy-makers, government officials, parliamentarians, private sector and civil society. The Government of the Union of Myanmar is committed to improving the level and the quality of economic and social infrastructure services across the country and is seeking to develop a substantive role for Public Private Partnership (PPP) as a means for promoting private sector investment and utilizing private sector expertise, innovation and management ability in the provision of public infrastructure and public services.

PPPs are long-time practiced in Myanmar as BOT (Build Operate and Transfer) and mostly in road, power sectors and some projects in hotels. In the category of BOTs, there are both Greenfield and brownfield projects. Apart from that Production Sharing Contracts (PSCs) and Joint Venture agreements between Ministries and private companies can be considered as PPPs as they use project financing financial structure and special purpose vehicles (SPVs) to implement investment projects. However, most of the PPPs were based on unsolicited proposals and bilateral negotiation rather than going through competitive bidding process (Khine Win, 2019).

### 3.2 Myanmar PPP Regulatory Framework

The long term vision of Myanmar Government is to establish Public-Private Partnerships (PPP) as a significant approach through which infrastructure and services are delivered to support the strong future development of the country's economy and society ("PPP Knowledge Lab, Myanmar"). The medium term vision of the Government is to further develop the enabling environment for PPP together with implementing pioneer PPP projects.

In Myanmar, there is no specific PPP Law at national or local level except the Project Bank Notification, the framework for all the infrastructure and procurement projects, issued on 30th November 2018 by Office of the President.

**PPP Policy Paper:** Myanmar Public-Private Partnership Policy Document (including a Legal Review of PPP-related issue), Draft for consultation was developed under a United Nations Development Account project. The Policy Document was published and updated as final draft and submitted to the Legal Affairs and special Issues Assessment Commission (which was first formed in November 2011 in the USDP-led Pyithu Hluttaw), renewed in the NLD-led Pyithu Hluttaw on March 1, 2016.

Policy document aimed to develop the use of PPP approach, outline where its use is appropriate, and instigate a consistent and effective approach to their identification, development, procurement and management. The Policy document also clarifies the current roles and responsibilities of institutions and bodies in the Government at each stage of infrastructure projects. The Policy Document is made up of policy formulation; objectives, principles, PPP definition, PPP models and scope of PPP in Myanmar, enabling framework with Legal and regulatory framework, other related laws and regulations, draft PPP law (intended), and regulatory Mechanisms. Moreover, an institutional arrangement, Government supports for PPP projects, PPP process and finally capacity building arrangements are included. However, the PPP Policy Document was not adopted officially.

On March 2016, JAICA issued an analytical paper which was based on DICA-JICA Discussion Series on PPP for infrastructure with the inputs of the PPP Task force Members of the government of Myanmar, Director General, DICA, lecturers and inter-ministerial participants who contributed to the discussion in this series. The

objectives of the series are to provide learning opportunities for various aspects of PPP framework for private sector-led infrastructure development initiatives and to promote PPP related actions outlined in the 2014 Long-term Foreign Direct Investment Promotion Plan (FDIPP) of the Directorate of Investment and Company Administration (DICA). Discussion series included in country preparatory sessions and study to Indonesia and Philippine. As per interview with DG, PAPRD, Ministry of Finance and Planning, in January 2017, JAIKA withdrew their technical assistance to PPP Task Force and the outstanding PPP functioning work was handed over to PAPRD. Unfinished PPP Financing Document and three model contracts for Construction, Port and Electricity were to be carried out.

On 30th November 2018, Office of the President published Project Bank Notification. “Project Bank” is defined as an interactive, web-based, publicly accessible database or project information bank that includes Projects that IGAs plan to develop to implement the MSDP and its Strategic Action Plans. “Public-Private Partnership (PPP)” means an investment mechanism based on a contractual agreement between an IGA and a private party for providing a public asset or infrastructure or service that includes but is not limited to financing, designing, implementing, managing, and/or operating infrastructure facilities and services traditionally provided by the public sector in an effort to reduce the Government’s capital and operating expenditures while improving the quality of assets and services (“Project Bank Notification”). All the projects that government agencies are planning to develop, along with specific information about these projects, will be accessible to the public, enhancing transparency and predictability as the projects are developed. In this document, section 4 to 10 cover establishment of PPP Center, PPP Units with standards and processes to implement PPPs, unsolicited PPP proposals, sources of funds for PPPs, environmental and social aspects for PPPs, contractual requirements for PPPs, monitoring and supervision for PPPs and transferring SEEs in part or whole to private sector through equalization or PPP mechanisms (Min Ye Paing Hein, 2019).

The purpose of the Project Bank is to strengthen the development of projects that will enable the Government to align with the strategic actions plans and effectively implement the Sustainable Development Plan (MSDP), including: (a) by publishing government plans for the priority projects needed to achieve national development objectives in a predictable and transparent way, and (b) by developing procedures to

ensure that projects are well coordinated and facilitated among the MOPF and IGAs, to make projects attractive to local and international investors and to find appropriate financing mechanisms; some with the government budget, some with development assistance and some to be eligible for public-private partnerships (U Set Aung, 2018).

“**Project Bank**” contains priority initiatives that have been rigorously screened, stringently assessed and approved as strategic projects by the government for their positive impact on economic and social development. The initiative aims to overhaul the way in which ministries identify and tender projects for development partners to find strategic projects, and will provide a new framework for public-private partnerships and enable the private sector to invest in state assets (“MoPF”).

Some of the key points in the notification are:

- The MoPF will establish the project bank, determine which projects will be included, and make the project bank accessible via an interactive, web-based, publicly accessible database.
- Government agencies and departments will be responsible for proposing projects that will be financed in one of five ways: with the state budget; with development assistance; in partnership with the private sector through PPPs, including unsolicited proposals; through the transfer of state-owned enterprises, in part or entirely, to the private sector; or through a combination of these.
- Once projects are proposed they will each be screened based on criteria including their strategic value. If they pass the screening process, the MoPF will determine the most appropriate source of funding.
- A PPP Centre will be established within the MoPF to strengthen capacity within government departments to identify, develop, procure, implement and monitor the projects.
- The PPP Centre will also be responsible for developing concrete criteria on which government support might be provided for PPP projects, such as government guarantees or viability gap funding, neither of which have been employed in Myanmar before.

- Any unsolicited proposal by a private party to a government agency with a value over K2 billion must be presented to the PPP Centre, except proposals for the development of Greenfield projects in the energy and mining sectors.
- The government agency will then launch a Swiss Challenge tender process, unless the PPP Centre agrees that this is unnecessary. Only projects that have been tendered will be eligible for financial support from the government.
- PPP projects exceeding \$100 million will require approval from cabinet.
- Environmental and social impact studies for all the proposed projects have to comply with Ministry of Natural Resources and Environmental Conservation regulations, and the government will be responsible for compensating and/or resettling those who are impacted (U Set Aung, 2018).

The private sector can propose unsolicited proposals and have to go through a competitive and transparent open tender process before they are eligible for government support. In addition to that some state-owned enterprises will be included in the project bank, for their possible privatization or equalization, particularly to turn some state-owned enterprises into PPPs (U Set Aung, 2018).

### **3.3 General Regulatory Framework**

The legal system in Myanmar supports the PPP implementation although there are inconsistencies in some areas with PPP nature. Relevant legislation related to PPP is as follows.

- Myanmar Companies Law (2017)
- Myanmar Investment Law (2016)
- Permanent Residence of a Foreigner Rules (2014)
- Myanmar Special Economic Zones Law (2014)
- Securities and Exchange Law (2013)
- Myanmar Citizens Investment Law (2013)
- Central Bank Law (2013)
- Foreign Investment Rules (2013)
- Foreign Investment Law (2012)
- Law Amending the Commercial Tax Law (2011)
- Private Industrial Enterprises Law (1990)
- Financial Institutions of Myanmar Law (1990)

- State-owned Economic Enterprises Law (1989)
- Special Company Act (1950)
- Burma (Myanmar) Companies Act (1914) (World Bank, 2018)

However, since BOT establishes for long, general tendering processes are governed by the terms of Directive No. 1/2017 (“Tender Rules”). The Tender Rules are generally used as a standard for PPPs. The Tender Results sit behind the overarching framework of Presidential Directive on Procurement No.1/2013 (“Directive 1/2013”). These are both supported by guidance issued by the Ministry of Construction in relation to construction contracts (released 9 January 2014 and 6 September 2016). Further, where the private party (ies) has some international connection, the regulations on investment, which are the Myanmar Investment Law (“MIL”) promulgated in 2016 and its rules (“MIR”) apply. Restricted investment activities are outlined in the notification 15/2017 of the Myanmar Investment Commission (10 April 2017) and the list of Restricted Investment Activities (Notification 15/2017) (The World Bank, 2018).

**The Myanmar Citizen Investment Law-** The Pyidaungsu Hluttaw Law No.18., the notification no. 49/2014 of Myanmar Investment Commission (14 August, 2014) Amended Classification of Types of Economic Activities (“Notification 49/2014”), Environmental Impact Assessment Procedure (“EIA Procedure”), Notification No.616/2015 generally apply, as well as Public Debt Management Law of 2016, State-owned Economic Enterprises Law of 1989 and Contract Act of 1872. PPPs can also be regulated by sectorial notifications prepared by Ministries. However, these are released independently and should be considered in relation to the industry of each specific project (for example, a transport project would be governed by notifications from the Ministry of Transport and Communications) (The World Bank, 2018).

### **3.4 Sector-wise laws inconsistent with PPP implementation**

Sector-wise laws in some specific areas are contradictory to the nature of PPP implementation.

**Transportation:** According to the Notification 15/2017, transport services are restricted and require the approval of the Ministry of Transport and Communication. These are listed under section 1. (D) 4, including train operation and manufacturing

and maintenance of locomotives, carriages, wagons, and maintenance of railways (1.(D)4.4 (and related service), domestic and international air transport services (1. (D) 4.31 and 32), coastal and inland water transport services for passengers and cargo (1. (D) 4.36 and international transport services (1 (D) 4.39) (The World Bank, 2018).

**Water and Irrigation:** PPPs in fresh water fisheries and relevant services are explicitly prohibited under Section 1(b) serial no (2) of the Notification 15/2017. Manufacturing and distribution of purified drinking water is only permitted in the form of joint venture with Myanmar citizens (Section 1.(C) 17) (The World Bank, 2018).

**Energy generation and distribution:** Notification 15/2017 explicitly prohibits administration of electric power systems and inspection of electrical work. Administration of electric power systems is listed as an investment activity which can only be carried out by the Union. Furthermore, large-scale power project (above 30 MW) require the approval of the Ministry of Electricity and Energy. And all electricity generation projects which connect to the power grid also require the approval of the Ministry of Electricity and Energy (The World Bank, 2018).

**Telecom:** Pursuant to Section 1 (d) serial no.4(c) of the Notification 15/2017, telecommunication services may be permitted in the form of a joint venture with a Myanmar citizen with the approval of the Ministry of Transport and Communications. Production and domestic marketing of mobile handset and telephone is possible only with the approval of the Ministry of Transport and Communications. In addition, Tender Rule also note that a specific tender process shall be developed and carried out for PPP activities relating to issuing telecommunications licenses, although this has not yet been released (or may in fact be determined individually for each project) (The World Bank, 2018).

