Late Development and the Private Sector: A Perspective on Public-Private Partnerships in Vietnam

This Note examines a statute approved by Vietnam's National Assembly in June 2020: the Law on Investment in the Form of Public-Private Partnerships. Analyzing the statute and two of its publicly available drafts, this Note argues that the new legislation is unlikely to achieve its goal of generating development through expanded, cost-effective infrastructure projects. Further, it argues that the new statute's deficiencies flow from the inability of the current institutional approach—known as law and development—to learn from the failures of previous developmental reform efforts. Though establishing a legal framework for public-private partnerships may facilitate infrastructural expansion and serve a vital role in economic development, this comes at great cost. In the long term, the Vietnamese state may suffer diminished administrative and financial capacity as a result of the new statute.

INTRODUCTION

Over the past three decades, Public-Private Partnerships ("PPPs") have become an increasingly popular method for the public authority, often constrained in its budget, to meet infrastructural demands. Enthusiasm for PPPs has been particularly pronounced in the context of international development, as investment in infrastructure is seen as a key way to spur economic growth and improve public

welfare in low- and middle-income countries.[1] As a result, a number of emerging economies have worked to draft and implement legal frameworks to facilitate private investment in infrastructure projects, often with the help of multilateral development banks ("MDBs"), international aid organizations ("IAOs"), and other global institutions whose assistance may hinge on such regulations being established.[2]

However, this represents a problematic trend for several reasons. First, it is unclear that PPPs, even when successful, will positively impact the economic growth of low- and middle-income countries. Indeed, there is evidence that even in the developed world, where established state institutions have the capacity to oversee such projects, PPPs may not supply more cost-effective infrastructure relative to traditional public procurement. In fact, they may even harm general welfare. Second, the legal frameworks enacted in the developing world continue to suffer from the shortcomings that plagued those implemented throughout the first and second law and development movements,[3] which sought to help low- and middle-income countries achieve development through legal reform. Ultimately, the promotion of these PPP frameworks represents the failure to move beyond eurocentric and structuralist models for growth and may stunt the long-term social and economic development of the very states they purport to help.[4]

This Note examines Vietnam's Law on Public-Private Partnership Investment ("PPP Law"), passed at the Ninth Session of the Fourteenth National Assembly in June 2020. Using the PPP Law and two of its publicly available drafts, I will argue that the current institutional approach to law and development suffers from the same shortcomings of previous developmental reform efforts.

Part I attempts to situate the PPP Law in the context of the evolving nature of both international development efforts and Vietnam's political economy. Part II will examine the theoretical

1. James Leigland, *Public-Private Partnerships in Developing Countries: The Emerging Evidence-Based Critique*, 33 WORLD BANK RSCH. OBSERVER 103, 103–04 (2018).

2. *See, e.g.*, WORLD BANK GROUP, COUNTRY READINESS DIAGNOSTIC FOR PUBLIC-PRIVATE PARTNERSHIPS (2016) [https://perma.cc/7W6P-TXGE]; WORLD BANK GROUP, PROCURING INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS REPORT 30 (2018) [https://perma.cc/732M-HSGZ]; CAROLINA LEMBO ET AL., FUNDAMENTAL PRINCIPLES IN PPP LAWS: A REVIEW OF LATIN AMERICA AND THE CARIBBEAN 78–79 (2019) [https://perma.cc/N9BR-QY33]; Bruno de Cazalet, *UNCITRAL to Keep the Lead on PPP Regulatory Work*, 2 INT'L BUS. L.J. 137, 137–40 (2016).

3. For a discussion of these shortcomings, see *infra* Part III.

4. Eur. Ct. of Auditors, *Public Private Partnerships in the EU: Widespread Shortcomings and Limited Benefits*, 44–46, Special Report 09/2018 (2018).

justifications for adopting PPPs to further development. It will then discuss the developmental impact of PPPs in practice and their limited success in low- and middle-income countries. Part III will proceed with an analysis of Vietnam's PPP Law. It will argue that the legislation is part of the legacy of the previous legal reform movements and is unlikely to achieve its anticipated outcomes or positively impact development due to theoretical defects.

I. THE ROAD TO PUBLIC-PRIVATE PARTNERSHIPS IN VIETNAM

Vietnam's PPP Law is one of a number of recent legislative projects undertaken in developing countries focused on bringing private finance to public works.[5] While the content of these laws may be new, the laws themselves are part of a broader trend: the promotion of legal reform as an instrument for development. To shed light on the global and historical context in which Vietnam's PPP Law has arisen, Section A of this Part will describe the evolution of "law and development" movements, in which powerful international actors have encouraged the adoption of various legal frameworks to accelerate economic growth in developing countries. Section B will then review the more recent rise of PPPs and how they fit into international efforts to achieve development through law. Finally, Section C will describe Vietnam's transition to a market economy, Vietnamese governance and policy-making, and the regulatory regime for PPPs that existed in Vietnam prior to the adoption of the PPP Law.

A. The Evolutions of Law and Development

In the past seventy-five years, the design and theoretical underpinnings of global development policy have undergone three significant shifts. Beginning with the developmental state in the immediate aftermath of the Second World War, the first law and development movement viewed strong governmental involvement in the national

5. *See, e.g.*, *Updates on Public Private Partnership Regulation and Projects in Thailand*, HERRERA & PARTNERS (Jan. 15, 2019) [https://perma.cc/MEK4-WXZJ] (discussing Thailand's 2019 PPP Law); *New Rules for Public-Private Partnerships in Angola*, CHINA-LUSOPHONE BRIEF (Dec. 11, 2019) [https://perma.cc/DN3J-WLJB] (discussing Angola's 2019 PPP law); Curtis Masters, *Uzbekistan Enacts Public Private Partnership Law*, BAKER MCKENZIE (May 29, 2019) [https://perma.cc/9AC7-XXDJ] (discussing Uzbekistan's 2019 PPP law); Jonathan Brufal, *Ethiopia Introduces a Public Private Partnership Law*, GOWLING WLG (Mar. 27, 2018) [https://perma.cc/U2RU-ME4Z] (discussing Ethiopia's 2018 PPP Law).

economy as a prerequisite for progress.[6] When the neoliberal agenda of the Washington Consensus came into vogue in the 1980s, a new movement emerged, adopting a more market-centered approach.[7] In response to failed projects under both law and development movements, a third iteration has emerged.[8]

1. The First Law and Development Movement

Questions surrounding the role played by law in stimulating economic development became especially pertinent in the wake of the Second World War, as former colonies gained independence and new states came into being. Economic and legal-political theories emerged attributing national progress to the specific legal frameworks that had evolved in the West.[9] Western governments, believing laws and regulations would lay the foundations for stability and prosperity, directed efforts to disseminate legal systems to the newly independent nations.[10] This later came to represent the first law and development movement. By exporting investment, institutions, and cultural tenets from the developed world, scholars and policymakers argued, the West would facilitate industrialization and long-term economic growth in

6. *See, e.g.*, David M. Trubek, *Law, State, and the New Developmentalism: An Introduction*, *in* LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT 3, 5 (David M. Trubek et al. eds., 2013); David Kennedy, *Law and Development Economics: Toward a New Alliance*, *in* LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 19, 23–25 (David Kennedy & Joseph E. Stiglitz eds., 2013).

7. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1, 2–3, 6 (David M. Trubek & Alvaro Santos eds., 2006). The "Washington Consensus" was originally coined by John Williamson in reference to the specific policy prescriptions under the model reforms that the International Monetary Fund ("IMF"), World Bank, and U.S. State Department (all Washington, D.C.-based entities) promoted in the developing world. John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7, 7 (1990). In the years since the term's first use, it has evolved to encompass strong market-oriented policy more generally. *See* Moises Naim, *Fads and Fashion in Economic Reforms: Washington Consensus or Washington Confusion?*, 21 THIRD WORLD Q. 505, 505–06 (2000).

8. *See* Shunko Rojas, *Understanding New-Developmentalism*, *in* LAW AND THE NEW DEVELOPMENTAL STATE, *supra* note 6, at 65, 73–81.

9. *See* David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 7, at 74, 74–78.

10. *See id*. at 78.

the Third World.[11] Law was a key component of this plan as policy-makers viewed it as a powerful tool to shape human behavior and thus cultivate an environment favorable to economic growth.[12]

Key to the first movement's ideology was the "developmental state theory." According to developmentalism, the state is more than a mere participant; it is the most fundamental driver of a nation's economic growth and overall progress.[13] The theory was well received in many of the Third World's newly independent states by governments eager to play an active role in their respective countries' industrialization and modernization.[14] The movement's policies—characterized by protectionism, *dirigisme*,[15] and a focus on rapid industrialization—appeared well supported by the historical experiences of certain European nations.[16] One of the primary aims of the State was therefore to

11. *See* Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 900 (2008). In using the term "Third World," I refer to its meaning in the historical context of the Cold War, *i.e.*, the nations that politically aligned with neither the North Atlantic Treaty Organization ("NATO") nor the Soviet Bloc, many of which were—and still are—developing states. I do not refer to any contemporary connotations the term may have. *See, e.g.*, Marc Silver, *Memo to People of Earth: 'Third World' Is an Offensive Term!*, NPR (Jan. 8, 2021, 3:42 PM) [https://perma.cc/6YYJ-9GBL].

12. *See* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1071 (1974).

13. *See* Adrian Leftwich, *Bringing Politics Back in: Towards a Model of the Developmental State*, 31 J. DEV. STUD. 400, 401–03 (1995).

14. Olabisi Delebayo Akinkugbe, *The Dilemma of Public-Private Partnerships as a Vehicle for the Provision of Regional Transport Infrastructure Development in Africa*, 6 LAW & DEV. REV. 3, 8 (2013).

15. *Dirigisme* is a political-economic concept which places the state at the heart of the economy, where it plays a critical role in reducing the market inefficiencies which might otherwise occur under its foil, a *laissez-faire* regime. *See* Élie Cohen, *Dirigisme*, *Politique Industrielle et Rhétorique Industrialiste* [*Dirigisme, Industrial Politics and Industrialist Rhetoric*], 42 REV. FRANÇAISE DE SCI. POL. 197, 205–16 (1992); *see generally* JEAN FOURASTIÉ, LES TRENTE GLORIEUSES: OU, LA RÉVOLUTION INVISIBLE DE 1946 À 1975 [THE GLORIOUS THIRTY: OR, THE INVISIBLE REVOLUTION FROM 1946 TO 1975] (1979). For a discussion of *dirigisme* in the East Asian context, see generally IAIN PIRIE, THE KOREAN DEVELOPMENTAL STATE: FROM DIRIGISME TO NEO-LIBERALISM (2008) and Robert Wade, *Dirigisme Taiwan-Style*, 15 IDS BULL. 65 (1984).

16. For example, Germany and Russia, while relative latecomers to European industrialization, were extraordinarily successful in catching up to their continental counterparts, thanks in part to active state participation in economic affairs (in contrast to the more *laissez-faire* approach of Britain). Russia in particular gave direct financial aid to capital-intensive sectors of heavy industry and encouraged the formation of large-scale enterprises. ALEXANDER GERSCHENKRON, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE: A BOOK OF ESSAYS 11–20 (1962).

create infrastructure and provide services to its people through state-owned enterprises.[17] In this context, law was a tool that the state could use not only to shape the behavior of individual actors, but also to structure and refine the national economy. Accordingly, the state's ability to achieve its developmental aims depended on its ability to wield law.

