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Laos: anti-corruption laws key to economic development

Dino Santaniello
Tilleke & Gibbins

Background

With neighbouring economic powerhouses such as Thailand, Vietnam, and Myanmar, the Lao People's Democratic Republic (Laos) is often overlooked as a burgeoning economy in the ASEAN region.

Laos is situated in a unique geographical location. It shares borders with Thailand, Vietnam, Myanmar, Cambodia and China, meaning that the country has great potential to become a vibrant hub, linking China to other ASEAN countries.

Although foreign direct investment (FDI) is still heading towards its neighbours, Laos has quietly been flourishing and it has continued making strides with a gradual overhaul of its anti-corruption framework in a bid to attract more foreign investment by instilling confidence in its legal system.

Economic development continues to flourish

As a small, landlocked nation with a small population, Laos is easily overlooked as a potential economic hotspot. It is also overshadowed by its neighbouring countries, which have significantly more inhabitants and, therefore, potential for growth and increased consumerism. Recent GDP figures show, however, that Laos' economic growth has continued as confirmed by the Asian Development Bank and the World Bank, which both forecast that GDP will rise from approximately 6.8 per cent to 7 per cent in 2016.

Economic sectors to watch

The economic outlook of Laos is good, and while mining and natural resources continue to be the main sectors contributing to Laos' growth, it is the influx of infrastructural and real estate projects in the country's largest cities that are now driving much of the rapid economic development.

The greatest amount of foreign investment is coming from China, followed by Vietnam. Chinese and Vietnamese investors are behind most real estate projects in Laos, which includes hotels, shopping malls and residential properties.

Tourism is another flourishing sector that has benefited from strong government backing. The government is seeking to boost ecotourism by granting incentives to business operators that invest in this niche sector.

Electricity production will continue to increase. As new hydro-power plants are built, exportation of hydropower is expected to increase over the coming years, strengthening Laos' economy.

Economic growth has led to an increase in prosperity, which in turn has led to improved living standards. According to the Asian Development Bank and the World Bank, the poverty rate in Laos fell from 33.5 per cent in 2003 to 23.2 per cent in 2013. This explains a recent decision by the World Bank to reclassify Laos as a lower-middle income nation, which stated that income per capita exceeded US\$1,000 in 2011. In fact, if the country sustains this, Laos may shed its title as a 'least-developed country' by 2020 as intended by the government.

Influx of foreign direct investment

Since 2012, FDI has steadily flowed into the country. According to the United Nations Conference on Trade and Development (UNCTAD) and its World Investment Report, FDI inflow has risen steadily from US\$294 million in 2012 to US\$427 million in 2013 to US\$721 million in 2014 and US\$1.22 billion in 2015. This increase in foreign investment is attributable to the adoption of more friendly policies towards foreign business operators, which has helped facilitate the influx of foreign investment.

Cutting back on red tape as Laos streamlines bureaucratic processes

In 2013, Laos finally acceded to the World Trade Organization, and for more than a decade, the country has been gearing up towards ASEAN integration. It has passed a series of laws and regulations to meet the standards outlined in the ASEAN legal framework and other related regulations aimed at facilitating integration.

The government also embarked on a restructuring programme in response to this inward investment and economic growth, and it has distributed new mandates to ministries in an attempt to avoid overlapping assigned management tasks and responsibilities.

To date, the Prime Minister has been involved in almost every domain, and has acted as the main decision maker in enacting decrees on economic and political matters. This bureaucratic re-organisation, however, will offload many duties from the Prime Minister's office to help improve efficiency.

Tackling corruption a key to continued FDI

Laos' Anti-Corruption Organisation has now been assigned a head to spearhead the drive to reduce corruption in the country.

The increased inflow of money into Laos has led to a surge in corruption. According to the Corruption Perceptions Index of Transparency International in 2015, Laos is ranked 139th out of 175 countries (with 1 being the best and 175 the worst). Although this indicates an improvement, as the country was ranked 145th out of 175 in 2014, and this is slightly better than Myanmar and Cambodia (147th and 150th, respectively), this ranking is nonetheless very low and is a real concern for authorities.

In general, the country suffers from a lack of transparency, and laws and regulations are often not in line with current practices. Therefore, foreign investors must understand the current regulations, particularly in respect of the legal environment and how this impacts the anti-corruption drive in Laos.

Government Anti-Corruption Plan to spur economic development and investment in Laos

In a move to attract FDI inflows, in 2013, the government issued an action plan on anti-corruption based on a strategic anti-corruption plan issued a year earlier. This action plan focuses government action on: (1) political training and awareness of laws; (2) research on and drafting of new legislation and amending existing laws;

(3) reorganisation of the state administration mechanism; and
(4) improvement of organisations and officials in charge of the fight against anti-corruption.