**Land Tenure:** MIL, Article 50 “Rights to Use Land” provides that investor shall obtain permit or endorsement to use land. Additionally, (d) The investor shall register the land lease contract at the Office of Registry of Deeds in accordance with the Registration Act and (e) The Government may grant more favorable terms and conditions for the lease of land and the use of land by Myanmar citizen investors (The World Bank, 2018) (“Myanmar Investment Law”).

### 3.5 The PPP procuring authorities in Myanmar

Union Departments are the procurement bodies for national procurement processes. Union, Region, or State Departments or Organizations are the procuring bodies for State or Region procurement processes, as examples, namely Ministry of Electric Power, Ministry of Energy and, Ministry of Communications and Information Technology, Ministry of Transport. Besides the procuring authority and the Ministry of Finance or Central Budgetary Authority, the President’s Office and the Union Government approve the PPP project before launching the procurement process and provide the relevant legal/regulatory provisions (World Bank, 2018).

**Specialized government entity that facilitates the PPP program (PPP Unit):** The Ministry of Planning and Finance has established the Project Appraisal and Progress Reporting Department (PAPRD) as a PPP Unit in November 2016 and PAPRD started to prepare its PPP related functions. However, the functions of PAPRD as to PPP project and policy management have not been clearly outlined (World Bank, 2018).

Table (2.4) Number of Screened Projects

| Status  | No of Projects | %    |
|---------|----------------|------|
| New     | 293            | 48%  |
| Ongoing | 319            | 52%  |
| Total   | 612            | 100% |

Source: Min Ye Paing Hein, Deputy Minister, Investment Promotion Seminar on 2<sup>nd</sup> September 2019.

Table (2.5) Number of Screened Projects in Myanmar

| Financing Source    | No of Projects | %    |
|---------------------|----------------|------|
| Budget              | 417            | 68%  |
| ODA                 | 86             | 14%  |
| PPP                 | 82             | 13%  |
| No financing Source | 27             | 4%   |
| Total               | 612            | 100% |

Source: Min Ye Paing Hein, Deputy Minister, Investment Promotion Seminar on 2<sup>nd</sup> September 2019.

Project pipeline is not disclosed to public yet and according to Deputy Minister, it is being data accessed. Total 417 projects with 68% of total projects are used from state budgets while ODA, 86 Nos, 14 % and PPPs are 82 projects with 13% only.

## **CHAPTER IV**

### **COMPARATIVE STUDY OF PPP**

#### **4.1 Historical Regulatory Process for PPP**

Vietnam invests in infrastructure about 10% of its annual gross domestic product, which is mostly either state-led or through official development assistance (ODA) (ADB, 2017). But it is not sufficient to meet Vietnam's huge infrastructure funding need. However, for an economy of the size of Vietnam's, private investment in infrastructure has been very limited. To a lesser extent, PPP is also viewed as a means to improve efficiency and service delivery to citizens and gain access to new expertise and technology. Another common reason for advancing PPP is the concern about the possibility of reduced access to ODA as Viet Nam moves to middle-income country status.

Vietnam's public-private partnership (PPP) regulatory framework was first appeared in the revised Law on Foreign Investment in 1992 with the definition of build-operate-transfer (BOT). In addition, most of the infrastructure projects undertaken have not been subject to competitive tendering (Eurocham, 2014) increasing the risks of poor outcomes. Subsequently, it was revised as Decree 78/2007 and Decree 108/2009, in 2010, pilot PPP regulations (Decision 71) to promote more PPP projects for infrastructure development. Decree 108, as amended in 2011, the government's renewed attempt to mobilize private investment for infrastructure projects, but could successfully pursued two new power projects involving foreign investors to reach financial closure in Vietnam. Subsequently, in 2015, new PPP regulations (Decree 15) were enacted to establish a unified legal framework for the PPP and the BOT/build-transfer-operate (BTO)/build-transfer project regimes aimed to attract more private investment toward the development of national infrastructure, ending an important source of uncertainty for investors. In 2015, Decree 30/2015/ND-CP (the Investor Selection decree) was issued, providing guidance for implementing provisions in the Law on Public Procurement, which was amended in 2013 to provide for the

procurement of PPP projects in addition to the procurement of goods and traditional construction services. Other relevant legislation include: the new Law on Public Investment of 2014, which unified the previous scattered regime for public investments and provided clearer guidance for its implementation; the Law on Construction, which was amended in 2014 to better align with the new Law on Public Investment; the new Law on Investment and the Law on Land (ERIA, 2015). The framework is complemented by a number of guiding documents issued in 2015 and early 2016. This new PPP framework brings about many important improvements to Vietnam's regulatory framework for investment in infrastructure (OECD, 2018).

The key advances in the PPP framework included new PPP contract forms, enabling the availability/performance-based payment schemes where investment can be recouped through payments by the public sector and removal of the previous limit on viability gap funding (VGF) of 49% of the total investment cost. The regulations also enabled a wider scope of infrastructure projects to be procured as PPPs and established processes for PPP project identification, appraisal, and approval (ADB, 2017). The new framework provides a more detailed framework for preparing and implementing unsolicited proposals, aligned with the one for projects identified and published by the competent authorities.

In Vietnam, in order for a project to be selected for development under PPP form, it must represent eligible sector for PPP; has to be consistent with the development master plan and sectorial and regional development plans, and with the local socio-economic development plan; and must be prioritized by the ministry, ministerial-level agencies, or provincial people's committee. In addition, general laws (e.g., the Investment Law, the Public Investment Law, the Bidding Law, the Construction Law, and the Law on Public Debt Management) will continue to be applicable to PPP projects together with the new PPP decree (ADB, 2017).

**Thailand government** is seeking to use the PPP mechanism as a tool to protect vulnerable environments, and to bridge income inequality by improving participation among small- and medium-sized businesses and attracting more socially responsible investors (The Economist, 2018). There have been 40 projects completed through PPPs. The actual implementations and degrees of success of the projects have varied widely as the regulatory and legal framework surrounding PPPs for infrastructure

delivery in Thailand is incomplete, outdated, and fragmented and there were several different loose "interpretations" of law (Valentine, 2008).

The largest gap in the 1992 Act is that it simply does not address risk allocation for PPP projects (Susengarn 2007). PPSU, 1992 was designed more to prevent Government corruption in granting rights to private investors for operation or use of state properties rather than to facilitate private investment in public infrastructure. However, "PPISU, 2013 shifted the focus and sought to streamline the project approval process by establishing a PPP Policy Committee chaired by the Prime Minister with the Minister of Finance as the deputy. The State Enterprise Policy Office (SEPO) acts as the secretariat for the PPP Policy committee. PPP projects are structured as long term concessions to facilitate project financing.

The PISUA made substantial changes to the approval process for projects ("SEPO"). Approved projects are presumptively required to undergo a competitive bidding process, which may be waived with the approval of the committee in certain circumstances. Final approvals of the private investor selected and the terms of the investment contract are up to the Cabinet. PPP projects are then put under the watch of a supervisory committee until they are completed. PPP projects that do not exceed the BT1bn threshold are required to comply in principle with the foregoing procedures with the exception that Cabinet approval is not required and the use of an independent consultant to prepare the appraisal report is not mandatory. To facilitate the PPP investment, the government set up the streamlined procedure, precise timeframe for project consideration and bidding processes and support project development fund. For transparency, the government arranged pool of experts for selection and monitoring committees, prohibits related person to serve private counterparts and set disqualification criteria for advisors and bidders ("SEPO").

**In Malaysia**, the government has prompted the private sector's involvement in the provision of public service using the concept of PPP, due to budgetary pressure, as a tool to speed up national development (Ismail, 2013a). Furthermore, innovation, reduction of public money tied up in capital investment, reduction of the total project cost and local economic development are the factors that led the Malaysian government to consider PPP as a tool for the provision of infrastructure and public services (Ismail, 2013b). In PPP Guidelines (2009), the PPP projects should only

proceed if the following principles are observed. First, the PPP projects must have a high socio-economic impact. Second, value for money can be realized from the projects in terms of providing more efficient services, and, at the same time, can be completed in a shorter period. Finally, the project shows a sufficient level of accountability (Tenth Malaysia Plan, 2010; Khairuddin, 2007; Abdul Aziz and Kassim, 2011; Ismail, 2013a, 2013b; Ismail and Harris, 2014).

**Malaysia's Unit Kerjasama Awam Swasta (UKAS):** There are neither new legal frameworks nor specific legislation for PPP in Malaysia. UKAS is the central agency assigned by the Government of Malaysia to facilitate and coordinate Public Private Partnership (PPP) procurement in the country. UKAS negotiates with the private sector on behalf of the government but do not enter into any contract.

PPP implementation in Malaysia has proven to provide many benefits to the Government and the public as a whole. Malaysia has experienced many successful PPP projects that can benefit the public, such as KL Central, Light Rail Transit (LRT), medical facilities, many highways, bus stations and others (Beh, 2010; Abd Karim, 2011). If the yardstick of success is measured by delivering infrastructure to the people, credit is due to the agency for its achievements. From its initiation until 2010, 1,679 km of highways were completed through the privatization programme (Wang, 2012). This network of highways connects most of the cities and rural areas in Malaysia, supporting the domestic economic activities and being seen as a positive gain in socioeconomic terms in the rural areas ("Benchmarking PPP procurement in Malaysia, 2017").

**In Myanmar,** there is no specific or generic law that addresses PPPs apart from general investment framework "Project Bank Notification" which includes all kinds of investment and infrastructure projects, but large part is highlighted for PPPs. The notification provides clarity on types of PPPs that can be undertaken such as "Availability payment", "Build-Own-Operate (BOO)", "Build-Operate-Transfer (BOT)", "Build-Transfer-Lease (BTL)", "Build-Transfer-Operate (BTO)", "Operation and Management (O&M)" and "Other Forms of PPP". The process for approval of projects includes procurement of projects; regulation and management of project through the construction, but approval stages are not clearly stated in details. Institutional structures that initiate, implement, and manage the PPP process with

clarity on roles and responsibilities are still work in progress, stated by the Deputy Minister.

PPP Center of Myanmar can assist IGAs in preparing a Business Case, in the process of preparing tender documents, producing request for proposal, developing criteria for bidder selection and selecting the winning party, preparing and signing the PPP contract upon the request of IGAs. The model contract or standardized contract is under preparation as per Deputy Minister and U Set Aung. Up to this stage, each ministry does their own contracting format although some is with the help of international expertise and be prosecuted by the Prosecution Department of the Attorney General's Office. It is not published how much the government has done for standard methodologies and guidance for value-for-money assessment, risk assessment, and fiscal impact (affordability) assessment, with established benchmarks comparable to international norms.

PPP Center is set up and located at NPD under MoPF, up to this date; it does not have clearly defined roles and responsibilities. Previously, as PAPRD, the officers made years-long learning process as PPP Task Force with UNDP, JAIKA and other international technical assistances since 2014.