Though law may play a significant role in economic development, the reciprocal influence of such development, and that of its absence, on the legal sphere was largely ignored by theorists of the first movement.[18] Without the requisite economic, social, and political conditions, attempts to reform legal codes and institutions floundered as the mere adoption of imported laws and policies proved insufficient to actualize promises of growth.[19] The first movement's failure to factor local contexts into the development schema and its disregard for the potential impact of socioeconomic conditions on reform led to its ultimate demise.[20]

2. The Second Law and Development Movement

The second iteration of the law and development movement was born in the 1980s and 1990s in the shadow of the Soviet Union's collapse. Proposing a neoliberal menu of privatization and deregulation, the second movement sought to limit economic intervention by states.[21] Again, academics and policymakers believed that development could be achieved through the adoption of the legal frameworks of the newly-bolstered First World.[22] The impact of the second movement was more wide-reaching than the first. There were few obvious alternative models with the disappearance of the Soviet bloc,[23] and the

17. D. Andrew C. Smith & Michael J. Trebilcock, *State-Owned Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies*, 12 EURO. J.L. & ECON. 217, 219 (2001).

18. Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of "Scholars in Self-Estrangement"*, 25 AM. J. COMP. L. 492, 516 (1977).

19. Trubek, *supra* note 9, at 74–76.

20. *See* Trubek & Galanter, *supra* note 12, at 1080–83.

21. Wade Channell, *Lessons Not Learned About Legal Reform*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137, 146 (Thomas Carothers ed., 2006).

22. Use of the term "First World" in this Note refers to its Cold War era meaning—that is, countries that aligned with NATO. *See supra* note 11 and accompanying text.

23. China's economic rise was still nascent at this point, and so the Chinese model could not yet serve as a template for development elsewhere. For discussion of the potentiality of a model based on the "Asian Tigers," see Yong-Shik Lee, *Call for a New Analytical Model for*

global presence and economic clout of neoliberal financial institutions and aid agencies provided strong incentive to implement the Washington Consensus's proposed policies.[24]

The neoliberal schema was a fairly radical departure from the developmental state model. Neoliberalism favors shifting economic management out of the state's hands and into those of private individuals, premised on the assumption that progress and growth are optimally achieved with a free market in which economic actors allocate resources and enter into transactions efficiently through individual self-interest.[25] The government's role in such a system is far more passive—limited to supporting the economy indirectly through the promulgation of laws and legal institutions that enhance market forces.[26] The Washington Consensus aimed to dismantle the protectionist economies favored by developmentalists under the belief that global economic integration and the free flow of foreign capital would maximize the ability of a nation to successfully develop itself.[27] In a large number of developing economies, legal reform to these ends was enacted in no small part as a result of the conditions attached to loans from large international organizations such as the World Bank or the International Monetary Fund ("IMF").[28]

Once more, however, the law and development movement failed to achieve the results it had ostensibly promised. As Latin American states struggled with debt crises in the early 1980s, the IMF and World Bank extended loans to the region's governments, conditional on the adoption of market-oriented reforms.[29] The adopted policies led not to recovery, but to a decline in living standards and increased social inequalities while economic growth faltered all the same.[30] The IMF later imposed similar conditions on loans issued in response to the 1997 Asian Financial Crisis, achieving comparably

Law and Development, 8 LAW & DEV. REV. 1, 27–52 (2015) and text accompanying *infra* note 36.

24. *See generally* Williamson, *supra* note 7.

25. *See* Trubek, *supra* note 9, at 87.

26. Examples of such indirect support might include the State's sanction and enforcement of contracts, or the provision of political and, by extension, economic stability through the maintenance of a well-equipped and well-trained military, among others.

27. Trubek, *supra* note 9, at 87.

28. Akinkugbe, *supra* note 14, at 9.

29. Enrique R. Carrasco, *The 1980's: The Debt Crisis and the Lost Decade of Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 119, 123 (1999).

30. *See, e.g.*, *id.* at 124–25.

lackluster results.[31] That the IMF's prescriptions may have delayed recovery is especially ironic given that the crisis flowed, in no small part, from the financial deregulation undertaken by many Asian governments with the encouragement of the IMF, the Organization for Economic Co-operation and Development ("OECD"), and Western governments.[32] The Washington Consensus was also central to the reforms instituted in Russia—and other former Soviet states—to hasten the transition to a market economy following the U.S.S.R.'s collapse. Rather than support long-term economic development, the neoliberal policies adopted led to rampant corruption, an increased concentration of wealth, and severe economic hardships for the vast majority of Russians. From São Paulo to Seoul to Saint Petersburg, the disappointing results of the reform packages under the second law and development movement ultimately suggested not only an inability to deliver development to most emerging markets, but also serious economic difficulties across the globe.[33]

Additionally, the movement failed to include in its analysis—or even explain—the significant strides in development that had occurred across the Asian continent. Singapore, Taiwan, and South Korea had each seen substantial economic growth and increases in standards of living since the first law and development movement.[34] All three countries did so thanks to—rather than in spite of—state-led industrialization and strong interventionist economic policies.[35] Despite the rapidity of development displayed by the three, and more recently by China, there was—and continues to be—little attempt to

31. YONG-SHIK LEE, LAW AND DEVELOPMENT: THEORY AND PRACTICE 21–22, 75–76 (2019).

32. Joseph Stiglitz, *The Insider: What I Learned at the World Economic Crisis*, NEW REPUBLIC (Apr. 17 & 24, 2000), at 56, 56. For further discussion of neoliberal reforms in Asia leading up to the Asian Financial Crisis of 1997, see generally Robert Wade & Frank Veneroso, *The Asian Crisis: The High Debt Model Versus the Wall Street-Treasury-IMF Complex*, NEW LEFT REV., Mar.-Apr. 1998, at 3, 9–10; Jean Grugel et al., *Beyond the Washington Consensus? Asia and Latin America in Search of More Autonomous Development*, 84 INT'L AFFS. 499 (2008).

33. Trubek & Santos, *supra* note 7, at 3, 6–7.

34. For the period from 1960 until the pre-crisis year of 1996, South Korea's GDP per capita grew by over 8,000 percent, Taiwan's by over 9,000 percent, and Singapore's by 6,000 percent. *See GDP Per Capita (Current US$) in Singapore, East Asia & Pacific, Korea, Rep*, WORLD BANK [https://perma.cc/V7FH-8ZML] (comparing the historical GDP per capita of South Korea and Singapore from 1960 to 1996); *Taiwan GDP – Gross Domestic Product*, COUNTRYECONOMY.COM [https://perma.cc/6LCQ-MC46] (listing Taiwanese GDP per capita from 1960 to 2019).

35. *See generally* ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990).

integrate the experiences and strategies of East Asia into the developmental models of global institutions promoting the export of law as a pivotal tool for socioeconomic progress.[36]

Like its predecessor, the second movement failed to examine local contexts, seeking to export a one-size-fits-all solution to socioeconomic challenges.[37] The importance of ensuring that such "transplanted" laws are a correct fit for their intended destinations cannot be overstated. The meaning and value of a given law is born of a specific context—one that is as much political, cultural, and economic as it is legal—and in too dissimilar a "host" it is unlikely to have the intended effect.[38] A failed legal transplant results not only in a waste of resources,[39] but also risks undermining rule of law to the extent that the transplanted legislation increases areas of uncertainty in the host's legal regime. Unsuccessful legal imports may also symbolize edicts by state authorities and thus, where neither respected nor enforced, reduce the credibility of other forms of governmental regulation.[40] Ultimately, where not properly adjusted to the local context, a transplanted law may hinder development and can result in the stagnation of economic growth.[41]

With such dire consequences flowing from the use of poorly or maladapted legal models, it is perhaps unsurprising that neither of the initial law and development movements were able to deliver the economic and societal results economists and legal academics envisaged. The use of foreign law in an emerging economy, while frequently the result of external pressures, presents a long-term danger to its prospects of prosperity. It subsequently becomes important to take a plethora of localized factors into consideration when transplanting

36. The South Korean government has since begun efforts to export its legal frameworks abroad. Lee, *supra* note 23, at 29.

37. In addition to the privatization and deregulation of a given state's markets, the policies promoted by Western financial institutions and aid agencies focused on lower marginal tax rates, interest rate liberalization, liberalization of trade and inflows of foreign capital. *See* Williamson, *supra* note 7, at 22.

38. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 178 (2003).

39. Resources that go into promoting a legal transplant might include grants, loans, and other forms of assistance from international financial institutions and development-aid agencies, as well as the time and money spent by the national government on drafting, debating, and carrying out the legal project.

40. Berkowitz et al., *supra* note 38, at 170.

41. *See*, *e.g.*, Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EURO. ECON. REV. 165, 192 (2003); Channell, *supra* note 21, at 148.

law. Suggestions for changes to the second law and development movement, beginning in the 1990s, included attempts to regionalize the field rather than adhering to strict neoliberal doctrine exported by the First World.[42]

3. The Third Law and Development Movement

Following the inability of either the first or second movements to generate sustained economic development, scholars and practitioners have invested in efforts to further scrutinize the constituent concepts of "law" and "development" as well as the interactions between each.[43] The new literature on law and development has often included a more holistic view of development.[44] Such approaches are wholly valid in their criticisms of prioritizing economic over socio-political measures of development but suffer from a significant drawback.

In effect, the lack of cohesion as to which elements should be included in a holistic measure of development, as well as the conflicting views, on both personal and cultural levels, in the determination of what constitutes social progress create a substantial obstacle for moving beyond purely economic assessments.[45] Moreover, economic development's primordial role in lifting people out of poverty and providing for basic and immediate needs—as well as the extent to which financial constraints are a primary limit to "human development"—suggest that economic measures, while very much blind to the importance of the respect of human rights, among other indicators of development, remain the optimal proxy for development.[46]

B. Public-Private Partnerships

A significant obstacle to development in many Third World countries is the lack of modern, functional infrastructure. Without key networks in place, connecting citizens to jobs, energy, and one another, it is difficult to envisage a bright economic ascendance. The longer it takes for developing countries to meet their rising infrastructural demands, the larger the gap between develop*ing* and develop*ed* becomes.

42. Nobuyuki Yasuda, *Law and Development in ASEAN Countries*, 10 ASEAN ECON. BULL. 144, 150 (1993).

43. Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT'L L.J. 415, 422 (2017).

44. *Id*.

45. *Id*. at 431.

46. *Id*. at 429.

Where delays in development are readily apparent, social tensions are likely to grow,[47] and thus a growing gap can further destabilize the polity. The financing of massive infrastructure projects, however, requires a significant amount of capital, often not fully within reach for developing states.[48] As a result, novel uses of project finance are needed in order to facilitate infrastructural expansion without incurring a significant monetary burden for the State.

