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Laos: anti-corruption laws key to economic development

Dino Santaniello
Tilleke & Gibbins

Background

Surrounded by neighbouring economic powerhouses such as Thailand, Vietnam and Myanmar, Laos can often be overlooked as a burgeoning economy within the fast-developing ASEAN region.

However, by sharing common borders with Thailand, Vietnam, Myanmar, Cambodia and China, Laos' unique geographical location means that the country has tremendous potential to develop itself into a vibrant and vital economic hub, linking the world's second largest economy, China, to the nine other member states that comprise the dynamic ASEAN Economic Community (AEC).

Although foreign direct investment (FDI) is still heading towards its neighbours, Laos has quietly been flourishing and it has continued to make 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 not easily recognised as a potential economic hotspot. It is also overshadowed by its neighbouring countries, which have significantly more inhabitants and, therefore, more potential for growth and increased consumerism. However, recent GDP figures show that Laos' economic growth has continued to rise, as confirmed by the Asian Development Bank and the World Bank, which both forecast that GDP will rise from approximately 6.9 per cent[1] to 7 per cent[2] in 2017.

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 infrastructure and real estate projects in the country's largest cities that are now driving much of the rapid economic development.

China is the largest contributor to foreign investment, followed by Thailand and Vietnam. Many of these investors are driving real estate projects in Laos, which include hotels, shopping malls and residential properties.

Tourism is another booming sector, boosted by strong government backing. The government is seeking, for instance, to boost ecotourism by granting incentives to business operators that invest in this niche sector. It has also been implementing legal reforms aimed at boosting tourism, such as the newly amended Law on Investment Promotion, which provides specific tax incentives to a host of activities, including ecotourism.

Electricity production is continuously increasing, with the exportation of hydropower expected to rise over the coming years, fuelled by the construction of new hydropower plants, further strengthening Laos' economy.

Economic growth has resulted in greater prosperity and 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.[3] This explains a decision by the World Bank to reclassify Laos as a lower-middle income nation, as income per capita exceeded US$1,000 in 2011. In fact, if the country sustains this pace of improvement, the government may achieve its goal of helping Laos shed its title as a 'least-developed country' by 2020.

Influx of foreign direct investment

Laos has seen a steady inflow of FDI since 2012, and according to the United Nations Conference on Trade and Development (UNCTAD) and its World Investment Report, FDI inflow rose from US$294 million in 2012 to US$427 million in 2013. FDI further increased to US$721 million in 2014 and US$1.22 billion in 2015, although a slight drop in FDI is anticipated for 2016, according to an estimate from the UNCTAD, which estimates that US$890 of FDI was recorded for this period.[4] This influx in foreign investment is attributable to the adoption of more facilitative policies towards foreign business operators.

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, along with 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. However, this bureaucratic reorganisation will offload many duties from the prime minister's office, to help improve efficiency. These governmental changes have continued, and in April 2017, a number of substantive amendments to the Law on Investment Promotion were enacted to provide a more seamless process, aimed at facilitating domestic and international investments.[5]

Tackling corruption – the key to continued FDI

The Law on Anti-Corruption (2012) designates the Counter-Corruption Organization as the state organisation responsible for preventing and countering corruption throughout the country, and tasks the State Inspection Authority with implementing these duties. In addition, the Anti-Money Laundering Intelligence Unit has been placed under the direct supervision and leadership of the National Coordination Committee for Anti Money Laundering and Countering of Financing Terrorism, as part of the Bank of Lao PDR from which it receives its budget. It has mandates and responsibility to collect and analyse information relating to money laundering, and report such incidents to the National Coordination Committee for Anti-Money Laundering and Countering of Financing Terrorism for its review and consideration.

Rising inflows of money into a country can also be accompanied by increased corruption, and the country in general suffers from a lack of transparency with laws and regulations that 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.

As the government moved to attract FDI inflows, an anti-corruption action plan was issued in 2013, largely based on a strategic anti-corruption plan issued a year earlier, focusing government action on: (i) political training and awareness of laws; (ii) research on, and drafting of, new legislation and amending existing laws; (iii) reorganisation of the state administration mechanism; and (iv) 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 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. However, it is too early to draw any significant conclusions on the results so far.

However, Laos has demonstrated an ongoing commitment to tackling corruption, and statistics show that in recent years, the government's anti-corruption drive has gradually made inroads into reducing this problem; a development that has been welcomed both domestically and internationally. Indeed, the Corruption Perceptions Index of Transparency International shows that Laos has registered constant progress over the past few years. In 2014, the country was ranked 145th out of 175 countries (with 1 being the best, and 175 being the worst), 139th out of 175 in 2015, and has this year improved its ranking to 123rd. Although this ranking indicates that corruption remains rife in the country, nonetheless, it demonstrates that Laos' efforts to tackle this issue have resulted in it registering the best ranking improvement among its neighbouring countries.