Since 2011, the Myanmar's economic and political reforms significantly made improved the regulatory framework for foreign direct investment. In particular, it has pursued a policy of liberalizing the energy sector and opening it up to foreign investment. In 2013, Asian Development Bank (ADB) supports for the development of a public-private partnership (PPP) framework and tools to better direct and balance PPP project outcomes. By establishing the Development Assistance Coordination Unit (DACU), Government of Myanmar shows a more proactive and strategic approach to development assistance. DACU has been coordinating with relevant line ministries and development partners to direct development assistance into the rapid development of basic infrastructure. However, as per interview with DG, PAPRD, MoPF, instead of setting up PPP Units in concerned IGAs with extension of organization chart or with the new crew, a new body was formed by getting part of internal strength. As per Deputy Minister, the arrangement is work in progress so far.

Table (4.6): Regulatory and Institutional Framework for PPPs

| Particulars  | Vietnam   | Malaysia          | Thailand                           | Myanmar  |
|--|---|-------------------|------------------------------------|--|
| The regulatory framework explicitly prohibit or restrict PPPs in specific sector besides national defense and other matters of national security | No in all sectors                                 | No in all sectors | No in all sectors                  | Transportation<br>Energy generation and distribution<br>Telecom<br>Land Tenure |
| Identification and selection of PPP projects from the pipeline.  | Yes   | No                | No                                 | Yes  |
| Technical support in implementing PPP Projects.  | No  | Yes               | Yes                                | No   |
| Revision of fiscal risks born by the Government  | Yes, in co-operation with other relating agencies | No                | No                                 | No   |
| Consultation with affected communities on potential impact of PPP projects   | No  | No                | No                                 | No   |
| Relevant legal/regulatory provisions:  | The Public Private Partnership Steering Committee | UKAS              | The State Enterprise Policy Office | IGAs<br>PPP Center upon requests of IGAs                                       |

Source: OECD, 2018

Most important point to highlight is Myanmar has inconsistent laws in four sectors while other three countries do not have such problems. Other similarity in four ASEAN countries is that they do not consult with affected communities on potential impact of PPP projects.

#### 4.2 National Policies and PPP projects

**Vietnam** implements Millennium Development goal (MDGs) and Socio-Economic Development Plan (SEDP), 2011–2015, clearly cites the importance of establishing policies to attract private sector investment in infrastructure by means of PPP in line with international best practice. Its development strategy is based on the opening and diversification of its economy. In 2016, a project development fund (PDF) was established to assist in PPP project preparation. Vietnam has also announced a pipeline of PPP projects in transport, utilities sector, and social infrastructure sectors

(ADB, 2017). For Vietnam's industrialization strategy approved in 2013, the steering committee was formed with the ministers of concerned ministries and is tasked to work with authorized agencies to solve obstacles of regulations, procedures and interdisciplinary issues in order to support enterprises investing and operating in six prioritized industries. It is assigned to monitor and evaluate the implementation of the goals of six selected industries to develop as the strategy.

**Thailand's Eastern Economic Corridor Bill, 2017** comprises some tax and non-tax incentives for business operators in the Special Economic Promotion Zones within the EEC area, including right to own land, the right to own a condominium, right to lease both land and other immovable properties in the special zones for a period up to 50 years, with one-time renewal for less than 49 years. The incentives include an exemption from all or part of the customs law, for imports and exports, the exemption or reduction of taxes; 17 % for investors in the EEC, 50% reduction in corporate income tax over a period of five years, Foreign experts operating in key fields will be eligible for tax exemptions between ten to 15 years and duties for business within the zone, granting work permit and visas for skilled workers, executives and specialists and their families and the right to use foreign currencies. Top of all, licensed foreign professional are able to practice in the special economic zones. The sector-wise incentives are available on one-by-one basics. The government has also established a Thai Baht 10 billion competitive enhancement fund for targeted industries. This funding will come from a mix of state funds, public-private partnerships (PPPs), and foreign direct investment (FDI) (ADB, 2017).

In 2015, within the EEC initiative, Thailand established 10 special economic zones in line with the objectives of Thailand 4.0 which is fully functional and then larger issues are settled. "Thailand 4.0 is the economic model of the government to transform the country from one based on manufacturing to one driven by innovation, research and development, and its destination is to become Southeast Asia's new manufacturing and economic hub. PPISU, 2013 and the PPP Strategic Plan 2017-2021 ensure that virtually all major infrastructure projects are developed as a public private partnership. It comprises a project pipeline of 66 projects in transportation, education, telecommunication and other sector and estimated investment costs of 1.41 trillion Baht. The PISU Act, the PPP Strategic Plan, the PPP Fast Track, and the EEC

Fast Track are policies that display the Thai government's commitment towards public private partnerships (ADB, 2017).

**Malaysia's New Economic Policy:** It is intended for the Bumiputera, the indigenous people of Malaysia to empower and upgrade their socio-economy. However there are no official guidelines for the implementation related to the unsolicited proposal procurement process by UKAS although the public procurement regulations have clear guidelines on its implementation. In addition to priority being given to *Bumiputera* companies, there is another UKAS restriction on the involvement of foreign companies or foreign ownership of PPP. By limiting the participation of foreign companies in the procurement process, some of the benefits of PPP are relinquished. It makes the government lose its bargaining power, thus enabling concessionary companies to make excess profits from the government over a prolonged period. This may result in government spending and unacceptable deficits due to the high cost further affecting the sustainable procurement goals. (Zawawi, MI, Kulatunga, U and Thayaparan, 2016)

**The Myanmar Sustainable Development Plan (MSDP)** contains not only policy directions and trajectories but also policy implementation metrics, in which 251 strategic action plans have been identified. These action plans must be further broken down into implementable projects and programmes. The projects and programs have to go through different assessment systems in order to find out whether they are relevant to the strategic plans of the country. Only those that pass will qualify to be implemented through multiple financing mechanisms. Moreover, Myanmar Investment Promotion Plan 2016-17-2035-36 is aimed to realize the responsible and quality investments necessary for Myanmar to become a middle-income country by 2030 and for pursuing subsequent further growth until 2035, through fundamental improvement of the business environment (“DICA”)

Table (4.7) Preparation of PPPs in Selected ASEAN Countries

| <b>Preparation of PPPs</b>  | <b>Vietnam</b> | <b>Thailand</b> | <b>Malaysia</b> | <b>Myanmar</b> |
|---|----------------|-----------------|-----------------|----------------|
| Central budgetary authority's approval                                | No             | No              | Yes(21)         | No             |
| Fiscal treatment of PPPs  | Yes(1)         | No              | No              | Yes (31)       |
| PPP's prioritization consistent with public investment prioritization | Yes(2)         | Yes(12)         | Yes(22)         | Yes(32)        |
| Economic analysis assessment  | Yes(3)         | Yes(13)         | Yes(23)         | No             |
| Fiscal affordability assessment                                       | Yes(4)         | Yes(14)         | Yes(24)         | Yes(33)        |
| Risk Identification   | Yes(5)         | Yes(15)         | Yes(25)         | No             |
| Comparative assessment (value for money analysis)                     | Yes(6)         | Yes(16)         | Yes(26)         | No             |
| Financial viability or bankability assessment                         | Yes(7)         | Yes(17)         | Yes(27)         | No             |
| Market sounding and/or assessment                                     | Yes(8)         | Yes(18)         | Yes(28)         | No             |
| Environmental impact analysis   | Yes(9)         | Yes(19)         | Yes(29)         | Yes(34)        |
| Assessments included in the RFP and/or tender documents               | Yes(10)        | No              | No              | No             |
| Draft PPP contract included in the RFP                                | Yes(11)        | Yes(20)         | Yes(30)         | No             |
| Standardized PPP model contracts and/or transaction documents         | Yes            | No              | No              | No             |

Source: Procuring Infrastructure Public-Private Partnerships Report, 2018

(1) Both budgetary and accounting/reporting treatment

(2) Detailed procedure established

(3)(4)(5)(6)(7)(8) Specific methodology developed

(9) No specific methodology developed

(10) Assessments not available online

(11) Tender documents not available online

(12) Detailed procedure established

(13) Specific methodology developed

- (14)(15)(16)(17)(18)(19) No specific methodology developed
- (20) Tender documents not available online
- (21) Both before tendering and contract signature
- (22) Detailed procedure regulated
- (23)(24)(25) No specific methodology developed
- (26) Specific methodology developed
- (27)(28)(29) No specific methodology developed
- (30) Tender documents not available online
- (31) Only specific budgetary treatment
- (32) Detailed procedure not regulated
- (33) No specific methodology developed
- (34) Specific methodology developed (Procuring Infrastructure Public-Private Partnerships Report 2018)

In the project preparation stage, of the three countries, most of the procedure are arranged, detailed procedure established and mostly specific methodology developed, but with the small requirement that tender documents are not available on line.

### **4.3 PPP Related Laws**

Recognizing the limited success in carrying out PPPs, the governments made effort to develop an improved enabling framework for PPP; specific actions are being taken to address existing legal, regulatory, institutional, and financial constraints.

**The Vietnam Investment Law**, in terms of investment policy alone, has been amended multiple times, first to unify the treatment of foreign and domestic investors and then to improve the registration proves. The enterprise law was also revised. The pace of legislative activity has also imposed a cost on government administration. Delay of implementing regulations has caused confusion among the business community, and issues of consistency arise across the various legislative reforms, creating uncertainty for existing and potential investors (OECD, 2018).

The Vietnam government enacted laws regulating business organization such as Enterprise law 1999 for private domestic enterprises, 2003-State-owned Enterprises

Law for SOEs, Foreign Investment Law and Law on Cooperatives. It built a stricter legal framework including the Anti-Corruption Law, 2005 that will help to curb corruption and even recover state assets (ADB PPP Monitor, 2017). Implementation of business laws inconsistent as the business environment varies from province to province. Substantial improvements to better protect IP have been made over the past two decades at policy and legislative levels, but enforcement of IPA regulations still needs to be further strengthened (ADB, 2017). Commercial arbitration has thus become the most common way of settling business disputes, such as the Vietnam International Arbitration Center. Moreover Vietnam agrees to the Investment court System by treaty with EU (OECD, 2018).

The authorities have made major adjustments towards further transparency and stronger protection for foreign investors, the 1987 law was amended four times in 15 years to progressively strengthen investor rights, create a more investor friendly environment and narrow the policy gap between foreign and domestic investors. The Law on Environmental Protection 2014 is the primary law governing environmental matters in Vietnam (OECD, 2018). Inadequate Thai bankruptcy law (1940) was updated by a new bankruptcy law in 1998 that addressed many of the flaws of the previous bankruptcy law (OECD, 2018). To ensure transparency and accountability, the government enacted the Licensing Facilitation Act 2015, for better enforcement of regulations, the Royal Decree on Review of Laws and Regulations (the Sunset Law) in 2015, and Regulatory Impact Analysis (RIA) Laws to improve the regulatory process (OECD, 2018). These gradual and interactive reforms of the legal framework brought new waves of FDI into the country (OECD, 2018).

**Thailand's Secured Transactions Law:** While Thai law permits pledges of personal property and mortgages, Thailand has no registration system for the recording of security interests in personal property. Loans cannot be secured by accounts receivable. Thai law does not recognize security interests in property that remains in the debtor's possession. In the absence of a modern secured transactions system, creditors frequently have relied on personal guarantees (OECD, 2018).