1. PPPs in a Nutshell

PPPs are a mechanism through which the public authority—at a local or national level—often facing an array of budgetary constraints, stands to reduce the cost of infrastructure development by soliciting financial participation from the private sector. While many approaches to PPPs and to the legal rules which structure the projects exist, they generally involve the following:

> *(1) The public authority—or an authorized state agency ("ASA")—determines the need for an infrastructure project and undertakes a feasibility study.*[49] *The feasibility study analyzes the requirements, costs, and risks of the project, and assesses the relative benefit of structuring the project as a PPP rather than pursuing it through traditional public procurement.*

47. GERSCHENKRON, *supra* note 16, at 28.

48. ECONOMIST INTELLIGENCE UNIT, EVALUATING THE ENVIRONMENT FOR PUBLIC-PRIVATE PARTNERSHIPS IN ASIA: THE 2018 INFRASCOPE 4 (2018).

49. Certain jurisdictions also permit the submission of unsolicited proposals from private investors. Frequently in such cases, the investor, having identified a potentially profitable project in line with the public authority's development plans, conducts a prefeasibility study, which it submits to the requisite governmental entity for evaluation. The procurement process for unsolicited proposals varies widely across countries, and a competitive bidding process to select the project sponsor may still occur. A state or locality may offer certain incentives to induce innovative proposals for infrastructural works. Without encouragement, the private sector may forgo investment in the research of potentially beneficial or overlooked projects, fearing that any capital expended would ultimately subsidize a competitor's bid. Many different incentive structures exist. Examples include reimbursement for the investor's research costs if they are not ultimately selected, or the opportunity to match the highest bidder's offer and win the project. *See*, *e.g.*, Ma. Gisella N. Dizon-Reyes, *Public-Private Partnership Towards Growth & Development: Is It Working?*, 87 PHIL. L.J. 799, 800 (2013); Huong Van Nguyen Cameron, *Unsolicited Proposals for PPP Projects in Vietnam: Lessons from Australia and the Philippines*, 12 EUR. PROCUREMENT & PUB. PRIV. P'SHIP L. REV. 132, 133 (2017).

(2) Once the feasibility study has been approved, the public authority solicits bids for the project, releasing the requisite information to potential private-sector investors.

(3) The potential investors submit their bids detailing plans for the technical and financial undertaking of the project.

(4) The public authority selects the bid meeting the required technical criteria and proposing the best value for money.

(5) The public authority and the selected bidder enter into negotiations to determine the details of provisions such as what form the income structure will take and what risks will be borne by whom, among others.

(6) After both parties have agreed upon the terms of the project's contract, the selected bidder seeks financing, generally from a number of different sources, including large credit institutions.

(7) Once the selected bidder (often referred to as project sponsor) secures financing, they incorporate a special purpose vehicle ("SPV") in the local jurisdiction, through which they will undertake the project.

By their nature, PPPs are long-term endeavors, ones that usually require significant amounts of capital and preparation. Once construction of the project is completed, the project sponsor may, depending on the nature of the PPP in question and the particularities of their agreement with the public authority, operate the project for a number of years and retain the profit earned from those operations.[50] Once the contractually agreed upon period has elapsed, the sponsor will subsequently transfer ownership of the infrastructure to public authority.[51]

Public-private partnerships represent a sizeable inflow of capital across the developing world. In 2015, over one hundred billion dollars was invested in PPPs, and from 1991 to 2015 the top five national destinations for PPP investments received over nine hundred billion dollars.[52] As a result, a number of countries have promulgated specific legislation and regulations with the aim of improving the efficiency with which both public authorities and private investors

50. Leonardo Freitas de Moraes e Castro, *Project Finance and Public-Private Partnerships: A Legal and Economic View from Latin American Experience*, 11 BUS. L. INT'L 225, 226 (2010).

51. *Id.*

52. The countries in question, calculated based on their cumulative received investments across the fifteen-year period, were Brazil, China, India, Mexico, and Turkey. *See* WORLD BANK, THE STATE OF PPPS: INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS IN EMERGING MARKETS & DEVELOPING ECONOMIES 1991–2015, at 10 (2016).

navigate the legal framework for foreign investment in infrastructure development, thus attracting further capital into their respective territories. These efforts have been strongly supported by international financial institutions and development banks, many of whom are actively involved in the drafting of model PPP laws and best practices, providing specialist support for countries considering legislative proposals relating to PPPs, and ultimately financing the loans of private investors who undertake PPP projects in emerging markets.[53]

2. The Place of PPPs in Law and Development Theory

Although buoyed by the ostensible aim of spurring development by allowing states to deliver infrastructure to the public without having to expend already-limited resources, questions have been raised about PPP with respect to the imbalance between the benefits gained by the public and the financial returns achieved by private actors involved in such projects.[54] Such problems ultimately put into serious doubt the effectiveness of PPPs as a tool for long-term economic development.

While using a PPP framework to fund large-scale infrastructure works provides advantages to both states and citizens, the structure of these projects cannot be divorced from their ideological and cultural contexts. The legal and procedural complexities involved in such projects, as they relate to financing, contracting, and risk allocation, can harm the developing state insofar as many of the assumptions that underly PPPs are steeped in the second law and development movement's neoliberal policy preferences.[55]

Indeed, despite the current trend in scholarship toward a rejection of the one-size-fits-all approach for law and development,[56] the institutional actors promoting PPPs as a cornerstone of infrastructural and economic development do so by attaching aid or promises of loans to state governments. Such benefits are often contingent on the promulgation and implementation of special legislation based on model PPP laws drafted by the same institutional actors.[57] In effect, the result is a

53. *See supra* note 2 and accompanying text.

54. *See, e.g.*, Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J.L. & SOC. POL'Y 47, 47 (2011).

55. Akinkugbe, *supra* note 14, at 6.

56. *See* discussion *supra* Section I.A.

57. *See*, *e.g.*, MARIAN LEONARDO LAWSON, CONG. RSCH. SERV., R41880, FOREIGN ASSISTANCE: PUBLIC-PRIVATE PARTNERSHIPS (PPPS) 2–4 (2011) (discussing the use of foreign

harmonization of PPP legislation across a selection of vastly different countries, with vastly different cultures and histories, that face vastly different socio-economic challenges.[58] Different institutional actors may vary in the model laws that they recommend lower-income countries adopt, but these proposals still largely suffer from the very transplantation issues—namely poor adaptation to the local context and little value provided to the local community—which resulted in the failures of the first and second law and development movements.[59]

PPPs present an interesting opportunity. Insofar as they represent an operationalization of Gerschenkron's described alliance of State and entrepreneur in the infrastructural context,[60] their theoretical merit warrants consideration. Indeed, they appear to represent a marriage between the first and second law and development movements.

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aid to facilitate PPPs); *USAID Supports Vietnam's First Public Private Partnership (PPP) Law*, U.S. AGENCY FOR INT'L DEV. (Oct. 11, 2019) [https://perma.cc/T4VC-P9PG] (referencing USAID's role in helping the Vietnamese government draft its PPP Law).

58. Irina Zapatrina, Alexei Zverev & Anastasia Rodina, *Harmonisation of Public-Private Partnership Legislation: Regional and International Context of the Model Law on Public-Private Partnerships for the CIS Countries*, 10 EUR. PROCUREMENT & PUB. PRIV. P'SHIP L. REV. 3, 3–6 (2015).

59. Take, for example, "Centralized PPP Units," centralized government entities dedicated to providing support in planning and managing PPPs. While the units have been somewhat successful in the United Kingdom and Australia, they have generated little concrete benefit when exported abroad. *See* Alberto Lemma, *Literature Review: Evaluating the Costs and Benefits of Centralised PPP Units*, ECON. & PRIV. SECTOR: PRO. EVIDENCE & APPLIED KNOWLEDGE SERVS., Apr. 2013, at 1, 12, 17 ("Most of the attributed value of PPP units are based on their theoretical functions rather than on an evaluation of how, on aggregate (or individually), PPP units have fared in carrying them out."). For other examples, see INTERNATIONAL RIVERS, INFRASTRUCTURE FOR WHOM? A CRITIQUE OF THE INFRASTRUCTURE STRATEGIES OF THE GROUP OF 20 AND THE WORLD BANK 9–13, 15–16 (2012) (evaluating hydro-electric PPP projects across Sub-Saharan Africa and arguing that these PPPs are ill-suited to local socio-economic conditions, displace poor communities, and reinforce public corruption); CENT. & E. EUR. BANKWATCH NETWORK, NEVER MIND THE BALANCE SHEET: THE DANGERS POSED BY PUBLIC-PRIVATE PARTNERSHIPS IN CENTRAL AND EASTERN EUROPE 48–50 (2008) ("[Central & Eastern European] governments, IFIs [International Financial Institutions], think tanks and consultants need to take a step back and consider whether their promotion of PPPs in the region may be encouraging unaffordable spending, placing a large long-term burden on taxpayers, and crowding out alternative financing arrangements.").

60. In the case of France, for example, Gerschenkron notes that innovation in the French financial sector by the risk-tolerant Pereire brothers and their investment bank, Crédit Mobilier, played a significant role in France's successful late development by mobilizing capital for industrial projects. GERSCHENKRON, *supra* note 16, at 12–13. By the same token, Gerschenkron also points to the deep-rooted values from the *Ancien Régime* and the resulting negative perceptions of entrepreneurs in nineteenth century France as a factor contributing to the country's relatively low rate of economic development overall. *Id*. at 63–67.

However, systematic frameworks for encouraging PPPs are fundamentally creatures of neoliberal orthodoxy.[61]

C. Legislation, Private Investment, and Development in Vietnam

At first glance, it is perhaps surprising that a socialist republic might enact legislation to facilitate the private sector's profit-seeking investments in public infrastructure. However, Vietnam has undergone significant political and socio-economic transformation over the past several decades, and the adoption of a law aiming to develop its infrastructure and facilitate foreign investment is not particularly unconventional. This section aims to contextualize the PPP Law by reviewing Vietnam's gradual transition to a market economy, the country's legislative process, and the frameworks that the new law supersedes.

1. Market Reform in Vietnam

Vietnam began efforts to transition from a command to a market economy as the Cold War neared its end and the Soviet Union teetered towards collapse. As might be expected with any similarly transformative political decision, law functioned as the instrument of choice to implement desired reform. Vietnam's *Đổi Mới* policy, adopted in 1986 at the Sixth National Congress of the Communist Party of Vietnam, marked the legal beginnings of the country's market liberalization.[62]

Vietnam is no stranger to the import of foreign law. Its legal codes have historically felt varying degrees of influence from time spent as a Chinese protectorate, a French colony, and an independent socialist state closely aligned with the U.S.S.R.[63] Even well after the overthrow of French colonial rule,[64] French civil law continues to

61. Matthew Flinders, *The Politics of Public–Private Partnerships*, 7 BRIT. J. POL. & INT'L RELS. 215, 233 (2005).

62. For a discussion of early economic reform in Vietnam, see Adam Fforde, *From Plan to Market: The Economic Transitions in Vietnam and China Compared*, *in* TRANSFORMING ASIAN SOCIALISM: CHINA AND VIETNAM COMPARED 43, 43–72 (Anita Chan et al. eds., 1999).

63. Bui Ngoc Son, *The Law of China and Vietnam in Comparative Law*, 41 FORDHAM INT'L L.J. 135, 145–146, 151–53, 155 (2017).