This is a seven-year plan, and the government expects to fulfil the targets set out in this programme by 2020. It has already started implementing the plan, mainly through the amendment and enactment of a new set of laws, and the restructuring of the internal bureaucratic and administrative system. It is too early to draw any significant conclusions on the results so far.

Absence of clear rules

In general, clear rules and guidance on laws when conducting business are still non-existent. This problem affects every sector. There is a lack of confidence towards officials when corruption is involved, and tax and customs sectors are often cited as examples, which explains, in part, why the state experiences difficulties each year in collecting taxes or customs duties from the private sector.

This problem is widespread and has become so well known to the public that it has become difficult for the government to ignore this problem and recognise that it must be addressed immediately to restore a degree of trust in local and foreign investors.

The vice president of Laos recently addressed this issue and warned both officials and private sector operators against bribery and violating anti-corruption legislation. The vice president also stressed that officials from departments or ministries were benefiting from such corrupt practices, and therefore, had a tendency to overlook or distort accounts, thereby lowering the taxes to be paid by foreign and local entities or awarding contracts in exchange for a bribe.

Laos is, therefore, facing a multitude of governance issues, which are compounded by a general lack of transparency and an inconsistent application of the law. These factors are corroborated by the granting of incentives or agreements that are negotiated on a case-by-case basis, such as concession agreements and tax incentives. While predetermined criteria or requirements for obtaining these agreements would lower corrupt practices, the current methods provide room for administrative discretion, which make the rules more opaque than originally intended.

The government is, however, trying to fight corruption. The government recently showed its determination to tackle corruption by passing a series of laws and regulations targeting money laundering.

Overview of Laos' anti-corruption legal framework

Laos is trying to minimise corruption throughout the country. Its determination to root out corruption from within the government is apparent, as the authorities recently took a former finance minister and the head of the Bank of Laos along with some colleagues into custody on suspicion of their involvement in corruption. The case involved a private company and the issuance of government bonds in return for a promise of payment for work that was never delivered. This internal crackdown should be continued and pursued by the current government.

The new prime minister, Thongloun Sisoulith, has also expressed his concerns and declared that the new government would be particularly attentive to corruption and fraud issues under his mandate. It is also noteworthy that Laos signed the United Nations Convention against Corruption on 10 December 2003, which it ratified on 25 September 2009. Laos also regularly hosts UN officials to get their opinions on anti-corruption issues and improving its legal framework.

The main regulations governing anti-corruption in Laos are as follows:

- Anti-Corruption Law No. 27 (2012);
- Penal Law No. 142/PO (9 November 2005);
- Law on Criminal Procedure No. 01/NA (15 May 2004);
- Law on Anti-Money Laundering and Counter-Financing of Terrorism No. 012/PO (4 February 2015); and
- Decree on Asset Declaration No. 159 (dated 4 June 2013).

The Anti-Corruption Law of 2012 replaced the Anti-Corruption Law of 19 May 2005, and brought a degree of consistency to some of the acts covered by the Anti-Corruption Law that were described differently in the Penal Law. The amended Anti-Corruption Law now covers bribery, which had previously been prosecuted and sanctioned under the Penal Law. Any wrongdoer can now be prosecuted under the Anti-Corruption Law.

The current Anti-Corruption Law covers the following acts: (1) embezzlement of state property or collective property; (2) swindling of state property or collective property; (3) bribes; (4) taking bribes; (5) abuse of position, power and duty to take state property, collective property or individual property; (6) abuse of state property or collective property; (7) excessive use of position, power and duty to take state property, collective property or individual property; (8) cheating or falsification relating to technical construction, standards, designs, calculations and others; (9) deception in bidding or offering concessions; (10) forging documents or using forged documents; and (11) disclosure of state secrets for personal benefit.

According to the Anti-Corruption Law, corruption is characterised when an official participates in any of the above-mentioned acts to 'benefit himself, or his family, relatives, friends, clan or group and causes damage to the interests of the State and society, or to the rights and interests of citizens.'

The other main legislation concerning anti-corruption is the Penal Law, which stipulates that 'corruption' involves any leader or person working for the state who commits different kinds of acts to benefit himself or herself or his or her family, relatives, friends and associates that would cause damage to the interest of the state, or collectives or to the rights and benefits of citizens.

Neither of these anti-corruption laws address corruption in the private sector, which is a major oversight as such practices are also endemic in the private sector in Laos.

The requirement that an act of corruption must cause damage to the interests of the state or to the rights and interests of the citizens is a real hindrance to the application of the law. This was noted in the United Nations Convention's Anti-Corruption Country Review Report of 2012, which recommended that the Lao authorities should remove this requirement from the Anti-Corruption Law. The amendments to the Anti-Corruption Law in 2012, however, did not take into account the UN's recommendation.