**Thailand's Trade Competition Act (1999)** was revised in 2017 which called for harmonized competition policies, strengthens alignment with international best practice, including through the introduction of a prior approval merger control regime,

and covers the commercial operations of state-owned enterprises to ensure a more level playing field between public and private firms. (Robert Osei-Kyei, Albert P.C. Chan, 2017) For the fiscal year of 2018, the government allocated THB 468 billion (Thai baht) - 16.1% of the total budget and the third largest amount overall-to developing the country's competitiveness (OECD, 2018).

**Thailand's Anti-Corruption Law:** Thailand has long recognized the need to address corruption. The attempts to combat corruption took the form of the counter corruption Act 1975, establishing the National Anti-Corruption Commission (NAAC), the Office of Auditor-General and the Public Sector Anti-corruption Commission (PACC), an Anti-corruption Court in 2016, and Anti-Corruption Strategy (2017-2021) which includes bold strategies to fight corruption and to mitigate corruption risks (OECD, 2018)

#### **4.4 Enabling environment for business**

Management Board of PPP Project: In Vietnam, Each ministry and the provincial-level people's committee have to assign an internal agency to act as coordinator to manage PPP activities or establish a new unit specialized for PPP project coordination. Such agency has a right to appraise the PPP project proposals.

**Finance and banking:** In Vietnam, the public finance and banking system is fragile, which hampers business investment and the public deficit still high. Banking sector is undercapitalized and non-performing loans weigh heavily on banks and businesses. International, local banks and institutional investors (such as pension funds) have interest to finance PPP projects in Vietnam; however, lack of well-prepared and structured projects limits the development. In most cases, international commercial banks would expect to have political risk insurance coverage which include: breach of contract, expropriation, political violence, and currency conversion/transfer ("Socialist Republic of Vietnam, 2016").

Norhayate, Yazid, Zainol and Shukri indicate that IFSA (2013) is Shariah compliance guidelines for Malaysian financial institutions. Tackful rules and regulations are very critical to ensure sound takaful operations in Malaysia. It could reduce mismanagement, increase the level of solvency and strengthen a company's position in the ace of global competition. Bank of Negasra Malaysia (BNM) or Central Bank is

a regulator and supervisor of the takaful operating system based on the principles of Islamic Law (Norhayate, Yazid, Zainol and Shukri, 2017).

The Bangkok International Banking Facility (BIBF), 1993, permitted domestic and foreign banks to operate international banking facilities in Thailand, and in particular, it contributed to the inflow of foreign capital into Thailand. Foreign banks faced the limitations at early period and later being liberalized. Thailand has the most mature local capital market compared to similar economies of Southeast Asian countries. Local bank loan can be available very cheaply Local banks can generally cope with higher debt-to-equity ratios, lower debt service coverage ratio, and no explicit sovereign guarantee where international lenders would require it (ADB, 2017).

There are 27 domestic private banks operating in Myanmar, which own about 67% of total bank assets. Private Banks are the drivers for innovation and growth in Myanmar's banking sector. The new Myanmar Company Act, 2018 allows foreign banks up to 35% stake in local banks, potentially facilitating knowledge transfer and capitalization of the domestic banking sector. The most formative laws for banking sector of Myanmar are the Central Bank of Myanmar Law 2013, the Financial Institutions Law 2016, the Foreign Exchange Management Law 2015 and the Anti-Money Laundering Law 2014 (Myanmar Banking Report, 2018).

**International Treaties:** The domestic legislative agenda has been matched and reinforced by the active engagement of Vietnam by signing 66 bilateral investment treaties, free trade agreements with many developed economics such as European Union and Trans-Pacific Partnership, high-profile multilateral treaties and international investment agreements and being as an ASEAN member, placing it at the center of international investment policy making. Being a member of the World Trade Organization, it will not only sustain and anchor the reforms that have already been undertaken but will also entail further reforms in the years to come. Vietnam's investment treaties typically protect existing covered investments against expropriation without compensation and against discrimination and give covered investors' access to investor-state dispute settlement mechanisms (ISDS) to enforce those provisions. Increasingly the treaties also facilitate the establishment of new foreign investments (OECD, 2018). Since the advent of the regional ASEAN treaty policy in 2009, in recent treaties, Vietnam has specified the meaning of key treaty

provisions such as on indirection expropriation and fair and equitable treatment, to clarify government intent. These clarifications can be an important tool in the quest for balance between investor protection and government's right to regulate (OECD, 2018).

**International Technical Assistance, Training, and Project Development Facility** are very important to enforce the enabling environment for the countries. Regarding state governance, UNDP has helped Vietnam with law-making processes and law enforcement, to ensure the development of a civil society, combat corruption and promote human rights to make the governance system congruent with the country's high speed economic development. The World Bank provided technical support for the establishment of a legal framework for PPP, decision 71 and decree 78. The United States Agency for International Development (USAID), through its Vietnam Competitiveness Initiative, has provided the layout for the PPP road map for the Ministry of Planning and Investment (MPI). By cooperating with international organizations like UNDP, ADB, it is vital the country gains experience and good policy consultation on how to cope with the challenges which will arise in PPP implementation (OECD, 2018).

**Myanmar's Sector-wise laws** such as (as an example) the Telecommunications Law, 2013 established the legal basis for sector liberalization and procurement processes were done with the Technical Assistance (TA) Grants. Successful tenders and completion of more independent power producer projects will help strengthen the regulatory and legal framework in the sector, and signal growing stability to the market, demonstrate the benefits of increasing Myanmar's power supply through low-cost PPP arrangements, and signal to the government, multinationals, and international financiers that private sector-led infrastructure investments can be undertaken successfully within sectors with sound legal and regulatory frameworks (The World Bank, 2014).

**Foreign Arbitral Award:** Vietnam is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, recognition and enforcement of foreign arbitral awards is not straightforward and has a mixed track record and the term still remains ambiguous. Additionally, the model examples are also not as helpful as they could be, because they are examples that quite obviously are contrary to the principles of Vietnamese law. (ADB, 2017)

**Thailand's 2013 PISU Act** governs all PPP projects with a total investment value above US\$158m and includes ten chapters with transitional provisions. The establishment of several PPP committees with the representatives from the central government such as the MPF, the Bureau of the Budget and the Office of the Attorney General, advice in matters such as project selection, dispute resolution and project governance and shaping PPP policy and ensuring that PPP implementation is fiscally and legally disciplined. The provision of support via SEPO are intended to implement PPPs in a timely manner. The Ministry of Finance establishes a "Private Investment in State Undertaking Promotion Fund" which serves to support the preparation of a Strategic Plan and support a state agency in making a project proposal, preparing the project appraisal report and hiring the PPP-consultant ("The Asia Cooperation Dialogue (ACD) Summit 2016"). Medium- to long-term national infrastructure developments were also introduced, such as the eight year transportation master plan (The Economist, 2018).

Thailand's PPP registry is accessible in both English and Thai, and includes all necessary information. Annual progress reports of concession projects are also usually published by managing government agencies on their official websites (OECD, 2018).

**Judicial System** is one of the prominent factors which enable good business environment. The judiciary in Thailand is well-known for its independence and it has vigorously defended its powers from encroachment by the executive and the legislative branches of government. Enforcement continued to be a problem. And the legal process could be extremely costly and time-consuming, and somewhat corruptive (ADB, 2017).

Thailand was regarded as top-ranking countries which have no history of government default and boast deeper financial markets. It has very low sovereign payment risk Thailand also encourages institutional investors, including mutual funds, hedge funds, pension funds and insurance companies, to participate in PPP projects through local capital markets (ADB, 2017).

Thailand also has check and balance measures that include financial and contracting oversight of the finance and justice ministries, cost-benefit assessment evaluations and ensuring that projects fall within budget constraints codified by law and to ensure its PPP agency operates independently. SEPO, under the Ministry of Finance, ensures that projects are assigned to the most appropriate managing government agency, and

provides clear guidance and facilitation through the PPP process, especially when more than one agency is involved in managing a project.

**Local Capabilities:** Thailand has very strong pool of local private contractors with capacity and know-how to carry out most of the road/highways-related work except for very complex bridge construction (ADB, 2017).

**The regulator as a key partner:** Privatization is regarded as PPP in Malaysia. The Government of Malaysia has improved efficiency of Port Klang and prevented anti-competition behaviors while adopting regulation and tariff mechanisms to ensure competitiveness and operational capability. The government revised the tariff regulation in 2012, and again in 2014 to set tariffs by two PPP partners for port users within the price cap set by Port Klang Authorities (Zawawi, MI, Kulatunga, U and Thayaparan, 2016).

To foster financial sustainability, sector laws, regulations, or policies provide a basis for reasonable level of tariffs, Myanmar's MoPF with the technical assistance of IMF, is working to establish clear methodologies to set, increase, and periodic review for tariff since 2012.

**Legislation:** Myanmar Investment Law and Myanmar Companies Law have already been enacted and enforced in 2016 and 2017 respectively. But PPP is a term largely undefined in Myanmar Law. Multi-windowed system is used in Myanmar (1) going through MIC in which Concession, BOT, BTT and other different types of PPP are not prohibited (2) then under the project bank in which IGAs can handle the investment projects directly with the private partners whether it is PPP or not. Due to the recent change in governments and low levels of legal certainty, laws may not always be interpreted by the government and the courts in a consistent manner (Conventus Law 2016). Myanmar Investment Law clearly has provision to protect the investors from nationalization of project assets.

Going forward to the bright side, with the entry into force of the amended Myanmar Company Act on 1 Aug 2018, companies are now subject to various new clearer rules and requirements in order to lawfully conduct their business in the country. By launching of the Directorate of Investment and Company Administrations' (DAICA) online registry system, Myanmar Companies Online ("MyCo"), Myanmar has made a

notable stride forward in its efforts to attract greater levels of foreign participation and investment. The corporate compliance process is now significantly more streamlined and efficient under the Myanmar Company Law of 2017 (MCL). By virtue of the new MCL and subsequent notifications, the distinct features are earned; all corporate filings are now readily accessible online, no more applications to extend the term of the Certificate of Incorporation, no more par value requirement, single shareholder and single director companies are now permitted, 35% of foreign shareholding now permitted in local companies without changing the company's status as a local company;

**Vietnam's Land Issues:** As per the Constitution, land belongs to the State and is subject to administration by the State. However restrictions on access to land have been progressively relaxed. On a case-by-case basis, certain PPP projects may be entitled to have the benefit of government support in the form of land availability and land fees. General Law will apply and comes under administration of the provincial or district people's committee. The key regulation governing land-use rights are Land Law 2013 and Decree 43/2014/ND-CP (Decree on Guidance of Implementation of Land Law) (ADB, 2017).

**Thailand government** is responsible for making land available for specific public infrastructure projects. Resettlement of affected households is also part of government's responsibility. There is no dedicated central government organization responsible for land acquisition and resettlement. Each of host organizations will be responsible for this.