64. Vietnam's revolutionary leader, Ho Chi Minh, officially proclaimed the country's independence on September 2, 1945, recognized by France only in the aftermath of the 1954 French defeat at the Battle of Dien Bien Phu. For more on the history of Vietnam

impact Vietnam. In 1995, the state enacted its first Civil Code following *Đổi Mới*, containing multiple provisions on mortgages, pledges, and suretyship, originating from Annam's colonial Civil Code.[65] In effect, much of Vietnam's recent private law has been developed through transplantation and modeling, particularly in the realm of corporate law.[66] The Enterprise Law, passed in 1999 and reformed under the 2014 Law on Enterprises, introduced comprehensive Western corporate governance rules, borrowing largely from the principles espoused in Anglo-American company law principles.[67] A number of the most significant portions of the Vietnamese Competition Law of 2004, proscribing various forms of anti-competitive behavior, were based on the European Union Competition Law.[68]

This transmission of foreign law to Vietnam results from both internally- and externally-facing influences. Within the country, domestic economic reform has led to demand for a legal framework capable of both empowering and constraining the market appropriately.[69] On its face, foreign law offers a solution to the extent that its adoption (and subsequent adaptation to the Vietnamese context) is a mechanism to attract foreign investment[70] by bringing global legal norms to Vietnam and solidifying integration into global economic order.[71] This

independence, see generally, for example, VU HONG LIEN & PETER D. SHARROCK, DESCENDING DRAGON, RISING TIGER: A HISTORY OF VIETNAM 176–241 (2014).

65. JOHN GILLESPIE, TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A 'RULE OF LAW' IN VIETNAM 162 (2006).

66. Son, *supra* note 63, at 169.

67. The Vietnamese Law on Enterprises looks to Anglo-American law particularly in provisions touching upon the duties of directors, minority shareholder rights, dividend payments, as well as dissolutions, mergers, and liquidations. John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam,* 51 INT'L & COMP. L.Q. 641, 649 (2002).

68. John Gillespie, *Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective,* 64 INT'L & COMP. L.Q. 935, 938 (2015).

69. Son, *supra* note 63, at 169–71.

70. *Id*. While conventional wisdom suggests that foreign actors seeking to invest in developing economies will favor countries with laws transplanted from jurisdictions with which the international investing community is familiar, there is some evidence to suggest that the decision to allocate capital towards a given country is not primarily influenced by the legal frameworks in place on the ground. *See* Tamara Lothian & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 109 (2003).

71. Vietnamese attempts to integrate itself into the global economic order are similarly evidenced by its accession to the World Trade Organization, its conclusion of numerous bilateral investment treaties, as well as the recent European Union-Vietnam Free Trade Agreement and the European Union-Vietnam Investment Protection Agreement.

would simultaneously allow the Vietnamese government to solidify its standing on the international stage, which is itself a strategy to improve the state's legitimacy in the eyes of Vietnamese citizens.[72] Externally, a number of international organizations and foreign governments work to continue Vietnam's trend towards global legal norms, using trade agreements, investment treaties, and legal aid programs, among others.[73]

2. Law-Making in Vietnam

Vietnamese laws are often drafted in general terms, with the aim that they will be further clarified once guidelines for implementation are issued by the Government or by the relevant Ministry.[74] The government and its ministries play a role in the legislative process by drafting and implementing Decrees, Circulars, and Directives, which serve to refine and specify laws. This gives the executive branch a significant function in making, interpreting, and carrying out the laws. The power of the ministries to issue their decrees independently can pose serious problems. Said regulations are not systematically in harmony, and even when they are, may generate conflicting interpretations which result in problematic grey areas, shadows under which private investors and State agents with ill-intent find cover for self-serving deals.[75]

3. Vietnamese Regime for Public-Private Partnerships

In the first half of 2018, Vietnam became one of the top five countries for total volume of private participation in infrastructure.[76] The Vietnamese government subsequently released a draft law on Public-Private Partnerships that, after several revisions, was passed by the

72. Son, *supra* note 63, at 170.

73. *See* Gillespie, *supra* note 68, at 937.

74. Phuong-Trinh Nguyen, *Vietnam's Emerging Stock Market and the Enterprise Law*, 7 INT'L TRADE & BUS. L. ANN. 25, 27 (2002). For examples of this in the July 2019 Draft Law on Public-Private Partnership Investment, 2019 (Law No. ___/___/QH__) (Viet.) [hereinafter July 2019 Draft PPP Law], see July 2019 Draft PPP Law, arts. 4(4), 6(5), 11(5), 27(7), 28(6), 36(3), 42(4), 48(6), 53(7), 60(4), 67(3), 69(3), 78(4), 82(5), 98(5), 100(2), 101(7).

75. Simon Benedikter & Loan T.P. Nguyen, *Obsessive Planning in Transitional Vietnam: Understanding Rampant State Planning and Prospects of Reform*, 13 J. VIETNAMESE STUD. 1, 14–15 (2018).

76. WORLD BANK, H1 2018: PRIVATE PARTICIPATION IN INFRASTRUCTURE (PPI) 1 (2018).

National Assembly in June 2020 ("PPP Law").[77] These reforms represent fairly significant economic and legislative transformations for a socialist state. Facing a stretched state budget and a massive gap between demand and supply in infrastructure development,[78] PPPs provided an attractive avenue through which the government could pursue its developmental goals without being forced to increase its budget deficit or drastically reduce its spending on social programs.

The PPP Law represents both an evolution in Vietnamese legislation on foreign investment and a consolidation of existing regulations issued by various ministries and governmental departments. It is important to highlight the significance of foreign influence on this PPP legislation. It is the product of international collaboration, having been drafted with the help of the U.S. Agency for International Development ("USAID") in the context of PPP promotion by the Japan International Cooperation Agency ("JICA"), the Asian Development Bank ("ADB"), and other global financial institutions. Further, a number of provisions of the Vietnamese PPP Law even include references to the PPP frameworks of several different countries, most notably the Philippines and South Korea, as well as to the model PPP Laws of the UN Commission on International Trade Law ("UNCITRAL").[79]

II. PUBLIC-PRIVATE PARTNERSHIPS AND DEVELOPMENT—IN THEORY AND PRACTICE

In theory, PPPs offer states the opportunity to pursue more cost-effective infrastructure projects, support capital accumulation, stimulate innovation, and strengthen institutions. For countries facing serious developmental obstacles, the appeal of PPP-enabling

77. Law on Public-Private Partnership Investment, 2020 (Law No. 64/2020/QH14) (Viet.) [hereinafter PPP Law]; Duc Tran & Adam Moncrieff, *New Law on Public-Private Partnerships (PPP) in Vietnam*, ALLEN & OVERY (Sept. 8, 2020) [https://perma.cc/9QMP-MWMS].

78. Bruce Delteil, Matthieu Francois & Nga Nguyen, *What Will It Take to Achieve Vietnam's Long-Term Growth Aspirations?*, MCKINSEY & CO. (Sept. 9, 2020) [https://perma.cc/Q3MV-K5P6]; *Five Charts Explain Vietnam's Economic Outlook*, INT'L MONETARY FUND (July 16, 2019) [https://perma.cc/3G4Q-QVBQ] (indicating that Vietnam's public debt spiked in the late 2010s).

79. The footnotes referencing foreign laws have been omitted from the official version of the PPP Law, but are present in the drafts. For references to the Philippines, see May 2019 Draft Law on Investment in the Form of Public-Private Partnership, (Law No. ___/___/QH__) (Viet.) [hereinafter May 2019 Draft PPP Law], arts. 31(2), 34(1), 73(1). For references to South Korea, see *id*. arts. 3(2), 68(2)(a), 74. For references to UNCITRAL's model PPP law, see *id*. arts. 31(2), 34(1).

frameworks is strong. In experience, however, PPPs have not yet been able to deliver on these promises. The following sections will examine the theoretical strengths of PPPs in stimulating development and contrast them with the shortcomings that have materialized when applied in practice.

A. A Theoretical Fit for Developmental Outcomes

1. An Infrastructural Solution to Developmental Challenges

Empirical work linking infrastructure investment to economic development began to emerge in the late 1980s, and that link has remained an important topic of discussion among economists.[80] Evidence accumulated over the past few decades suggests that developing and improving infrastructure can have far-reaching effects: decreased costs of production,[81] accelerated diffusion of technology,[82] and even improved employment prospects and facilitation of entrepreneurship.[83] Moreover, infrastructure may even positively impact a state's social development by reducing overall income inequality.[84] Finally, some have posited that well-planned spending on infrastructure has potential as an engine for long-run development that will generate

80. David Aschauer, an economist with the Chicago Federal Reserve Bank, has been credited with instigating the debate on infrastructure spending's relationship to economic growth. David Alan Aschauer, *Is Public Expenditure Productive?*, 23 J. MONETARY ECON. 177, 193 (1989). For discussions and elaborations on Aschauer's empirical and theoretical findings, see generally DAVID BANNISTER & JOSEPH BERECHMAN, TRANSPORT INVESTMENT AND ECONOMIC DEVELOPMENT (2000); Nina Czernich et al., *Broadband Infrastructure and Economic Growth*, 121 ECON. J. 505 (2011); see also Sylvie Démurger, *Infrastructure Development and Economic Growth: An Explanation for Regional Disparities in China?*, 29 J. COMP. ECON. 95, 115 (2001); Kenneth Button, *Infrastructure Investment, Endogenous Growth and Economic Convergence*, 32 ANNALS REG'L SCI. 145, 156 (1998); César Calderón & Luis Servén, *The Effects of Infrastructure Development on Growth and Income Distribution* 26 (World Bank Pol'y Rsch., Working Paper No. 3400, 2004); Catherine J. Morrison & Amy Ellen Schwartz, *State Infrastructure and Productive Performance* 34 (Nat'l Bureau of Econ. Rsch., Working Paper No. 3981, 1992).

81. Morrison & Schwartz, *supra* note 80, at 17, 33–34.

82. Démurger, *supra* note 80, at 103.

83. Czernich et al., *supra* note 80, at 509 (discussing broadband infrastructure's effect on increasing access to information, developing more innovative employees, and facilitating the development of home-based businesses).

84. Calderón & Servén, *supra* note 80, at 21–26.

sufficient sustainable growth to transform low-income countries into steady-state economies.[85]

It is not difficult to understand why the international community has, in recent years, turned to PPPs as an instrument to help low- and middle-income countries bridge the global economic divide.[86] Developing economies often suffer from the largest infrastructural deficits[87]—a challenge exacerbated by rocketing population growth[88]—and thus theoretically have the most to gain from investments in infrastructure expansion. However, because infrastructure works are extremely capital-intensive, the states which may benefit the most from such projects are those least likely to have the funds to pursue them. The appeal of PPPs, therefore, is their theoretical ability to harness private sector capital to reap the benefits of public infrastructure, expediting economic development at reduced cost. Consequently, the promotion of PPPs and the legal frameworks to support them has grown louder. Many leading voices—including development aid agencies,[89] international financial institutions,[90] and other economically-oriented global institutions[91]—have encouraged their adoption, funded research on best PPP practices, and assisted in drafting and implementing laws to facilitate private-sector participation in public

85. Pierre-Richard Agénor, *A Theory of Infrastructure-Led Development*, 34 J. ECON. DYNAMICS & CONTROL 932, 945 (2010). Agénor's theory involves increased levels of spending on both hard infrastructure (e.g., roads, ports, water-sanitation facilities, and telecommunications) as well as soft infrastructure, which includes health services and educational facilities. *Id*. at 946. Public-private partnerships in both categories of infrastructure exist, though they are much more common in the former.