Absence of clear rules

In general, clear rules and guidance on laws in relation to conducting business remain 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 partially explains why the state experiences difficulties collecting taxes or customs duties every year.

This problem is widespread, and has become so well known to the public that it has become difficult for the government to ignore. The government thus recognises that it must be addressed immediately to restore a degree of trust in local and foreign investors, and within society as a whole.

Laos is also facing a multitude of governance issues, which are compounded by a general lack of transparency and inconsistent application of the laws. In addition, those laws can often be substituted by best practices, which adds another layer of uncertainty, and undermines any semblance of legal certainty. These factors are corroborated, for instance, by the granting of incentives or agreements that are negotiated on a case-by-case basis, such as concession agreements and tax incentives. While pre-determined criteria or requirements for obtaining these agreements would reduce corrupt practices, the current methods provide room for administrative discretion, which makes the rules more opaque than originally intended. Also, these issues concerning corruption are relatively nascent in Laos, and consequently officers and local investors find it hard to quantify the adverse impact of such practices on the business environment in Laos, which reflects the lack of legal culture. In order to reiterate the importance of combating corruption, the Minister of Finance announced rules that officials in the Ministry of Finance must adhere to or face disciplinary sanctions. For many, this reiterates the prohibitions imposed in the Law on Anti-Corruption (against actions that have the purpose of securing personal gains or benefits for family members, relatives or friends, indirectly or directly), but they also prohibit officials from holding positions within the Ministry of Finance and the private sector at the same time. As such, the Minister warned that finance officials are expressly prohibited from conducting broker activities, and holding a position as an accounting consultant or an accountant for a business, etc.[6] This statement has been subject to the enactment of a decision (a statutory instrument under Laotian law), and therefore has legal force.

Overview of Laos' anti-corruption legal framework

During the course of the past three years, the government has demonstrated its determination to tackle corruption by passing a series of laws and regulations targeting money laundering, to ensure compliance with international standards, such as the Law on Anti-Money Laundering and Counter-Financing of Terrorism (2014, and entered into force in 2015). The government has also passed the Decision on Know Your Customers and Customer Due Diligence (2016), which elaborates on the Law on Anti-Money Laundering and Counter-Financing of Terrorism in relation to the information which must be provided by reporting entities (a class which covers almost every type of legal entity) that are now required to adhere to the know-your-customers and customer due diligence process prescribed under these regulations. The Decision on Reporting Suspicious Transactions Related to Money Laundering or Financing of Terrorism (2015) is a further sign of the government's intent to stamp out corruption in the country. Accordingly, the government has launched an anti-corruption campaign to purge the ruling Lao People's Revolutionary Party of corrupt members.[7]

Prime Minister Thongloun Sisoulith has also expressed his concerns, and declared that the 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 obtain their opinions on anti-corruption issues and on improving its legal framework. Likewise, Laos is a member of the Asia Pacific Group on Money Laundering, and thus has to adhere to the 40 recommendations of the Financial Action Task Force. These recommendations set out the minimum standards that are not only applicable to money laundering, but also terrorist financing.

The main regulations governing anti-corruption in Laos are:

- Anti-Corruption Law No. 27 (2012);
- Penal Law No. 142/PO (9 November 2005);
- Law on Criminal Procedure No. 17/NA (10 July 2012);
- Law on Anti-Money Laundering and Counter-Financing of Terrorism No. 50/NA (21 July 2014); and
- Decree on Asset Declaration No. 159 (dated 4 June 2013).

The Anti-Corruption Law of 2012 replaced the Anti-Corruption Law of 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: (i) embezzlement of state property or collective property; (ii) swindling of state property or collective property; (iii) bribes; (iv) taking bribes; (v) abuse of position, power and duty to take state property, collective property or individual property; (vi) abuse of state property or collective property; (vii) excessive use of position, power and duty to take state property, collective property or individual property; (viii) cheating or falsification relating to technical construction, standards, designs, calculations and others; (ix) deception in bidding or offering concessions; (x) forging documents or using forged documents; and (xi) 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 interests 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 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 Laotian authorities should remove this requirement from the Anti-Corruption Law. However, the amendments to the Anti-Corruption Law in 2012 did not take into account the UN's recommendation.[8]

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 kip. If the offender willingly reports their own wrongdoing, and returns the assets 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 kip, the 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. However, in a positive development, the government has since enacted the Decree on Asset Declaration, whereby every government official is now required to declare their assets. However, these declarations are not publicly available, and therefore the government still has the discretion to decide whether or not to prosecute potential infringers. As of mid-January 2017, it was reported that more than 1,900 officials and civil servants at the central level, 98,000 people under the supervision of ministries, and 142,000 officials and civil servants under provincial administrations, have declared their assets.[9]