The sanctions imposed on corruption vary depending on the severity of the offence. There are educational measures for damage caused to the nation in an amount not exceeding 5 million Lao kip. If the offender willingly reports their own wrongdoing and returns the asset in the same manner, they would face education measures and a warning. However, this punishment would be different if the infringer attempted to extricate himself or herself from the sanctions. In this case, a note would be recorded in the official's book, and the infringer would be suspended, prevented from receiving any promotion or salary raise, removed from his or her position or transferred to a lower level or simply dismissed. In contrast, employees or personnel from the private sector who are found guilty of the

same offence would receive a reprimand, along with an order to pay compensation and a fine amounting to 1 per cent of the value of the damage caused.

For offences which amount to damage of more than 5 million Lao kip, such offenders would receive a fine and may be imprisoned. In addition, compensation can also be sought before the Civil Court.

In 2012, when the UN's anti-corruption report was released, despite a provision under the Anti-Corruption Law that raised the possibility of triggering an investigation when any government staff member 'appears to be unusually rich,' it was also noted that no mandatory income or asset declaration was required for civil servants. The requirement of Decree on Asset Declaration that every government official must declare their assets was a positive development. These declarations, however, are not publicly available, and therefore the government still has discretion as to whether it prosecutes potential infringers.

There are no official statistics available regarding decisions rendered under the Anti-Corruption Law, and access is challenging because approval from the relevant authorities needs to be sought. It is believed that up to 50 officials from Huaphanh and Oudomxay provinces, in the northern part of Laos, have been prosecuted for using state assets for their own benefit. These officials have been subject to education measures and a warning, which is the sanction imposed for minor offences, as discussed above.

There are also seizure and confiscation mechanisms in place under the Criminal Procedure Law and Penal Law, respectively. Seizures are possible if there is reason to believe the funds or assets are related to a crime, or they are important to an investigation or as material evidence. Seizures are a provisional measure applicable to all types of property and for all serious crimes, including money laundering offences and related predicate offences.

In a bid to prevent money laundering, the government recently enacted a law on anti-money laundering, which allows banks to inspect and report suspicious transactions. The scope of the law encompasses both local and foreign businesses, and although it is not specifically aimed at either the private or public sector, a number of more specific regulations clarify the duty and responsibility of any official who is tasked with combatting such crimes.

Among these, Decision No. 13 dated 19 October 2015 on Reporting Suspicious Transactions Related to Money Laundering, or financing of Terrorism, and its Recommendation No. 42 dated 12 January 2016, along with Decision No. 1 dated 15 January 2016 on know your customer and customer due diligence, finally provided clarification on the anti-money laundering law to ensure its effectiveness.

Reporting entities, which are defined under the anti-money laundering law as public and private sector financial institutions, have to report suspicious transactions and adhere to the know your customers and customer due diligence process prescribed under these regulations. This should counter corruption, because transactions are typically made anonymously. The anti-money laundering law and its related regulations have yet to be tested in practice, as no cases have been reported to date.

UK Bribery Act and Foreign Corrupt Practices Act

In addition to Laos' anti-corruption legal framework, business operators should also be aware of possible infringement of the Foreign Corrupt Practices Act (FCPA). This Act potentially applies to a wide range of entities and persons, and specifically, to these types of entities: (1) companies having securities listed on the Securities Exchange Commission in the United States; (2) legal

entities or persons that have their principal place of business in the United States; and (3) any foreign persons or entities suspected of involvement in bribery while on United States territory.

The provisions of the Act relating to bribery target the above persons and entities, and more importantly, applies not only within US territory but also to those perpetrators operating outside of the United States. The FCPA covers payments which have the intention of influencing foreign officials, and such bribes are often characterised by payments (or so much as a promise of a payment, gift, etc) made to obtain contracts, or any other advantages that would not otherwise be granted by local officials.

As such practices were not sanctioned by laws in Laos until recently, foreign companies in Laos could easily fall within the scope of the FCPA.

Facilitating or expediting payments, which are payments that are made to speed up some of the officials' actions, are supposedly exempt from the FCPA. These actions can include payments related to obtaining visas, permits and licenses in a timely manner, or supplying electricity to facilitate the operation of a factory. These payments, which are made to foreign officials to further the performance of these actions, are tolerated and accepted by the FCPA, as long as they do not involve non-discretionary acts or a decision-making process. However, this remains a controversial provision and it is not clear how an act would be interpreted by the US authorities.