86. For a general view on PPPs and the benefits they can generate, see DARRIN GRIMSEY & MERVYN K. LEWIS, PUBLIC PRIVATE PARTNERSHIPS: THE WORLDWIDE REVOLUTION IN INFRASTRUCTURE PROVISION AND PROJECT FINANCE (2004).

87. WORLD BANK, *supra* note 52, at 6–7.

88. *Population Growth (Annual %)*, WORLD BANK [https://perma.cc/UAF3-LDHR].

89. *See USAID Public-Private Partnerships Database – Partnerships Active in 2015*, U.S. AGENCY FOR INT'L DEV. [https://perma.cc/5UBS-AYWZ]; *Appuyer les Partenariats Public-Privé au Sein des Municipalités Brésiliennes* [Supporting Public-Private Partnerships in Brazilian Municipalities], AGENCE FRANÇAISE DE DÉVELOPPEMENT (AFD) [French Development Agency] (Nov. 1, 2018) [https://perma.cc/2Z2Z-D9VA].

90. *See, e.g.*, Maximilien Queyranne, Wendell Daal & Katja Funke, *Public-Private Partnerships in the Caribbean Region: Reaping the Benefits While Managing Fiscal Risks* xii (IMF Departmental Paper No.19/07, 2019); REALIZING THE POTENTIAL OF PUBLIC–PRIVATE PARTNERSHIPS TO ADVANCE ASIA'S INFRASTRUCTURE DEVELOPMENT ix–x (Akash Deep et al. eds., 2019) [hereinafter REALIZING THE POTENTIAL OF PPPS].

91. UNCITRAL is one such economically oriented global institution. *See generally* UNITED NATIONS COMM'N ON INT'L TRADE LAW (UNCITRAL), MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (2004) [hereinafter MODEL PPP PROVISIONS].

infrastructure projects. The analysis that follows is based primarily on the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, which directs to and is supplemented by the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects,[92] and the UNCITRAL Model Law on Public Procurement.[93]

2. Capital Accumulation

Considerable resources are needed in the transition from agrarian- to industrial-led economies, a fundamental step in development.[94] Without sufficient capital, the ability to industrialize and find equal technical and technological footing with neighboring nations would be near impossible. To that end, Gerschenkron identifies the facilitation of capital accumulation as a primary objective for states suffering from "economic backwardness."[95] Further, over time, nations with a minimum accumulated capital will progressively grow their wealth, while the have-nots of the global community continue to languish in the face of increasingly sharpened inequalities.[96] There may be substantial challenges in coordinating actors with a view to enhance capital accumulation. In the face of the substantial risks involved in mobilizing assets for industrial use in a developing economy, private actors may avoid deploying capital towards such aims, resulting in a suboptimal level of investment.[97] Moreover, even once invested in industry, individuals may be disincentivized from creating backward linkages which would contribute to national economic development.[98]

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92. *Id*. at iii.

93. *Id*. at 7–8.

94. John C.H. Fei & Gustav Ranis, *Innovation, Capital Accumulation, and Economic Development*, 53 AM. ECON. REV. 283, 284 (1963).

95. GERSCHENKRON, *supra* note 16, at 1.

96. Paul Krugman, *Trade, Accumulation, and Uneven Development*, 8 J. DEV. ECON. 149, 149 (1981).

97. DAVID WALDNER, STATE BUILDING AND LATE DEVELOPMENT 167–68 (1999); *see generally* ALBERT HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1961).

98. The concept of backward and forward linkages was first developed by Albert Hirschman. Backward linkages are the positive pecuniary externalities that a given activity provides to prior stages of production, or to other facilities which contribute to the activity's completion or success. For example, the erection of a factory that produces automobile parts may create backward linkages that encourage investment in local steel manufacturing, which will now benefit from the automobile-part factory's demand for input. Forward linkages, on the other hand, are positive pecuniary externalities which an activity will create for upstream production. To continue with the prior example, investment in a steel mill and the subsequent

The PPP model has strong potential to facilitate capital accumulation and its subsequent mobilization towards industrial and developmental ends. PPPs—highly leveraged endeavors—bring in initial capital from financial institutions, many of which are multi-lateral development banks.[99] This foreign investment, whether sourced from international banks or sponsors, is injected into the local economy in the form of infrastructure development, thereby benefiting the domestic private sector. As improved infrastructure lowers input costs, the start-up capital required to develop an industrial enterprise stands to decrease, leading to fewer barriers and higher returns—and a stronger overall incentive to invest. Sovereign guarantees, subsidies, and tax breaks can serve functions comparable to the risk-alleviating incentive schemes in Hong Kong, Taiwan, Singapore, and South Korea. This state-led coordination encouraged the private sector to accumulate capital and helped propel the Four Asian Tiger economies to high-income status.[100]

The state, meanwhile, benefits to the extent that less of its budget has to be dedicated towards public infrastructure. It can use additional funds for other projects focused on development, increasing public spending on human or social capital, or its participation in industrial and technological enterprises. Alternatively, it can create incentive schemes, offering tax breaks, subsidies, and guarantees to other specific developmental activities.

3. Innovation, Entrepreneurship, and Technological Change

Innovation and entrepreneurship are likewise key features of development theory.[101] To the extent that both elements can be grouped under the umbrella of human capital, they represent an extension of capital accumulation and similarly support more rapid economic progress.[102] The impact of entrepreneurship and technological

supply of cheap local steel may incentivize an entrepreneur to build a factory for automobile parts. *See* HIRSCHMAN, *supra* note 97, at 100.

99. *See* WORLD BANK, *supra* note 52, at 23–24.

100. WALDNER, *supra* note 97, at 189–96 (detailing the use of subsidies, threats, forced mergers, and production requirements which enabled South Korea and Taiwan to successfully navigate both Gerschenkronian and Kaldorian collective dilemmas). Jue Wang, *Innovation and Government Intervention: A Comparison of Singapore and Hong Kong*, 47 RSCH. POL'Y 399, 401–03, 407 (2018) (linking government intervention in the private sector with innovation and economic growth in Singapore and Hong Kong).

101. *See supra* note 60 and accompanying text.

102. While economic gains from innovation and entrepreneurial activity have often been combined in analytical frameworks, there are arguments to be made that they represent distinct

innovation on the enhancement of national economic growth—improved productivity, positive spillover effects, and more effective resource allocation, among others—is well established.[103] While these advances are most frequently associated with large, technologically advanced firms in developed economies, empirical work has shown that innovation and the enhanced productivity which follows it have a serious role to play in stimulating development for low- and middle-income countries seeking to bridge the economic divide as well.[104] The adoption of new technology alone is nonetheless insufficient for sustained development.[105] Where industrialization is not met with local innovation—among other factors—countries risk falling into the "middle-income trap."[106] The adoption of technological advances in

phenomena with their own respective impacts on economic growth. Poh Kam Wong et al., *Entrepreneurship, Innovation and Economic Growth: Evidence from GEM Data*, 24 SMALL BUS. ECON. 335, 344–45 (2005).

103. *See, e.g.*, Fei & Ranis, *supra* note 94, at 283–85; M. Ishaq Nadiri, *Innovations and Technological Spillovers* 19–22 (Nat'l Bureau Econ. Rsch., Working Paper No. 4423, 1993); Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312, 316–17, 320 (1957) (finding that almost ninety per cent of U.S. GDP growth from 1909 to 1949 was attributable to technological change).

104. Jan Fagerberg et al., *The Role of Innovation in Development* (2010), *reprinted in* JAN FAGERBERG, INNOVATION, ECONOMIC DEVELOPMENT AND POLICY: SELECTED ESSAYS 64, 76–83 (2018).

105. Stan Metcalfe & Ronnie Ramlogan, *Innovation Systems and the Competitive Process in Developing Economies*, 48 Q. REV. ECON. & FIN. 433, 437 (2008) ("With limited opportunities to develop indigenous innovation systems, there is little recourse in the short term to relying on foreign technology and knowledge."). Moreover, the adoption of foreign technology may even reduce local innovation and, subsequently, long-term economic development. For a discussion of the negative impacts that imported technology can have on indigenous innovation, see Xiaolan Fu et al., *The Role of Foreign Technology and Indigenous Innovation in the Emerging Economies: Technological Change and Catching-Up*, 39 WORLD DEV. 1204, 1209–11 (2011).

106. The middle-income trap is a phenomenon in the developing world in which countries, as they transition from low- to middle-income status, lose their comparative labor advantage as living standards increase, but the countries themselves are unable to upgrade to a higher position in global value chains. This results in a stable, low-growth market despite productivity gains. *See, e.g.*, Pierre-Richard Agénor et al., *Avoiding Middle-Income Growth Traps*, ECON. PREMISE, Nov. 2012, at 1, 4–5 (explaining that, to escape the middle-income trap, policies must be adopted to enhance innovation); Homi Kharas & Harinder Kohli, *What Is the Middle Income Trap, Why Do Countries Fall into It, and How Can It Be Avoided?*, 3 GLOB. J. EMERGING MKT. ECONS. 281, 286–88 (2011) (identifying obstacles to individual and corporate innovation as one of the significant difficulties that countries wishing to escape the middle-income trap face). However, the middle-income trap may be a problematic lens through which to analyze stalled economic growth insofar as it reifies modernization theory's unproven notion of economic convergence and is often used in the context of promoting neoliberal reform, masking more substantial challenges to industrialization and development.

the context of industrialization must, therefore, be accompanied by state-structured incentives and institutional support to promote indigenous entrepreneurship and innovation and the diffusion of the resulting gains across other sectors of the national economy.[107]

To the extent that project sponsors are comprised of foreign investors with experience in infrastructure development, PPPs allow for more a rapid diffusion of technology and an increased transmission of know-how to local partners. As a result, local entrepreneurs stand to gain an enhanced technical capacity from initial project involvement, allowing them to develop the capacity to later engage in such undertakings alone. Moreover, the added capital and increase in demand for local materials and labor that these projects require create incentives for entrepreneurs to invest in related businesses. These backwards linkages can in turn create the forward linkages necessary for additional future economic development.[108] At the same time, the previously discussed revenue structure encourages efforts to maximize production efficiency,[109] which may ultimately give good reason for project sponsors and their partners to invest in technical and technological innovation.

Innovation can be further supplemented by the country's legal framework for PPPs. The general trickle-down effects of strengthened legal institutions and contract enforcement—particularly where intellectual property rights ("IPR") are concerned—would be one source of reassurance for potential innovators. More particularly, however, PPP legislation's structuring of unsolicited projects from the private sector and its specific provisions on IPR protections can further generate innovation.[110] In allowing unsolicited bids and their approval for proposals that meet the criteria of applying new techniques and technology to unanticipated areas at high value-for-money ("VfM"),[111] a

Pietro P. Masina & Michela Cerimele, *Patterns of Industrialisation and the State of Industrial Labour in Post-WTO-Accession Vietnam*, 17 EUR. J.E. ASIAN STUD. 289, 290–91 (2018).

107. *See* Herbert Kitschelt, *Industrial Governance Structures, Innovation Strategies, and the Case of Japan: Sectoral or Cross-National Comparative Analysis?*, 45 INT'L ORG. 453, 460–75 (1991) (analyzing Japan's industrial experience and arguing that innovative capacity is closely connected to institutional skills and structures on sectoral and national levels).