**Myanmar's Land Administration:** National Land Use Policy in 2016 includes provisions for, among others, improving public access to information about land use management and developing independent dispute resolution mechanisms (ICS 2017). These land laws are not harmonized and sometimes contradict one another. The laws typically classify land into categories that are outdated and/or overly complicated. They do not accurately reflect how the land is currently being used or has been used in the past (ADB, 2016).

**Government Guarantee in Vietnam:** There has been a long running lack of commitment of the government to guarantee (i) exchange rate risk and (ii) availability of hard currency for convertibility. Even though Decree 15 made certain provisions, it is understood that the current policy is to strongly discourage such type of guarantees.

The practice is to offer a very limited guarantee for currency availability such as 30% at the time the guarantee is called followed by 70% at a later date if the government has currency available. To date, the two BOT power projects that have been internationally financed (Phu My 2.2 and Phu My 3) were both supported by central government guarantees (ADB, 2017).

**Thailand's Ministry of Finance** establishes a "Private Investment in State Undertaking Promotion Fund" which serves to support the preparation of a Strategic Plan and support a state agency in making a project proposal, preparing the project appraisal report and hiring the PPP-consultant ("The Asia Cooperation Dialogue (ACD) Summit 2016").

**Malaysia government** introduced the Facilitation Fund, worth MYR20 billion as a form of support for public projects to bridge the viability gap and stimulate private investment in PP projects in priority areas (ERIA, 2015).

Table (4.8) Procurement of PPPs in Selected ASEAN Countries

| <b>Procurement of PPPs</b>   | <b>Vietnam</b> | <b>Thailand</b> | <b>Malaysia</b> | <b>Myanmar</b> |
|--|----------------|-----------------|-----------------|----------------|
| Evaluation committee members required to meet specific qualifications    | Yes (1)        | Yes (10)        | Yes (18)        | Yes (25)       |
| Public procurement notice of the PPP issued by procuring authority       | Yes (2)        | Yes (11)        | Yes (19)        | Yes (26)       |
| Foreign companies permitted to participate in PPP bidding                | Yes            | No              | Yes             | No             |
| Minimum period of time to submit the bids                                | Yes (3)        | Yes (12)        | Yes (20)        | Yes (27)       |
| Availability of various procurement procedures for PPPs                  | (4)            | (13)            | (21)            | (28)           |
| Direct negotiation not discretionary                                     | No             | No              | No              | Yes            |
| Tender documents detail the procurement procedure                        | Yes            | Yes             | Yes             | No             |
| Tender documents specify prequalification/shortlisting criteria (if pl.) | Yes            | Yes             | Yes             | No             |
| Clarification questions for procurement notice and/or the RFP            | Yes(5)         | No              | Yes (22)        | Yes (29)       |
| Pre-bidding conference   | Yes(6)         | No              | Yes (23)        | No             |
| Financial model submitted with proposal                                  | Yes            | Yes             | Yes             | Yes            |
| Proposals solely evaluated in accordance with published criteria         | Yes            | Yes             | Yes             | Yes            |
| Treatment when only one proposal is received                             | Yes (7)        | Yes (14)        | No              | No             |
| Publication of award notice  | Yes (8)        | Yes (15)        | Yes (24)        | Yes (30)       |
| Notification of the result of the PPP procurement process                | Yes (9)        | Yes (16)        | No              | Yes (31)       |
| Standstill period  | No             | No              | No              | No             |
| Negotiations with the selected bidder restricted                         | Yes            | No              | No              | No             |
| Publication of contract  | No             | Yes (17)        | No              | No             |

Source: Procuring Infrastructure Public-Private Partnerships Report 2018

- (1) Detailed membership and/or qualifications regulated
- (2) Available online

- (3) 90 calendar days
- (4) Open procedure (Single-stage tendering). Restricted procedure (competitive procedure with prequalification stage)
- (5) Answers publicly disclosed
- (6) Results publicly disclosed
- (7) Detailed procedure established
- (8) Available online
- (9) Grounds for selection included
- (10) Detailed membership and/or qualifications regulated
- (11) Available online
- (12) 60 calendar days
- (13) Restricted procedure (competitive procedure with prequalification stage)
- (14) Detailed procedure not regulated
- (15) Available online
- (16) Grounds for selection included
- (17) Available on line
- (18) Detailed membership and/or qualifications regulated
- (19) Available online
- (20) No specific period of time regulated
- (21) Open procedure (Single-stage tendering). Restricted procedure (competitive procedure with prequalification stage). Competitive dialogue and/or multi-stage tendering
- (22) Answers publicly disclosed
- (23) Results publicly disclosed
- (24) Available online
- (25) Detailed membership and/or qualifications regulated
- (26) Available online
- (27) 30 calendar days
- (28) Open procedure (single-stage tendering)
- (29) Answers not publicly disclosed
- (30) Available online
- (31) Grounds for selection included (Procuring Infrastructure Public-Private Partnerships Report 2018)

In the PPP procurement process, the three ASEAN countries arranged most of the necessary procedure in principle, but some are in need of detailed procedure establishment.

#### **4.5 Constraints and ongoing issues**

**Unsolicited Proposals:** Vietnam accepts the unsolicited bids with 5 percent cost advantage in bidding. Although it is expressly regulated, there is no vetting procedure

or pre-feasibility analysis, no competitive PPP procurement procedure is used. Pre-assessment and evaluation of consistency of USPs with other government priorities are done (“Decree 15”). Unsolicited proposals will not be contributed state capital but can be contributed capital from ODA and concessional loans by foreign donors if the project is within the category eligible to use such capital by foreign donors (ERIA, 2015).

**Malaysia’s UKAS** welcomes unsolicited proposal from the private sector, even though it does not publish any established mechanisms to handle such proposals. PPP Guidelines applies to both solicited and unsolicited proposals, but does not explicitly state so. Lack of competition in unsolicited proposal is a major concern in achieving sustainable goals of procurement. This could be addressed by introducing a competitive element to unsolicited proposal. (Zawawi, MI, Kulatunga, U and Thayaparan, 2016). The guidelines are very general in nature and do not have an established mechanism for dealing with unsolicited proposal (Anuar, 2012). Like Swiss Challenge, the Best and Final Offer was not specified in any of the UKAS guidelines or on the website, thus making its implementation unclear. Multiple rounds of tendering are conducted until the government obtains its objective. It is informed that the guideline for Best and Final Offer is for internal use only and it is in the process of enhancement (Zawawi, MI, Kulatunga, U and Thayaparan, 2016).

**Myanmar** is also accustomed to the unsolicited proposals under the name of ‘projects’ through the direct negotiation for many decades. Unsolicited proposals can be accepted under existing law or under contract, but without specific regulations which provide clarity on: types of USPs that are allowed, minimum requirements for USP submission, time-limited processes, agency leading evaluation of USP, procedures for approval of USPs and procedures for ensuring competition or fair market value. In the Notification, one separate section is entirely focused on unsolicited PPP proposals. It mentioned the template which PPP Center has to prepare for USP, the process of Swiss Challenge tender and the requirements from the private party. In No.27, Swiss Challenge tender process to be held while No.28 mentions USP can be awarded directly to a private party with certain conditions. Another noted clause is in Section IV, No.15 states the Pre-Feasibility Study to be conducted by the private party proposing the Project (ERIA, 2015).

Table (4.9) Unsolicited Proposals in Selected ASEAN Countries

| Unsolicited Proposals  | Vietnam             | Thailand          | Malaysia          | Myanmar           |
|--|---------------------|-------------------|-------------------|-------------------|
| Regulation of USPs   | Expressly regulated | Not regulated (2) | Not regulated (3) | Not regulated (6) |
| Assessment to evaluate unsolicited proposals                       | Yes                 |                   | Yes               | Yes               |
| Vetting procedure and/or pre-feasibility analysis of USPs          | No                  |                   | Yes               | No                |
| Evaluation of consistency of USPs with other government priorities | Yes (1)             |                   | Yes (4)           | No                |
| Competitive PPP procurement procedure for USPs                     | No                  |                   | Yes               | No                |
| Minimum period of time to submit the bids                          | No                  |                   | Yes (5)           | No                |

Source: Procuring Infrastructure Public-Private Partnerships Report 2018

- (1) Detailed procedure not regulated
- (2) Not regulated and do not happen in practice
- (3) Not regulated but do happen in practice
- (4) Detailed procedure not regulated
- (5) Minimum time provided but not explicitly specified
- (6) Not regulated by do happen in practice

Thailand does not regulate the USP and did not happen USP project. New Economic Policy for Ethnic Malaysian favors in some instance, the government fulfilled the necessary procedure for USPs. Unsolicited proposed projects are usual methods for Myanmar while there are not enough regulations to govern properly. U Set Aung pronounced in his interview with media that the government has to mind the investors' preferences.

**SOE and Privatization:** Vietnam's State-owned enterprises (SOEs) play the dominant role in the economy despite commitment to privatization. Existing PPPs involving SOEs as investors have usually involved negotiated or direct appointment contracts. Government oversight of these companies and their spending is limited and largely reactive. With Decree 30, SOEs are treated in the same manner as private investors, and they are not entitled to any advantage over private investors in

tendering process. Sectorial ministries (e.g., Ministry of Transport (MOT) have embarked on a roadmap up to 2020 to privatize and equitize the SOEs (ADB, 2017). An SOE is allowed to participate in a PPP as counterparty to the government and hybrid arrangements (e.g., joint venture between SOEs and private firms). The Government of Vietnam has shown commitment to ensuring equitable competition for PPP opportunities to reduce the weak public finance. To reach the objectives, the country will have to continue to reform public companies, while the gap between large private enterprises benefiting from FDI and unprofitable state enterprises has been growing wider. (Fauziah Zen, 2018). The cost of slow privatization is high for Vietnam's competitiveness. Regards the entry of new private companies, create risk of corruption can exacerbate economic volatility through excessive investment financed through the soft credit (ADB, 2017). Vietnam's economy continues to face challenges. In September 2012, the official bad debt ratio climbed to 8.8%, though some independent analysts believe it could be higher than 15%.

**Privatization in Malaysia** is one of a vital component of the government's economic policies which aims at reducing the government's administrative and financial burdens. Kay et al identified three interrelated policies under the umbrella of the privatization program such as (1) Denationalization (2) Liberalization or deregulation (3) Contracting-out or franchising (Ismail and Rashid, 2007).

**The Myanmar government** has started to privatize a number of state-owned enterprises (SOEs), because SOEs prove to be costly for the government (ICS, 2017). The 1989 law on SOEs gives them exclusive right to carry out economic activities in a number of sectors including banking, teak extraction, and oil and gas, but in practice, private sector development is possible, often in the form of a joint venture (ICS, 2017). Project Bank allows transferring State Economic Enterprises (SEE) to transfer in part or in whole to the private sector through equitization or PPP mechanisms. In a process of increased privatization, problems of cronyism and nepotism are highlighted in the awarding of contract, and the process lacks transparency (FP, 2015).