There are no available official statistics relating to decisions rendered under the Anti-Corruption Law, and access is challenging, because approval from the relevant authorities needs to be sought. However, according to the Party Central Committee's inspection regulatory body, corrupt practices over the last five years along have involved payments totalling more than 4,807 billion kip, and 734 officials were found to have been involved.[10] Additionally, between 2011 and 2015, more than 130 police officers were dismissed from their tenure in the province of Oudomxay for taking bribes and benefits related to their position, in a clear abuse of power.[11] Other officials have been subject to education measures, received warnings, or been refused promotions, which are sanctions for minor offences as discussed above.[12]

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 enacted an anti-money laundering law that 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 combating such crimes.

These regulations include Decision No. 13, dated 19 October 2015, on Reporting Suspicious Transactions Related to Money Laundering or Financing of Terrorism, in conjunction with Recommendation No. 42, dated 12 January 2016; and Decision No. 1, dated 15 January 2016, on know your customer and customer due diligence, which finally provided clarification on the Anti-Money Laundering Law and thus ensured its effectiveness. The enactment of these laws and regulations have recently been recognised by the Financial Action Task Force, which has noted great improvement in the Laotian regulatory framework, and consequently moved Laos off the Grey List in June 2017. This was one of the objectives of the government for 2017, and constitutes a noteworthy achievement in itself.

UK Bribery Act and Foreign Corrupt Practices Act

In addition to Laos' anti-corruption legal framework, business operators should also be aware of possible infringements of the Foreign Corrupt Practices Act (FCPA). This Act potentially applies to a wide range of entities and persons, and specifically to: (i) companies having securities listed on the Securities Exchange Commission in the United States; (ii) legal entities or persons that have their principal place of business in the United States; and (iii) 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, apply not only within

US territory but also to those perpetrators operating outside of the United States. The FCPA covers payments that have the intention of influencing foreign officials, and such bribes are often characterised by payments (or so much as a promise of a payment, or a 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 licences 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.

The Anti-Bribery Systems Standard, ISO 37001, was published in October 2016, and this set of good practices was drafted by the International Organization for Standardization (ISO), which is the same entity that has created other standards such as ISO 9001. In summary, ISO 37001 aims to provide guidelines and measures aimed at implementing control and ameliorating anti-bribery good practice within a company. Indeed, this set of standards has been drafted so they can be utilised by a large panel of legal entities in any country, regardless of whether these are private companies or NGOs. This will also help raise awareness of the requirements that are in place at any particular company operating in Laos, and significantly lower management risks and costs for a company in respect to bribery, and especially in those countries where those issues are relatively prevalent and the employees are not particularly aware of the risks that bribery can inflict on a company. This development should also 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

Last year, the vice president of Laos, along with the prime minister, addressed these issues and warned both officials and private sector operators against bribery and violating anti-corruption legislation. This year, the government's commitment to fighting corruption has been reiterated several times. Accordingly, the past year has seen Laos making progress, and it is encouraging to observe that the political discourse is in line with the facts. The Corruption Perceptions Index of Transparency International and Laos' progress shows that Laos has been addressing this matter, and the country's removal from the Grey List is certainly a positive signal. However, although Laos has made some inroads, it still has a way to go to achieve its objectives.

It remains to be seen how effective the newly enacted regulations will be, and how they will be applied and enforced. Although the legal framework surrounding these issues is becoming more solid, the problem in Laos also revolves around human resources and strict enforcement of the law. Undoubtedly, more time is needed to determine the effectiveness of recent measures in practice, but Laos, through its anti-corruption action plan, has assigned itself 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 of 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. In addition, Lao laws are rarely translated into English, 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.

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.

Notes

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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.

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Established in 1890, Tilleke & Gibbins is a leading South East Asian regional law firm with over 150 lawyers and consultants practising in Bangkok, Hanoi, Ho Chi Minh City, Jakarta, Phnom Penh, Vientiane and Yangon.

Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

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.

Through our multi-jurisdictional presence, we assist clients seamlessly across borders. Our attorneys and consultants are deeply knowledgeable about local business practices and cultures, which allows us to provide a unique blend of legal and practical advice in this complex field. Our anti-corruption services include:

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- Designing, advising and implementing compliance programmes.
- Advising clients on the FCPA and the UK Bribery Act.
- Conducting anti-corruption due diligence on agents, partners and M&A targets.
- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
- Defending and prosecuting corruption-related allegations.
- Assisting with asset recovery and protection.