108. *See* HIRSCHMAN, *supra* note 97, at 100.

109. *See supra* Section II.A.2.

110. Cameron, *supra* note 49, at 134–36.

111. The concept of VfM includes quantitative and qualitative aspects and governments measuring the VfM for a given project will need to use some degree of judgment in so doing. VfM is typically defined in terms of economy (minimizing costs for inputs), efficiency (minimizing inputs for given set of outputs), and effectiveness (ensuring sufficient outputs to deliver the desired outcome). Philippe Burger & Ian Hawkesworth, *How to Attain Value for*

state gives the private sector incentive to research and develop pioneering infrastructural solutions. Unsolicited proposals may, however, be problematic where—following the determination of the project's merit—they are not subsequently tendered through a competitive bidding process. However, the state can avoid the possibility of waste and rent-seeking behavior and still encourage innovation through the provision of IPR and clear processes for IPR transfers in the event the original proponent is not selected.[112]

In the long-term, the increased infrastructure developed as a result of PPPs will also have a considerable impact on a country's overall innovation and entrepreneurship. The development of transportation, telecommunication, and broadband infrastructure will greatly improve contact and communication between citizens, as well as their access to information.[113] New ideas will spread more rapidly, business networks will develop with greater ease, and thus innovations will nurture one another and more readily find the financing and labor they require to succeed.[114] Moreover, as soft infrastructure PPPs drive improved and expanded educational systems, citizens will have better tools and competencies with which to start businesses and develop technological advances.

4. Institutional Hurdles and Corruption

In structuring incentives to grow capital, innovation, and entrepreneurship, the state and its institutions—both formal and informal—serve a fundamental function in development. To be sure, there is serious academic debate as to what role is truly played by institutions in the developmental process, and questions as to whether specific forms of institutions—as well as forms of law and rule of law[115]—positively affect development, whether it is possible to actually discern such impact, or whether understanding such impact is of any practical value.[116]

Money: Comparing PPP and Traditional Infrastructure Public Procurement, 1 OECD J. ON BUDGETING 91, 141 (2011).

112. Cameron, *supra* note 49, at 137, 143–34.

113. Démurger, *supra* note 80, at 95–104.

114. Czernich et al., *supra* note 80, at 505.

115. The rule of law can be characterized as a set of firmly established restrictions on the public authority's indiscriminate use of power.

116. *See, e.g.*, Channell, *supra* note 21, at 144–49 (maintaining that efforts to use law to drive development have failed due to the legal reform community's oversimplification of law and misidentification of legal reform as an end in and of itself rather than a feature within the process of development); Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, *in* PROMOTING THE RULE OF LAW ABROAD, *supra* note 21, at 75, 75 (arguing that law's contextual

While there are no clear answers as to which institutions matter, or how to build impactful institutions, there is wide consensus that the "right" institutions are a vital ingredient in development.[117] Indeed, to engender growth, the state must set policy goals for the short and long term, as well as build and manage the framework under which economic actors make their various investment decisions.

The proposed legal models for PPPs aim to help increase the transparency and accountability of state institutions. In and of itself, the adoption of a clear framework through which the public authority initiates a PPP project, solicits bids, and selects an investor helps to set stable expectations and provide a benchmark against which the general public, private investors, and the state can measure the actions of procuring institutions and their agents. Moreover, the publication of information surrounding the projects, the bids, and the awards allows the public and investors to easily monitor for inequitable treatment and rent-seeking behavior.[118] Combined with review mechanisms for contested projects or bids,[119] as well as sanctions where bidders or state agents are found to have violated procedures, PPP frameworks can help state institutions strengthen their legitimacy.

Self-imposed limits on the state's prerogatives[120] and well-defined dispute resolution mechanisms,[121] meanwhile, may enable the

nature renders problematic the international development community's push for top-down legal reform as well as its standardized approach); Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 144–48 (2004) (criticizing the assumptions used in prior empirical analyses that establish causal relationships between legal reform and development).

117. *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3–26 (James Alt & Douglass North eds., 1990). *See also,* WALDNER, *supra* note 97, at 179–207 (comparing the institutions and their evolution in Syria, Turkey, South Korea, and Taiwan, and arguing that differences in institutional quality was a significant cause of divergent developmental outcomes); Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1739–40 (2001) (referencing the substantial body of empirical findings that, while quite generalized, show that major state institutions have a positive effect on economic growth); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Developmen*t, 9 J. ECON. GROWTH 131, 135–37 (2004) (finding that institutional quality is one of the most important determinants for income levels across nations); Sara Ghebremusse, *Application of Y.S. Lee's General Theory of Law and Development to Botswana*, 12 LAW & DEV. REV. 403, 415–16 (2019) (describing the important role of Botswana's legal institutions in the country's development through their coordinated promotion of trade, investment, and industrialization).

118. LEMBO ET AL., *supra* note 2, at 47.

119. *Id*. at 107–12.

120. *Id*. at 88–93.

121. *Id*. at 60–66.

state's judicial institutions to develop their capabilities and help more firmly establish a "rule of law culture." Accrued experience in PPPs would thus strengthen the consistent enforcement of contracts, cementing institutional gains and advancing developmental goals beyond the sphere of infrastructure. Additionally, PPP projects that target soft infrastructure, particularly health services and education, would provide additional indirect benefits to the strengthened institutions. More educated officials benefiting from higher quality of life would be able to better guide institutions as well as formulate and implement policy.[122] Finally, private participation in infrastructure would free up the necessary resources to strengthen institutions in more immediate ways. This could be achieved by providing higher salaries for positions within institutions so as to attract top talent, by allocating additional funds for training, or even by investing in better tools to help agents carry out their duties.

B. A Gap Between Theory and Practice

Despite the rosy vision of PPP-powered development that the above examination may create, the evidence emerging from the past three decades of their implementation has not met such expectations. Though some theoretical models suggest that PPPs may be more appropriate means to deliver infrastructure than traditional public procurement,[123] the empirical research thus far has yielded mixed results.[124] There is difficulty in accurately assessing the PPP-related gains due to a multitude of legal structures used for private financing of public infrastructure, the extremely contextual nature of individual projects, and the absence of concrete and universally accepted indicators to measure performance.[125] Moreover, as will be discussed below, doubts as to the benefits of PPPs have been raised in both developing and developed economies. These levels of uncertainty seriously call

122. Robert Wade, *Managing Trade: Taiwan and South Korea as Challenges to Economics and Political Science*, 25 COMPAR. POL. 147, 158–159 (1993).

123. Minsoo Lee et al., *The Empirical Evidence and Channels for Effective Public-Private Partnerships*, *in* REALIZING THE POTENTIAL OF PPPS, *supra* note 90, at 15, 19.

124. *Id*. Research presented by the ADB—a significant proponent of PPPs—has shown that while infrastructure spending generally has a positive impact on economic growth, such investments do not have a significant relationship with economic development when structured as PPPs. Jungwook Kim & Suhyeon Wi, *Delivering Economic Benefits from Public–Private Partnerships: The Experience of the Republic of Korea*, *in* REALIZING THE POTENTIAL OF PPPS, *supra* note 90, at 191, 191.

125. Yongheng Yang et al., *On the Development of Public–Private Partnerships in Transitional Economies: An Explanatory Framework*, 73 PUB. ADMIN. REV. 301 (2013).

into question the appropriateness of the global development community's vocal embrace and robust promotion of this form of private sector involvement in public works. Indeed, there are reasons to suspect that in practice, PPPs (1) increase public expenditures, (2) yield minimal efficiency gains and distribute project benefits unequally, and (3) ultimately undermine state institutions.

1. Increased Costs

State institutions frequently cite improved value for money ("VfM")—savings realized relative to traditional public procurement, assessed by comparing estimates of overall long-term costs of projects under both forms—as a motivating reason for entering into a PPP.[126] Nevertheless, on strictly financial terms, it is unclear that PPPs present a cost-effective alternative for the provision of public infrastructure.[127] This inconsistency may be due in part to the fact that VfM is not a truly objective measure and is subject to manipulation and miscalculations, in addition to unanticipated cost variables.[128] Analysis of Portuguese infrastructure projects found that PPP-financing was on average 3.7 percent more expensive than public financing.[129] Other studies have reached similar conclusions regarding the expense of PPPs.[130]

Increased costs are not necessarily a problem to the extent that, in PPPs, such costs are theoretically borne by the private sector partners. In practice, however, added costs are often passed on to the public: through increased service prices for users—such as on toll roads, leases extended beyond projects' lives, or costly buy-outs thrust on the public authority by project sponsors.[131] When project sponsors' returns are paid out through end-user fees, contractual provisions may even require compensation from the public sponsor in the event of

126. Carlos Fernandes et al., *PPPs — True Financial Costs and Hidden Returns*, 36 TRANSP. REV. 207, 209 (2016).

127. Donal Palcic et al., *Performance: The Missing 'P' in PPP Research?*, 90 ANNALS PUB. & COOP. ECONS. 221, 225 (2019).

128. Fernandes et al., *supra* note 126, at 209–11.

129. *Id*. at 222.

130. *See* Ole Helby Petersen, *Evaluating the Costs, Quality, and Value for Money of Infrastructure Public-Private Partnerships: A Systematic Literature Review*, 90 ANNALS PUB. & COOP. ECONS. 227, 227 (2019).

131. Matthew Goldstein & Patricia Cohen, *Public-Private Projects Where the Public Pays and Pays*, N.Y. TIMES (June 6, 2017) [https://perma.cc/YYA5-VHTN].

insufficient demand, further increasing public costs for risks normally borne by the private sector.[132]

These forms of infrastructure provision allow the public authority to avoid immediate disbursements from public coffers—thus pushing fiscal troubles into the future—and so remain tempting to governmental bodies even though infrastructure built through traditional public procurement may be more cost-effective overall.[133] Indeed, private financing is generally more expensive overall in part because it costs more than the issuance of public debt.[134] Relative to traditional procurement, these increased costs—whether paid directly by citizens or indirectly through public authorities' budgets—would ultimately decrease capital accumulation and constrain the state's ability to direct investment towards industrial purposes. Capital troubles would be aggravated where project sponsors are foreign investors, remitting returns abroad.

2. Questionable Efficiency Gains and Unequal Distribution of Benefits

Beyond increased costs, there are also questions as to the overall effectiveness of public-private partnerships.[135] Decisions to turn to PPPs as a way of salvaging the viability of a given project may even exacerbate the problems that they face.[136] In effect, private partners' profit orientation may in reality incentivize violations of construction standards or service disruptions after disasters.[137] Part of the appeal of using a PPP to deliver infrastructure works is the private sector's alleged ability to provide significant gains for the public. However, there is little evidence to support claims of increased speed, more

132. Dannin, *supra* note 54, at 54–60.

133. Jean-Jacques Gabas et al., *Présentation. Financement ou Financiarisation du Développement? Une Question en Débat* [*Presentation: Financing or Financializing Development? A Question for Debate*], 178 MONDES EN DÉVELOPPEMENT [WORLDS DEV.], no. 2, 2017, at 7, 15.

134. Jean Shaoul, *'Sharing' Political Authority with Finance Capital: The Case of Britain's Public Private Partnerships*, 30 POL'Y & SOC'Y 209, 212 (2011).