Vietnam PPP faces systemic issues that need to be addressed. First, there are difficulties in creating bankable projects for PPP given uncertainties in the government commitment to address (i) the underlying issues of low tariffs and

willingness-to-pay (particularly in the transport and water supply sectors), (ii) perceived risks of investing in infrastructure projects, and (iii) lengthy government procedures. Second, there is the issue of the absence of government viability gap funding to support PPP projects that have strong economic returns but may not be commercially viable, as well as an absence of clarity on the other forms of government undertakings such as guarantees, making land available, and enabling access to ODA grants to identify bankable projects. The third issue is the lack of a “level playing field,” particularly with respect to concerns regarding bid transparency and state-owned enterprise access to state-directed and/or preferential financing, which creates a “crowding out” effect for private firms. The fourth and last issue is the lack of availability of long-term debt for private sector projects, particularly in the local currency. (ADB, 2017, OECD, 2018)

Vietnam’s current challenges for foreign participation include foreign lenders security issues as the framework for credit enhancements and guarantee mechanisms remains unclear and restrictions on mortgage over land-use rights in favor of foreign banks where land is conferred on a rent-free basis. There are also issues with assurance for foreign currency exchange, convertibility and remittance of local currency income. In transport and utility sectors, increasing tariff levels may increase investor interest (ADB, 2017). The new PPP regulations remove the approval mechanism and instead require that lending banks and the relevant governmental authority will determine the timing for execution of the agreement providing for step-in rights (The World Bank, 2016). Moreover, the law does not expressly regulate compensation. But the payment/concept can be provided for within the contractual terms agreed between the parties. The terms may vary from project to project (World Bank, 2016). The PPP regulations do not provide guidance as to what is an “other important project” nor as to what ministry, agency, or authority is being referred to, but it does seem clear that only projects of a certain importance are intended to benefit from government guarantees of foreign currency availability (and presumably also convertibility and remittance) (OECD, 2018).

**Currency Risk:** Vietnam’s currency inconvertibility remains an area of uncertainty for investors and international lenders. They do not go far enough to guarantee availability of exchange (ASEAN PPP Guides).

**Thailand's State Enterprise Policy Office** released the PPP Master Plan 2015–2019 to determine the direction for sectors and types of commercial and social investments with private participation. Regarding to PPP definition, PPP-projects are conducted in the form of various contractual models as set forth in the “Investment Contract” between the public authorities (the state) and the private “investor. The Minister of Finance is empowered by the PISU to issue Ministerial regulations for the implementation of the PISU. In reality, things are also little different from the guidelines. Almost half of the projects originally proposed by the government are still bogged down in feasibility studies and negotiations, or are under consideration by the Public Private Partnership Committee. Even when projects have been started, many of them remain far from completion. The problem is that the government has tried to launch so many infrastructure projects simultaneously that state officials have been unable to cope. Then the draconian Public Procurement Act passed in August 2017, threatens to impose criminal penalties on state officials guilty of taking kickbacks, which has made everyone extra cautious, slowing the flow of projects even further (The Economist, 2018). PPP-projects in Thailand are an extremely complex legal topic, involving various government authorities with shared different competencies, i.e. ministries, provincial administrative organizations, municipalities, tambon administrative organizations, the Bangkok Metropolitan Administration, Pattaya City or other local administrative organizations. Basically, projects with a value of over one million Baht require approval by the central government (“SEPO”). There are 44 PPP projects run by 16 agencies based on the State Enterprise Policy Office report, and have no documented instances of expropriation or unilateral price revision. Redress mechanisms in place for project terminations (Economist, 2018).

In Malaysia, there are also constraints that hinder the successful implementation of PPP projects through the possibility of project default, projects completed at a higher cost to the Government and where value for money is not realized (Cheung et al., 2009). Survey on 2013, the “existence of favorable legal framework” is the third most important CSF for implementing PPP projects in Malaysia as there is no generic PPP law except the announcement of the Ninth Malaysia Plan in March 2006, and the Tenth Malaysia Plan in 2011 (Ismail, 2013). Again, Ismail (1914) pointed out the key critical success factors in Malaysia PPP as commitment and responsibility of public and private sectors, favourable legal framework, sound economic policy, and

available financial market at 5<sup>th</sup> Annual PPP Conference. Moreover, Ismail and Haris presented the constraints hindering PPPs in Malaysia are lengthy delay in negotiations, political debates on a project, lack of government guidelines and procedures, high user charges, confusion over government objectives and evaluation criteria, and unsolicited proposals not being regulated within a PPP legal framework. All these problems center on incomplete legal frameworks, inefficient procedures, and the political economy. Their pronounced “favorable legal framework” consists of good governance, commitment and responsibility of public and private sectors, favorable legal framework, sound economic policy, and available financial market (Ismail and Haris, 2014).

The organizational structure of a typical PPP in Malaysia does not differ much from best international practice. The structure comprises the government, the Special Purpose Vehicle, lenders, private investors, works contractors and facilities maintenance contractors. The roles and responsibilities of the parties in Malaysian PPP are similar to their counterparts worldwide. Considering not enough, the Government needs to clearly state the objectives of promoting PPP as a mode to deliver public services in Malaysia, as was done previously with the introduction of the 1991 Malaysia Privatization Master Plan, which provides clear objectives, methods and the implementation of the policies, while highlighting the progress achieved and addressing the future direction of the programme (Beh, 2010). Meanwhile, continuous economic development also requires the public sector to enhance the proactive of PPP in Malaysia to ensure that the needs of the public can be met according to the required standard at the best cost to the public sector. (Ismail and Haris 2014). “Lack of government guidelines and procedures on PPP”, refers to the fact that although PPP was officially unveiled in 2006, the first official PPP reference, that is, the Malaysian PPP Guidelines, was only published in 2009 by the Unit Kerjasama Awan Swasta. Until recently, although there are six government guidelines on PPP implementation in Malaysia, the guidelines are too brief and may not be that useful to the users. It is crucial to have sufficient guidelines, particularly for the tendering and contract basis, as the lack of adequate guidelines may result in reduction in project quality and an increase in the cost of the PPP project.

The lengthy delays because of political debate”, reflects the scenario in Malaysia in which political intervention in PPP project implementation is always present, especially from the federal or state levels as a superior will attempt to influence the municipal level to accept a targeted tender for the PPP project. Hence, the local authority (municipal) have a conflict in deciding who should be granted the PPP project because they need to adhere to and strictly follow the rules and regulations while considering the request from the higher level. However, should any problem arise with regard to the project later, the local authority would be the ones to blame (Sigaravelloo, 2010). The intervention of another party (superior) causes a lengthy delay because of political debate. PPP implementation guidelines, which causes a lack of conformity in the detailed objectives of the government and the evaluation criteria needed to be fulfilled by the private sector to secure the PPP projects. There is no clear framework for the tendering process, project financing, project implementation, monitoring or performance auditing (Takim et al., 2009). Tracing from the literature, trenchancy is somewhat high in Malaysia administration, getting the fact “under the Ninth Malaysia Plan, over 425 projects were entrusted to the private sector using the Employees Provident Fund (EPF) (Khairuddin, 2007; Ismail, 2013c)”.

Unlike other ASEAN countries, social infrastructures are also done under PPP scheme such as giving training to the highway truck drivers for the road safety in form of foreign participated PPP. BLMT arrangements are concession projects that are applied in the health and education sectors in Malaysia. The Malaysian government has built hostels of a public university and a children’s hospital by using the BLMT. This adoption in the health and education sectors makes the BLMT model popular in developing the country. In this arrangement, the government pays rent to the private partner for the constructed facility and public services (Ahmad, Ibrahim, & Bakar, 2018).

**Institutional weaknesses:** Myanmar has about 25 different ministries and regional administrations, the interpretation of the law is different and written language is mixed use of English and the Myanmar. There is no standardization of style and coverage so that it is not always complete or consistent. Then judicial determination can vary per provisions and situations. Within a few years, many new laws are enacted but with no prior point of reference. It is difficult to give the proper advice. Another important issue is that legislation and regulation are functioning well in

practice, being followed in practice. There is not enough sound record of compliance with the law and contract obligations; for example, there are instances of the government reneging on its contractual obligations, including payments. There have been instances of unilateral contract termination by the government, or expropriation of project assets in the past. The government did not get the court cases or conflicts up front with PPP bidders or PPP contractors regarding the application of legislation and regulation in the past. Usual habit is allowing another new project for the losses of the private partner or putting the company into the black list for the public funding losses (OECD, 2018). Myanmar Investment Commission noted that the business environment of Myanmar is still unfavorable compared with neighboring countries (“MIC, 2018”).

According to major global indices, Myanmar is ranked 131 out of 140 countries in the Global Competitiveness Index, 170 of 190 for Ease of Doing Business, and 136 out of 176 in the Corruption Perceptions Index. Although the scores of Myanmar have been improving, its position is still much lower than Vietnam and at the same level as Bangladesh. With regards to the areas of evaluation for the Global Competitiveness Index, Myanmar is ranked particularly low for institutions (legal and administrative framework), infrastructure, higher education and training, good market efficiency, financial market development, technological readiness, business sophistication and innovation. These problem areas increase the cost of doing business in Myanmar. Poor infrastructure and insufficient higher education are also constraints for attracting investment (ADB, 2017)

Although Myanmar has improved in some rankings, there remain a number of obstacles and barriers to doing business in Myanmar. The unreliable electricity supply and the underdevelopment of transportation infrastructure are serious constraints on the productivity of business operations. The sectors to be highlighted are “investors’ concern about political risk, weak macroeconomic conditions, development of business- related regulatory systems, residual investment restrictions and uncertain investment approval procedures, weak investment promotion activities and investor support, underdeveloped infrastructure, underdeveloped business- related systems, weak financial sector, underdevelopment of local industries and insufficient skilled workforce (OECD, 2018).

To highlight in specific, reforms to the legal system are ongoing and major laws have been amended or newly enacted, however, enacting by-laws always delay in most ministerial levels. Moreover, there are problems in enforcement and unclear procedures. Important business-associated laws have not yet been prepared- for example, laws covering intellectual property and PPPs. In addition, legally-required procedures are often complicated and time-consuming (ADB, 2017). The timeframe and cost of various Government procedures are also pointed to as a source of business expense. In practical, co-ordination and information sharing between line ministries is worse than the previous administration by MIC high personnel experiencing that MIC personnel had to not down some contract details while ministries read out contract content without allowing a hard copy or taking photos of documents (Interview with MIC personals).

**Weak Governance concerned with doing business:** The recently passed Myanmar Investment Law which went into effect in April 2017 is intended to simplify regulations (ICS 2017). Open tendering is not the default method of procurement (The World Bank 2017). Procurement material such as laws and regulations, notices of calls for tender, tender documents, and award notices are not publicly accessible online. There are a few sectors where foreign firms are ineligible to submit bids such as the defense sector (The World Bank 2017). Companies face a high risk of corruption in the tax administration in Myanmar. Irregular payments in connection with tax payments are commonly exchanged (GCR 2015-2016). Businesses make significantly more payments and spend significantly more time on paying their taxes compared to other places in the region (DB 2017).