In addition, the UK Bribery Act has a broader scope than the FCPA, which only covers bribes offered to officials, and it does not include the private sector. In contrast, the UK Bribery Act includes both public and private sectors. As with the FCPA, the UK Bribery Act encompasses active and passive bribes. The former includes the offering, promising or giving of a bribe, while the latter covers requesting or agreeing to receive a bribe.

The UK Bribery Act's scope is relatively similar to the FCPA, as it sanctions bribery of a foreign official who is granted advantages in the conduct of business. Offences committed within the United Kingdom can be prosecuted, but organisations carrying on the business or part of a business in the United Kingdom can also be liable under the UK Bribery Act. Unlike the FCPA, the UK Bribery Act has no facilitation exemption. However, it is noteworthy that in theory an offence is not committed when an official is permitted by local applicable law to be influenced by such advantage.

Moreover, the UK Bribery Act also introduces an offence for legal persons who do not have an internal policy to prevent corruption. Companies conducting business in the United Kingdom must implement and define adequate procedures to prevent any act of corruption to someone associated with the company.

These Acts may soon be joined by the Anti-Bribery Management Systems Standard, ISO 37001, which is currently being drafted by the International Organization for Standardization, which is responsible for ISO 9001 quality certification. The drafting is being supported by more than 35 countries, including the United Kingdom and the United States, all of which have approved the draft. Companies may be certified under ISO 37001 if they meet the requirements set out by the Anti-Bribery Systems Standard. This will help raise awareness of the requirements that are in place at any particular company operating in Laos. This development will help the business environment, as the actions of companies established in the United Kingdom or United States would be more closely scrutinised, while companies from other countries can operate without being restricted by similar constraints and would not be required to adhere closely to established international quality standards.

Summary

It is evident that Laos has made a concerted effort to minimise corruption, as the Corruption Perceptions Index of Transparency International clearly indicates. Although it has made some inroads, Laos still has a way to go to achieve its objective.

It remains to be seen how effective the newly enacted regulations will be. More time is needed to determine their effectiveness in practice. Laos, through its anti-corruption action plan, has self-assigned a deadline of 2020 to fully implement its anti-corruption policies.

Despite the fact that these mechanisms remain untested, investors have shown they are willing to register their entities, or conduct their business in Laos, albeit with a degree of caution particularly in respect to regulatory compliance with corruption legislation. In effect, it is easy to fall within the scope of the law, but it is difficult to foresee how local authorities will interpret the law.

Also, laws are rarely translated into English in Laos, and so foreign investors should seek the advice of legal counsel in the country who are aware of the laws, business practices and most importantly, the potential legal and regulatory pitfalls.

However, in a globalised world, these problems cannot be resolved by one country alone. The Treaty on Mutual Legal Assistance in Criminal Matters, which is already in force and helps in the prosecution of money laundering-related matters in the ASEAN region, is a step in the right direction. However, its applicability remains uncertain, as most of the adhering countries still need to implement it domestically, and they are still engaged in bilateral agreements.

These local and regional efforts will not have an immediate impact, and foreign and local businesses must work in tandem to establish an internal programme to minimise anti-corruption regulation risks as much as possible.

Certain laws were not available in English at the time of writing this chapter. Therefore, some of the content of this article is based on unofficial translations.



Dino Santaniello
Tilleke & Gibbins

Dino Santaniello is a consultant working in Tilleke & Gibbins' Vientiane office. Dino has broad experience across many fields of law, including anti-corruption, patents and trademarks, privacy and data protection, corporate establishment, licensing, and other commercial transactions. He advises both domestic and international companies on legal matters in Laos, Myanmar and Thailand.

Prior to joining Tilleke & Gibbins, Dino worked as an in-house counsel in the insurance and oil and gas industries. During this time, he advised on corporate and commercial issues, as well as intellectual property matters such as trade secrets and restrictive covenants.

Dino has spent significant time in studying foreign languages with the aim of helping inbound investors entering into Asian markets. He is fluent in French, English and Thai, and he is conversant in Korean.

Tilleke & Gibbins

No. 302/1B, 3rd Floor, Vieng Vang Tower
Unit 15 Boulichan Road Dongpalan
Thong Village, Sisattanak District
Vientiane, Laos
Tel: +856 21 262 355
Fax: +856 21 262 356

Dino Santaniello
dino.s@tilleke.com

www.tilleke.com

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Tilleke & Gibbins advises clients on anti-corruption matters in South East Asia. Many countries we work in are attractive destinations for foreign investment. They are also high-risk environments for corruption, asset concealment, fraud and other forms of economic crime. The US government has made prosecutions under the Foreign Corrupt Practices Act (FCPA) a national priority, and more cases under the UK Bribery Act are expected. In addition, ASEAN governments are increasing their own anti-corruption efforts. Failing to curb or prevent corruption can have devastating economic, legal and reputational consequences.

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