135. Graeme Hodge & Carsten Greve, *Public-Private Partnerships: Governance Scheme or Language Game?*, 69 AUSTL. J. PUB. ADMIN. S8, S18 (2010) ("[I]nternational evaluations of such arrangements have, in reality, delivered contradictory evidence as to effectiveness.").

136. *See generally* Jean Shaoul, *A Financial Analysis of the National Air Traffic Services PPP*, 23 PUB. MONEY & MGMT. 185 (2003) (finding that the decision to resort to a PPP to improve the economic situation of the U.K.'s National Air Traffic Services ultimately worsened the financial difficulties of the air navigation service provider).

137. Palcic et al., *supra* note 127, at 224.

innovative solutions, or higher-quality end-projects stemming from PPPs.[138] Questions of innovation are particularly relevant in low- and middle-income countries where foreign private partners are selected to carry out projects. The limited impact of imported technology and know-how in spurring indigenous innovation could mean that, even if a particular project benefits from innovative solutions, the long-term effects on national development would be insignificant.[139]

Problematically, the efficiency gains that do result from PPPs do not necessarily benefit local populations evenly. In the developed world, enhanced productivity from PPPs may come at the cost of decreases in wages, employment benefits, and job security.[140] The individuals intended to benefit from PPP services—particularly those already in socially and economically precarious situations—may find their conditions worsened as the quality of received services degrades.[141] With issues of poverty exacerbated, the state's budget will necessarily be affected as tax revenues decline and welfare expenditures grow.[142]

Similar problems have arisen from PPPs in the developing world. In agricultural projects, private financing has facilitated corporate-scale intensive farming, leaving local farmers unable to compete.[143] With few institutional structures in place and little social spending available for rural workers' reintegration into other segments of the economy, these projects can decrease opportunities for employment and entrepreneurship for a significant number of farmers in the developing world.[144] Hard-infrastructure PPPs suffer from identical issues, and productivity gains have often been a result of reductions in

138. *Id*. at 225.

139. *See supra* note 105 and accompanying text.

140. Pauline Vaillancourt Rosenau, *Introduction: The Strengths and Weaknesses of Public-Private Policy Partnerships*, 43 AM. BEHAV. SCIENTIST 10, 14 (1999).

141. *Id*. at 14–16. Moreover, while service costs may decrease, those benefiting from the cost may be large corporate consumers, while families face increases in pricing. *Id*. at 13.

142. *Id*. at 14.

143. Gabas et al., *supra* note 133, at 20.

144. For a discussion on youth employment training programs in the developing world, see Janice S. Tripney & Jorge G. Hombrados, *Technical and Vocational Education and Training (TVET) for Young People in Low- and Middle-Income Countries: A Systematic Review and Meta-Analysis*, 5 EMPIRICAL RSCH. VOCATIONAL EDU. & TRAINING, no. 3, 2013, at 1, 1–3. For further discussion of unemployment in the context of low-income African countries, see generally Stephen Golub & Faraz Hayat, *Employment, Unemployment, and Underemployment in Africa*, *in* 1 THE OXFORD HANDBOOK OF AFRICA AND ECONOMICS 136 (Célestin Monga & Justin Yifu Lin eds., 2015).

a sector's workforce.[145] Theoretically, employment losses might be considered a necessary evil where they translate to significant cost reductions for users. In reality, however, efficiency gains have not been associated with either reduced consumer fees or with increased investment from private partners, further limiting long-term capital accumulation.[146]

3. Undermined State Institutions

Though the PPP models promoted by the global development community may seek to limit the opacity to which public procurement is often subject, private financing of infrastructure may in practice decrease transparency and accountability for the actors involved. Whatever gains are made vis-à-vis transparency and public entity oversight are in turn undercut by the responsibilities shifting into private hands.[147] The PPP structure often requires public authorities to provide constituents with public information without retaining the same obligations once public funds have been transferred to the private sector.[148] Complex organizational relationships between various responsible stakeholders on both public and private sides add an additional layer of opacity, while simultaneously decreasing the accountability of all parties involved.[149]

Obscurity cast onto infrastructure projects—capital-intensive by nature—provides much freedom and incentive for PPP players to engage in opportunistic behaviors. The profit motive of private investors can lead to dubious decisions, particularly when contractual agreements with state entities limit returns to whatever savings are gained from minimizing construction, operating, and maintenance costs. PPPs may consequently lead to poor-quality infrastructure, frequent interruptions of service, and active disregard for safety of the populations the projects are intended to serve.[150] Even where efficiencies are achieved through legitimate means, private actors may take advantage

145. Leigland, *supra* note 1, at 118 ("[L]abor productivity gains were associated with reductions in staff numbers for both water and electricity. Employment fell by 24 percent in electricity and by 22 percent in water following the introduction of private participation.").

146. *Id*.

147. Irma E. Sandoval-Ballesteros, *From "Institutional" to "Structural" Corruption: Rethinking Accountability in a World of Public-Private Partnerships* 26 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 33, 2013) [https://perma.cc/HQG4-A35A].

148. *Id*. at 47.

149. Flinders, *supra* note 61, at 235.

150. Vaillancourt Rosenau, *supra* note 140, at 19–20.

of weak regulatory institutions to retain all gains as profits, choosing neither to pass value to the public authorities nor to decrease costs to the end-users.[151] In effect, PPPs have been extremely profitable to many private sector consortiums, even when returns were supposedly capped.[152]

Engaging in self-serving activities is not, however, unique to private investors. Officials may select to structure an infrastructure project as a PPP as a source of financial rents, colluding with private actors where accountability is low, information costs are high, and decision-makers are given much discretion.[153] Though presented as tools to ensure greater transparency, there is evidence to suggest that, in practice, PPPs have a corrupting effect on state institutions, particularly in the developing world.[154] Issues of corruption and unaccountability, though problematic generally, pose particular problems in countries without strong democratic institutions.[155] If state officials do not owe their positions to the support of voters, there will be little incentive to respond to the public's grievances and low probability of public justice when private and public actors abuse PPP frameworks.

Finally, the private sector's involvement in spheres traditionally reserved to public authority may fundamentally undermine the state by limiting its prerogatives and eroding its sovereignty. The contracts entered into by state authorized agencies are ones that ultimately give the private sector a quasi-governmental status, at the expense of the state. Non-compete clauses—prevalent in American PPPs for toll roads—may legally prevent local governments from improving infrastructure or public transit options in locations near toll roads operated by project sponsors, thus depriving state institutions from fulfilling one of their fundamental roles.[156] Adverse action provisions, meanwhile, enable private parties to receive princely sums in the event that any governmental action adversely impacts the value of the infrastructural works.[157] In the developing world, similar contractual arrangements

151. Leigland, *supra* note 1, at 118.

152. Fernandes et al., *supra* note 126, at 218–19 (finding that even though private-sector upside was intended to be limited, IRR for shareholders of the project sponsors went on average from 10.7 percent to 17.1 percent in Portuguese PPPs).

153. *See* David Martimort & Jerome Pouyet, *To Build or Not to Build: Normative and Positive Theories of Public–Private Partnerships*, 26 INT'L J. INDUS. ORG. 393, 395 (2008).

154. *See, e.g.*, John Loxley, *Are Public-Private Partnerships (PPPs) the Answer to Africa's Infrastructure Needs?*, 40 REV. AFR. POL. ECON. 485, 490 (2013); *see also* Sandoval-Ballesteros, *supra* note 147, at 45–50.

155. *See* Vaillancourt Rosenau, *supra* note 140, at 20.

156. *See* Dannin, *supra* note 54, at 60–69; *see also* Goldstein & Cohen, *supra* note 131.

157. Dannin, *supra* note 54, at 69.

have been used, initially developed as mechanisms to protect investors from project expropriation by the state.[158] The ultimate effect of such terms, however, is to place an effective limit on a state's ability to legislate or on its institutions' abilities to regulate. Because of the types of restraints imposed by private actors—as well as the increasing number of functions delegated to the private sector—state actors find themselves unable to perform their functions.[159]

III. VIETNAM'S FRAMEWORK FOR PPPS MIRRORS SHORTCOMINGS OF PAST LAW AND DEVELOPMENT MOVEMENTS

The apparent conflict between PPPs in theory and practice raises important questions about Vietnam's new legislation: Does Vietnam's PPP Law guard against the challenges witnessed in projects elsewhere? Are the international actors who promote PPP-related reforms as instruments for development learning from the mistakes of the past law and development movements? The following sections answers both questions in the negative by analyzing the PPP Law through the lens of two conceptualizations of law that underlay the failed reform efforts of the past law and development movements. Section A will argue that many of the draft law's deficiencies flow from assumptions about the universal applicability of law. Section B will then explore the instrumentalization of law to achieve developmental ends and how this, too, feeds into the weakness of Vietnam's new PPP-enabling legislation.

A. The Universality of Law

One of the primary deficiencies of law and development movements of the past was their treatment of legal frameworks as primordial, universal truths, akin to the laws of science—constants around which all things organize themselves. In a sense, this reflected a legal parallel to theories of economic convergence in development. Law, it was proposed, transcends its context and will function identically regardless of the jurisdiction in which it is found. Rational economic actors would have similar reactions when faced with similar sets of rules. This belief led to the popularization of legal transplantation as a weapon in the battle for development.[160] Legal transplantation

158. *Id*. at 70–71.

159. Flinders, *supra* note 61, at 216–17.

160. Upham, *supra* note 116, at 100–01.

involves the export of legal frameworks from countries that have succeeded—to some degree—in "achieving" development. This method was one which fundamentally divorced law from the specificities of the institutional, political, and socio-economic contexts in which it arose. The legal reform community appears, however, content to experiment with new forms of old mistakes, with PPPs representing the latest attempt.

1. Inadequate Legal and Institutional Environment for Support and Success

Laws may be ineffective in the absence of appropriate legal-frameworks and institutional arrangements.[161] The PPP Law does not exist in a vacuum, however. It is subject to a number of other regulatory influences.[162] Cross-references to laws intended for public procurement, for example, limit the law's efficiency insofar as the former are not fully suited to the PPP model.[163] Moreover, the PPP Law's procedures for allocating state capital to PPPs remain subject to the Law on Public Investment, resulting in a complex process of project screening and approvals that leaves room for opportunistic behavior.[164] Most notable among these is the failure to impact the law on land, which bars foreign lenders from obtaining security interests in Vietnamese land.[165] This deters foreign financial institutions from extending credit to investors pursuing large-scale infrastructure projects with substantial risks—precisely those intended to benefit from a PPP structure.[166] A workaround that certain projects have used takes

161. Lee, *supra* note 43, at 441.

162. For example, in the PPP Law, the Law on Public Investment is referenced in Articles 12, 13, 70, 72, 74, and 99; the Law on State Budget in Articles 5, 13, 73, 75, and 82; and the Law on Land in Articles 51, 56, 72, 79, and 80.

163. Tony Foster & Nguyen Ngoc, *High Hopes for PPP Draft Law*, VIET. INV. REV. (Dec. 9, 2019) [https://perma.cc/34A6-XTMM].

164. *Id*.