In particular, the lack of transparency in some projects and absence of an open and fair tender process have undermined investor confidence (The Myanmar Times, Aug 2019). Siddhartha Basu pointed out that using public fund efficiently by competitive procurement is vital importance in a country like Myanmar, with its limited ability to raise tax revenues. Myanmar-the fourth Australian Business in Asean Survey identified government bureaucracy as a significant hurdle and also noted weak law enforcement as a continuing challenge to doing business in the country (Consult-Myanmar, 2019). The 20-year Myanmar Investment Promotion Plan (MIPP) which was released in October 2019, states that undeveloped regulations on the domestic front, not having full assurance on procedures for approved investments, and weak

development of basic infrastructures are some of the main restrictions for investors so that single-window system is the best to help investors do business (Thiha, 2019). U Thaung Tun, Chair of Ministry of Investment and Foreign Economic Relations (MIFER) and chair of MIC, pronounced that “those who come to invest have difficulties because of the many procedures involved. Investors have to go to one place after another for approvals and permits for construction, land and the environment and to avoid investors being confused and put off. Under the single-window system, investors can apply for all these permits in one place. The ministry will make necessary decision based on a list of standard operating procedures agreed on by all the relevant ministries” (U Set Aung, 2019).

Table (4.10) PPP Contract Management in Selected ASEAN Countries

| <b>PPP Contract Management</b>   | <b>Vietnam</b> | <b>Thailand</b> | <b>Malaysia</b> | <b>Myanmar</b> |
|--|----------------|-----------------|-----------------|----------------|
| System to manage the implementation of the PPP contract  | Yes (1)        | Yes (8)         | Yes (14)        | No             |
| System for tracking progress and completion of construction works  | Yes            | Yes             | Yes             | No             |
| Monitoring and evaluation system of the PPP contract implementation  | Yes (2)        | Yes (9)         | Yes (15)        | Yes (19)       |
| Foreign companies permitted to repatriate income   | Yes            | Yes             | Yes             | Yes            |
| Change in the structure (stakeholder composition) of the private partner and/or assignment of the PPP contract regulated | Yes (3)        | Yes             | Yes (16)        | Yes            |
| Modification/renegotiation of the PPP contract (once the contract is signed) regulated                                   | Yes (4)        | Yes (10)        | No              | No             |
| Circumstances that may occur during the life of the PPP contract regulated   | Yes (5)        | Yes (11)        | Yes (17)        | Yes (20)       |
| Dispute resolution mechanisms  | Yes (6)        | Yes (12)        | Yes (18)        | Yes (21)       |
| Lenders’ step-in rights  | Yes (7)        | Yes             | No              | No             |
| Grounds for termination of a PPP contract  | Yes            | Yes (13)        | Yes             | No             |

Source: Procuring Infrastructure Public-Private Partnerships Report 2018

- (1) Establishment of a PPP contract management team
- (2) Procurement authority gathers information
- (3) Same qualifications legally required for the replacing entity
- (4) Approval by an additional government authority required. Regulations about changes in the scope
- (5) Force majeure. Change in the law. Subcontracting
- (6) Domestic arbitration, International arbitration.
- (7) Expressly established in the regulatory framework
- (8) Establishment of a PPP contract management team. Elaboration of a PPP implementation manual. Detailed membership and/or qualifications of the PPP contract management team regulated.
- (9) Private partner provides periodic information. Procurement authority gathers information
- (10) Approval by an additional government authority required. Regulations about: changes in the scope; changes in duration; changes in the price or tariff
- (11) Force majeure
- (12) Domestic arbitration. International arbitration. Investor-State Dispute Settlement (ISDS)
- (13) Consequences of termination expressly regulated
- (14) Establishment of a PPP contract management team
- (15) Private partner provides periodic information
- (16) Changes in the private partner during an initial period regulated
- (17) Force majeure
- (18) Domestic arbitration, International arbitration. Investor-State Dispute Settlement (ISDS)
- (19) Private partner provides periodic information
- (20) Force majeure material adverse government action
- (21) Domestic arbitration. International arbitration

In the PPP contract management stage, Vietnam and Thailand fulfilled most of the necessities and Malaysia follows closely. Myanmar needs a long way to go for catching up their situation. Learning the importance of PPP implementation, those governments take quick action to enact the related Laws or amend regulations, establishing enabling business environments in timely manner.

## **CHAPTER V**

### **CONCLUSION**

#### **5.1 Findings**

Countries across Southeast Asia are increasing their efforts to narrow their infrastructure gaps. To get their objectives, these ASEAN countries try to implement PPP in their preferred ways.

The lack of capacity, coordination and the lack of unified approach amongst Vietnamese government authorities are critical for potential international project investors and also major difficulties for doing PPP projects in Vietnam. Although PPP projects under the name of BOT, BT and BTO have been carried out for decades, the legal framework for implementing PPP projects is not fully developed. As decree 63 was recently enacted, long governed Decision 71 and Decree 15 provide a broad framework for PPP but still lacks detailed implementing rules and regulations for implementing PPP, particularly at the sector level. The constant issued PPP Decrees and circulars do not fully address a number of key risk allocation and commercial issues including, for example, change in law and convertibility risk and also fail to provide detailed procedures for contract/project assignment rights. Those could result in confusion and uncertainty for the implementing authorities and, in turn, delay in project contract conclusion and practical project implementation. Development partners like ADB and others have made considerable efforts to advocate and train the government agencies, however, there are very few actual PPP transactions have occurred. There are also very limited precedents of financed and completed privately invested projects. The government authorities, therefore, often do not have sufficient legal and practical guidance to smoothly manage the implementation of projects, particularly outside the conventional power sector. It appears not having sufficient experience and/or understanding of the commercial drivers concerning private investors, such as elements relating to the financial viability of a project and risk sharing mechanisms between the private and public sector. The lack of coordination

by government and amongst related authorities has also cause confusion to investors. These institutional weaknesses lead Vietnam ranking 68 out of 190 countries in the Doing Business 2018 report by the World Bank while Malaysia 24<sup>th</sup> and Thailand 26<sup>th</sup> accordingly. Myanmar has all the similar features to Vietnam and worse than Vietnam in lack of rule of law so that government officials rather choose conventional provision which has less risk of regulatory takings in short term contracts than in a long lived PPP.

PPPs in Malaysia are governed by the national policies on PPPs, guidelines including the privatization master plan and UKAS as the central agency in coordinating and supervising PPPs in the country. UKAS negotiates with the private sector on behalf of the government but do not enter into any contract. PPP procuring authorities involve all governmental levels from Federal Government (ministries/agencies) to state governments as well as local governments depending on the project, in which their roles are conducted according to their respective authority or responsibility. Although there are six government guidelines recently on PPP implementation in Malaysia, the guidelines are too brief and may not serve enough for the implementation. It is crucial to have sufficient guidelines, particularly for the tendering and contract basis, as the lack of adequate guidelines may result in reduction in project quality and an increase in the cost of the PPP projects. Learning from Thailand and Malaysia, PPP center chaired by the Prime Minister, is the highest authority to do the regulating and monitoring work together with committees which is made up of personals from Ministries and other concerned departmental expertise. On the contrary in Myanmar, a part from complex sector laws and regulations in most of Myanmar Ministries, while line ministries are implementing authorities as “IGAs”, PPP center can assist only upon request of IGAs instead of being co-governing and co-monitoring body. Even PPP definition itself highlights IGAs to be one side of partner who deals with private investor whereas “the public” is the implementing partner in other countries’ PPP definition. IGAs definition is not clear enough with the possibility of Ad-hoc government branches under the specific line ministries.

Insolvency of project was not mentioned in “Project Bank Notification”. But it is notable that the Clause No.45 allows a waiver to immunity from jurisdiction and execution by statute to the IGAs when executing a PPP contract. On the other hand, IGAs are fully authorized for most of PPP process while no ground for project

termination and PPP center to be in a position to assist upon request of IGAs. Without any detailed provision for project executing in Project Bank, IGAs are fully empowered to prepare contracts and not being taken any action when executing PP contracts so that there is possible danger of the private investors taking advantages on the situation.

Thailand's Investment in State Undertakings Act (PISU) and the PPP strategic Plan ensure that virtually all major infrastructure projects are developed as a public private partnership. The government proved its commitment to PPP by deciding Seattleite-5 to be implemented under PPP scheme instead of extending the concession contract which is due in 2020. The Thai government has invested a lot in form of finance, time and management effort over the years in EEC, national economic policy prioritization and PPP as one of the key drivers. Their keen interest in focusing whatever new support arrangements might make the projects sustainable in the long-term. Government officials' forward-thinking views put on continuous research and development to understand what makes an effective PPP contract. Thailand PPP key players further pointed out the fact that PPP committees currently lack independent representatives from various industry sectors, resulting in centralized government management of the PPP mechanism. Moreover, Thailand's political instability poses political risk for foreign investors, especially in long-term projects that require consistent policy principles, project prioritization and a commitment by the government to the ongoing development of the PPP.

National Polies are driving forces for the country and PPP implementation. To reach its goal of high-income status by 2036, Thailand calls for structural reforms to boost economic potential and inclusiveness so that PPP involves one of the means and by spread-over effects received by the outcomes of national policies, it can overcome past implementation challenges. Thai government facilitates domestic competition, reduce cross-border barriers, encourage fostering innovation, improving education and skills training to strengthen institutions.

Policy continuity and governments' commitment is important for the reasons that the elected governments change in times since Myanmar's electoral system is First Past The Post (FPTP) and the whole government has to be replaced with new one based on

their votes. Myanmar PPP policy document was finalized in early 2016, but it was not adopted officially by the new parliament and only after two and half years, in November 2018, the new General framework, the Project Bank Notification was come out. The path of enacting the generic PPP Law was changed back to “Project Bank”, which is systematic updating with old style conventional Procurement but with consolidated web-based data base. The framework alone is not legally binding and possible delay or neglect to take action if anything went wrong with the projects. Privatization under the name of equalization is included and high officials like Deputy Minister and U Set Aung clearly stressed the intention of privatization and some state-owned enterprises into PPPs in their public speeches. The long experience of privatization in Malaysia has shown the pro and cons of process to which Myanmar has to learn and handle with serious care.

As per selected ASEAN countries’ past PPP process, starting a new PPP program requires that governments learn to master the regulatory, institutional and technical challenges involved in planning, designing and implementing a PPP. However, learning-by-doing approach has been utilized in Thailand and Vietnam with the assistance of international development partners like the World Bank and ADB, where PPP projects were implemented before a full legal and regulatory framework for PPP was established. After being implemented with insufficient regulations on unsolicited projects for a long time, Myanmar seems doing the same nature by setting Development Assistance Policy (DAP) which would serve as a guideline for the most effective use of development assistance to Myanmar, based upon internationally accepted principles. By establishing the Development Assistance Coordination Unit (DACU), Government of Myanmar shows a more proactive and strategic approach to development assistance. DACU has been coordinating with relevant line ministries and development partners to direct development assistance into the rapid development of basic infrastructure.

An important lesson learnt from Malaysia is that enacting the Bumiputra Economic Empowerment Program, policies that favor and advance the economic condition of ethnic Malays was reactivated after occurrence of many complaints. It is acknowledged and understood that PPP in Malaysia is one of the instruments for achieving the national agenda, including the New Economic Policy. *Bumiputera*

companies do not need to compete with each other. A transparent and competitive tender exercise for unsolicited proposal does not happen, instead, exclusively negotiating with and awarding contracts to a single company. So this may extend the perception of corruption and abuse of power by the government. Thailand does not regulate the USPs and do not happen in practice. In Myanmar's "Project Bank", unsolicited proposals (USPs) are highlighted with one whole section, but not much procedure mentioned in details. Besides the lack of detail on the competition aspects in the framework, there is no explicit information on the assessment criteria and procedures used to evaluate the proposals. There is no vetting procedure or pre-feasibility analysis of USPs, and evaluation of consistency of USPs with other government procedure, competitive PPP procedure for USPs and minimum submitting period are not publicly announced.

Unlike other three economies in which their regulatory framework do not prohibit or restrict PPPs in specific sectors besides national defense and other matters of national security, Myanmar has contradictory laws or regulations in four specific areas namely transportation, energy generation and distribution , telecom and land tenure. Moreover PPP are long lived contracts and without Intellectual Property Law, the private investors and the rights of the public are not protected. Rule of law is not in order and poor legal environment might severely suffer investors in regulatory takings and discourage the potential investors. Poor infrastructures cannot attract the foreign investment vice visa the investors do not interest to invest in the country.

By signing bilateral investment treaties and free trade agreements (FTAs) with many developed economies, Vietnam tries to catch up with international best practices. Those treaties typically protect existing covered investments against expropriation without compensation and discrimination covering investors' access. Increasingly the treaties also facilitate the establishment of new investments with fair and equitable legal treatment and also clarify quest for balance between investor protection and government's right to regulate.

These findings were derived from an investigation of PPP implementation in four ASEAN Countries, identified through published documents. Thailand is the only country publicly disclosing their PPP projects and other three countries' information disclosure is very weak. There are data in ADB, OECD and the World Bank but with

the remark of possible incomplete data due to insufficient information from the concerned authorities or websites or hidden failed projects.

The growing importance of PPP implementation as well as the existence of the constraints in its implementation in Malaysia, the researchers repeatedly pointed out to pursue the government and the key PPP players understanding the constraints or negative factors concerned with insufficient regulatory framework or specific PPP law for successful PPP adoption to take the necessary measures as an effort in overcoming the identified constraints to ensure achievement of maximum benefit from the PPP projects. Regardless of many constraints, government's effort for enabling business environment is remarkable. Islamist Banking system which provides group guarantee for landing and leasing is well supportive to PPP project financing. Tariff review mechanism in Port Klang has worked well in a manner that allows all stakeholders to be engaged in the decision-making process and to respond more quickly to market trends. More to be done in Malaysia, other safety and environmental regulations must be separated from commercial activities to ensure that these issues are not compromised by profit-making considerations.

Public-private partnership legal framework still needs to be made more operational in all four countries. All of studied countries try to build enabling environment for business, nevertheless, a big gap lies between the highest government officers and the regional or lower government officer on the understanding of importance of PPPs. Concerned with the banking system and financial market, Thailand is the leading country among the four ASEAN countries including Myanmar. To achieve its targets, the countries need to accelerate the restructuring of the banking system by better dealing with non-performing loans, setting up provisions, and re-organizing inefficient banks. More efforts are needed to reform public investments, offer incentives to private businesses and gradually put in place. In many projects, lack of adequate project documentation made weak budgeting processes, lack of multi-year funding commitments, and ineffective procurement system, all contribute to cost overruns and delayed implementation. Apart from that sustainability of the PPP projects is very important as in Myanmar; BOT projects for road construction were handed back to the government or not properly maintained as per contract terms. In all the economies, the monitoring and evaluation work of PPP is not properly exercised except Thailand in recent regime.

The key lessons learned to ensure successful PPPs are that there needs to be (i) government engagement on broad-based reforms and ensuring a level playing field for private sector participation, for which Thailand in recent regime performs very well although there need more to reform, (ii) strong political commitment on the part of senior government officials to promote and advance PPPs, for this factor, Thailand is the best example of working in full capacity and Vietnam as the second and Malaysia are doing too; (iii) strong institutional support for planning and carrying out effective PPP project preparation, including a thorough value-for-money analysis, Thailand and Malaysia do properly; (iv) a streamlined procurement process and institutional capacity to implement the process in which Thailand, Malaysia and Vietnam perform in their own context and within their political scope; (v) pooling of donor resources to achieve critical mass and consistency in approach, here Vietnam earned the best for in its PPP history and Myanmar follows the path; and (vi) sufficient financing support to include, but not be limited to, mechanisms for government to provide multiyear commitments, creditworthy support, and prudent management of the fiscal obligations created by PPPs for which all selected three countries and Myanmar could not fulfill and have to work harder.

Myanmar needs to develop a multiple-year, consolidated and prioritized infrastructure investment plan (cross-sector, cross-ministry project list) consistent with national development strategies and medium-term fiscal framework, in order to develop a credible project pipeline attractive for the private partners and manageable for the government. EEC is Thailand's focal national policy for three specific regions and set the target that big infrastructure projects must be in the form of PPPs. Myanmar lacks a cross-sector, cross-ministry plan that consolidates and prioritizes infrastructure projects that contribute to social and economic development. Over the past few years, sector plans with lists of key infrastructure projects managed by a ministry or several ministries have been drafted with help from development partners, but it is not pronounced by the key policy makers whether those plans are used by the present NLD administrations or not. There is no government support mechanism during the preparation and construction phases of the transactions. The Ministry of finance does not offer government guarantee for payment by the off-takers so far, not providing

even to ADB loaned Myingyan Hydro-power project. As An alternative, line ministry guarantees have been sought in recent transaction based on international practices.

All in all, Myanmar is facing a lot of constraints that the business environment is not conducive for PPP, being unaware of the importance of PPP by public sector officials who regards the conventional project procurement as their usual method, lack of a legal and regulatory framework conducive for PPP projects, the lack of capacity to manage PPP processes and information and limited access to financial resources and project finance skills. However following up the ASEAN countries' development approaches, by setting up a good regulatory framework or enacting specific PPP law and promoting enabling business environment, Myanmar can earn fruitful outcomes from PPP implementation.

## **5.2 Suggestion**

Learning from these ASEAN countries, a good regulatory management requires a whole-of government approach underpinning how it develops, implements and evaluates regulations. The studied ASEAN countries try to reform a more independent and dedicated legal institution especially for PPP implementation, with its own staffs and responsibilities separate from that of the Ministry of Planning or Ministry of Commerce. They set up procedure or enact law for review of existing laws to ensure they accommodate changes in business practices. If Myanmar government can assign more of responsibilities to PPP Unit which co-operates and trains to IAGs' staffs, the institutional arrangement can be more efficient, effective and inclusive. Institutional arrangements will be more implemented in letter and spirit since PPP task force is a dedicated team providing expert support on the preparation, procurement, and implementation of PPPs. There is no single design of a PPP unit, and each country needs to customize the design of the PPP unit according to the local context. Since PPPs can be conducted based on the needs and approvals of various Union and State departments and organizations, there is urgent need a standard contract format for PPPs and should be carried out importantly. A central PPP unit which is located in the Ministry of Planning and Finance should participate in all stages of a project lifecycle, co-governing with IGAs from structuring to contract management, allowing continuous feedback and dialogue between contract management and public teams. In

such an environment, the role of external advisors has to be carefully planned, as they provide key skills along the project lifecycle, but must not substitute those tasks where knowledge must be developed, stored and used by the public sector. Up to this date, providing for independent regulator(s) to the line ministries is not informed publicly.

Inventors are faced with a number of constraints when planning and implementing investment in Myanmar. The Government of Myanmar must identify solutions to these problems in investment promotion. Amid such constraints, the continuing mobilization of financial resources from non-state sectors for infrastructure development is urgently necessary. As a matter of fact, the Myanmar government is calling for PPP investments in many projects, contributing state-owned assets as part of government's contributing share to PPPs or privatizing some SEEs or getting foreign loans so that the government makes efforts to attract more foreign investors. On the other hand, controlling the increasing public debt is also an inevitable task for the Myanmar government. There need public awareness program, a clear consensus among a wide range of stakeholders (i.e., government, private sector, and other donors) that there is no choice but to advance PPP, especially in light of huge infrastructure needs. An integrated screening has been done as per Deputy Minister, but with the very high corruption index and pronounced failure of administrative reform since U Thein Sein's administration, line ministries are doing as the focal project selecting and implementing agents whereas they can avoid the judiciary action when the termination of the projects for any reason. Decentralization to the line ministries is a bit early and in order to avoid misperception and enhance common understanding of the PPP program, it is suggested to redefine IGAs or amend PPP center to be a focal authority promptly.

The government needs to take a strategic approach to PPP, preferably in the form of an overall PPP policy statement, relevant cross-sector, cross-ministry policies, and comprehensive planning that consolidates and prioritizes infrastructure projects. The government has to take the lead in developing clear and conducive legal, regulatory, and financial frameworks supporting the development and implementation of PPPs. Clear rules of government fiscal support, management of risk and government contingent liabilities, and oversight are important. In terms of procurement and

tendering processes, there should be a strong preference for competitive bidding with multiple bidders.

If unsolicited proposals are allowed, there need to be clear policies and procedures for ensuring they are in the best interest of the government and subject to some form of market scrutiny through either a “Swiss challenge” or some other similar mechanism. On the other hand, close monitoring of present unsolicited proposed PPP Project, using a differentiated approach is a must-do for all stakeholders.

Dispute resolution and arbitration mechanisms must be addressed and honored. Like other studied countries, the enforcement of foreign arbitration awards by domestic courts should be made easier in accordance to the provisions of the New York Convention to which Myanmar is a party. Strong Institutional Support – Dedicated Public–Private Partnership Unit(s) and Project Development Facility are needed.

To put the regulatory burden into perspective, it is important to measure the policy and institutional constraints on the overall "enabling environment" which are an important determinant of the efficient functioning of the markets. In doing so, it identifies key areas where states need to design high-quality regulation.

In the context of development assistance, PPPs play a significant role in promoting better performance and improving efficiency to deliver public goods and services in developing countries, getting a good example as Vietnam under much development assistance by the World Bank, ADB and others. By cooperating with international organizations, it is vital Myanmar will gain experience and good policy consultation on how to cope with the challenges which will arise in implementation.

Myanmar still lacks most of the elements required for a functioning framework of PPP. It is understandable that it is difficult to possess the full range of required elements in an instant, and also quite challenging to draw a realistic roadmap in the medium-to long-term due to the rapidly changing circumstances, a few key initial steps can be serves as concrete for future PPP framework drawing from the past mistakes and success in peer ASEAN countries. The PPP governance strategy should include guidelines and regulations regarding formal governance contracts. Although

“project bank is a good start for the government to develop a visible investment project pipeline, an effective and rapid implementation process should be materialized in urgent manner with support and coordination among all related authorities.

There is a clear need for Government Political commitment and Public–Private Partnership Champion, need for strong political commitment on the part of senior government political leaders to champion, promote, and advance PPPs. Political and public sector support to the strategic decisions related to PPPs have to be sustained. The government must adequately support, budget, and staff PPP institutions and efforts. PPPs are not easy to develop or execute. Governments remain central to the delivery of infrastructure services, both as enablers for PPPs and providers through traditional public sector approaches.

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