165. In Vietnam, all land is "collectively" owned by the Vietnamese people and administered by the state. As such, the government issues long-term leases to individuals rather than allowing them to purchase real property outright. Under Articles 174 and 175 of the Law on Land, individuals or organizations leasing land from the government have the right to mortgage such land, but only to credit institutions licensed to operate in Vietnam. LAW ON LAND, arts. 174(2)(d),175(1)(b) (Viet.).

166. Foster & Ngoc, *supra* note 163 ("[T]he land laws have restricted mortgages of land use rights (and assets attached to land) to foreign lenders, and have only allowed a project company to mortgage land use rights domestically if it pays the land rental in full up front (deemed impossible if the land is rent-free as for certain projects).").

advantage of the lack of clarity as to what qualifies as a domestic (as opposed to foreign) credit institution authorized to operate in Vietnam.[167] Foreign banks have used their local Vietnamese branches to provide credit facilities and take mortgages on project land.[168] However, this is a fairly grey area of the law, and State authorities have provided conflicting opinions on the legality of such maneuvering.[169]

Vietnam's PPP reform efforts are also suffering from poor coordination of institutional functions and policy aims. In effect, although the central government is pushing the leverage-intensive PPP model of public investment, domestic financial institutions are already stretched thin and collectively hold loans that exceed the country's GDP.[170] As a result of security interest restrictions discussed further below, Vietnamese banks are seeing a high demand for project loans, which tend to be repaid over long periods of time.[171] The country's financial sector risks dangerous levels of capitalization as roughly half of local banks are unable to meet the eight percent capital adequacy ratio required under the Basel Accords.[172] Raising capital would facilitate domestic financing for the types of projects the PPP Law seeks to encourage. However, the country's nascent capital market has too few investors, and the government has imposed a strict thirty percent cap on the foreign ownership of banks.[173] These somewhat contradictory policies make it difficult for Vietnam's banks to raise their authorized capital. As a result, it also becomes harder for project sponsors to finance PPPs.

Finally, systemic corruption and weak internal controls suggest that the state and its institutions lack the administrative capacity to even implement the Law. Many private sector investors view corruption as one of the most significant risks to successful PPPs in

167. CLIFFORD CHANCE, TAKING SECURITY IN VIETNAM 5 (2018) [https://perma.cc/GZY2-ZKAV].

168. *Id*. at 13.

169. Kazuhide Ohya, Vu Le Bang & Nguyen Van Trang, *Vietnam*, *in* THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW 274, 285 (Bruno Werneck & Mário Saadi eds., 5th ed. 2019).

170. Shuli Ren, *The Next China? Vietnam Looks Good Only on Paper*, BLOOMBERG (Dec. 29, 2019) [https://perma.cc/NWJ8-FRRT].

171. *Gov't Has Backup Plans for North-South Expressway If No Investors Found: Minister*, VIET. INV. REV. (Dec. 30, 2019) [https://perma.cc/EW9Y-5FQX].

172. Ren, *supra* note 170.

173. *Id*.

Vietnam.[174] There is evidence to suggest that the PPPs currently contributing to a significant proportion of land development in Vietnam are the result of corrupt practices.[175] Local officials frequently select project sponsors formed by family members and business associates, allowing interpersonal networks to reap the profits associated with converting rural land to residential and industrial properties.[176]

Outside the PPP-context, collusion between government officials tendering contracts and firms associated with the State—in contravention of bidding and competition laws—remains a regular occurrence.[177] Moreover, despite popular discontent and denunciations of the country's high levels of corruption in the Vietnamese press, policies implemented by the state have had little effect in reducing such practices.[178] The frequency with which such corruption transpires and the limited success in preventing it or punishing perpetrators point to serious deficiencies in the state's internal controls and, ultimately, its administrative capacity to effectively implement the law.

2. Insufficient Adaptation to Local Conditions

Successful implementation of a legal framework requires that it be properly adapted to its socio-economic context.[179] Vietnam's institutional and economic capabilities, however, appear insufficient to implement certain aspects of the PPP Law. For example, it imports a provision from South Korean PPP legislation[180] that aims to offer private investors new sources of debt financing through bond issuances by the special purpose vehicles investors form to undertake a PPP

174. Veerasak Likhitruangsilp et al., *A Comparative Study on the Risk Perceptions of the Public and Private Sectors in Public-Private Partnership (PPP) Transportation Projects in Vietnam*, 21 ENG'G J. 213, 225 (2017).

175. John Gillespie et al., *Exploring a Public Interest Definition of Corruption: Public Private Partnerships in Socialist Asia*, 165 J. BUS. ETHICS 579, 580 (2020).

176. *Id*.

177. Gillespie, *supra* note 68, at 947.

178. Adam Fforde & Lada Homutova, *Political Authority in Vietnam: Is the Vietnamese Communist Party a Paper* Leviathan*?*, 36 J. CURRENT SE. ASIAN AFFS. 91, 102 (2017). Fforde and Homutova largely attribute these failures to insubordination throughout the Vietnamese Communist Party and state structure. They illustrate the common attitude of local officials with the Vietnamese idiom "*trên bảo dưới không nghe* (superiors instruct, inferior levels do not listen)." *Id*. at 103 (internal quotations omitted).

179. Lee, *supra* note 43, at 441–42.

180. July 2019 Draft PPP Law, art. 70 n.5 (referencing Article 58 of Korea's Act on Public-Private Partnerships in Infrastructure).

project.[181] However, PPP project bonds in developing countries have not been particularly successful in generating capital for investors, and indeed the legal right to issue corporate bonds is of little practical value in a capital market too underdeveloped to garner demand.[182] In effect, even where bond financing is available for PPP projects in low- and middle-income economies, government bonds crowd out corporate bonds and reduce the incentive for private investment.[183] These provisions provide some suggestion that the PPP Law is poorly adapted to Vietnam's current level of economic development or its institutional context.

Just as damaging to the reforms' prospects, however, are the low levels of public support. PPPs in the developing world have a greater probability of success where the project and its private sponsor enjoy a degree of public support.[184] In Vietnam, however, many of the PPPs undertaken to date have failed to garner the general public's approval as projects involving the transfer of public assets to private actors are widely viewed as the product of corrupt practices.[185] When these PPPs gain their revenue through fees charged directly to users, there is even a possibility of conflict. For example, the National Assembly was forced to call a working session as a result of heated protests over the Cai Lậy toll road—a PPP structured as a Build-Operate-Transfer ("BOT") project—in Tiền Giang, a southern province in the Mekong Delta.[186] At issue were the placement of the tollbooths operated by the BOT project's private company, the fees being charged, and the company's failure to solicit feedback from local residents and associations.[187] Beginning before the tollbooths were even

181. PPP Law, art. 78.

182. Suk Hyun et al., *Determinants of Public–Private Partnerships in Infrastructure in Emerging Economies*, *in* REALIZING THE POTENTIAL OF PPPS, *supra* note 90, at 137, 148.

183. *Id*.

184. Comparing several PPP road projects in Sub-Saharan Africa, Osei-Kyei & Chan find that one of the strengths of the N4 Toll Road Project—connecting South Africa and Mozambique—was its public support, secured through the employment of local contractors, discounts for residents, and the consultation of local civil groups and trade unions when assessing price increases. Robert Osei-Kyei & Albert P.C. Chan, *Developing Transport Infrastructure in Sub-Saharan Africa Through Public-Private Partnerships: Policy Practice and Implications*, 36 TRANSP. REVS. 170, 177 (2016).

185. Gillespie et al., *supra* note 175, at 2.

186. *NA Committee Discusses BOT Controversy*, VIET NAM NEWS (Aug. 16, 2017) [https://perma.cc/6V5G-APW3].

187. *Id*. The cancellation of Vietnam's first healthcare PPP, the Cam Pha General Hospital, presents a comparable situation. The project aimed to transfer an existing public hospital to a private investor, who would then renovate the facilities and operate it as a subsidized private clinic. Neither the project sponsors nor the public authority consulted the

operational, the protests were highly organized and succeeded in causing massive traffic blockages.[188] The protests continued into the subsequent year[189] until the Ministry of Transport halted the collection of fees despite the resulting losses for the private partner.[190]

In addition to shoddy infrastructure, inadequate dialogue, and onerous fees paid directly to private investors, many Vietnamese citizens have serious concerns regarding the processes through which project land is acquired.[191] Despite liberalizing land reforms, the state has not recognized property interests in land, nor has it allowed the imposition of legal constraints on its power to compulsorily acquire any parcel of land.[192] For PPP projects, local governments routinely expropriate low-value rural land—subsequently developed into high-value industrial or residential land—using statutory powers to compensate the dispossessed locals at rates considerably below the market value of the land.[193] Because the state treats land as a public asset, aggrieved individuals are unable to challenge expropriations and under-compensation through legal channels.[194] Moreover, the Land Law of 2013 absolves the project sponsors of any legal or social responsibilities owed to the former occupants.[195] Such callous treatment of displaced persons and the resentment it engenders makes it difficult to see how PPPs may generate prosperity and stability in the short term,

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hospital staff, who had no desire to transition from public to private sector employees. As a result, the project faced protests and stiff opposition from stakeholders whose support was critical to its success. *See* U.S. AGENCY FOR INT'L DEV., VIETNAM PUBLIC PRIVATE PARTNERSHIPS AND SOCIALIZATION: CASE STUDIES 23 (2019).

188. Forms of civil disobedience included paying the fees in small denominations of VND (slowing the collection of tolls and exacerbating traffic jams) and opting to bypass the toll on smaller side roads that quickly became congested as they were not designed for substantial traffic. *NA Committee Discusses BOT Controversy*, *supra* note 186.

189. *Transport Ministry Wants to Maintain Toll at Gate Despite Protests*, VIET NAM NEWS (Apr. 19, 2018) [https://perma.cc/M6UJ-T4J7].

190. *MoT Proposes Resumption of Fee Collection at Controversial Cai Lậy Toll Booth*, VIET NAM NEWS (May 13, 2019) [https://perma.cc/4G4Z-MTU6].

191. Gillespie et al., *supra* note 175, at 6, provide a case study of two land acquisition disputes in Vietnam. The authors make several strong arguments about the blurred nature of distinctions between public and private spheres in socialist Asia and develop a more suitable definition of corruption—public-interest corruption—as a lens through which to examine problematic PPPs opposed by the constituencies they are ostensibly supposed to serve.

192. John Gillespie, *Transforming Land-Taking Disputes in Socialist Asia: Engaging an Authoritarian State*, 39 LAW & POL'Y 280, 286 (2017).

193. Gillespie et al., *supra* note 175, at 3.

194. *Id*.

195. *Id*. at 4.

particularly when broad cross-sections of Vietnamese society ultimately support the forcibly relocated landholders.[196]

The public's basic knowledge and understanding of law is also relevant to the analysis of the law's suitability to local conditions. This has a significant impact on likely legal compliance.[197] People are more likely to follow law broadly if they understand and appreciate the benefit they gain—as individuals and communities—through legal compliance.[198]

If, however, there is public knowledge of law, but its appreciation or understanding changes radically depending on social milieu, general compliance may be weakened nonetheless. John Gillespie's nine-year investigation into perceptions on the Vietnamese Competition Law provides an illustration of how knowledge does not systematically yield compliance, as well as how social and business networks may exert a strong influence on perceptions of legal legitimacy.[199] Gillespie's study examined the collective views of individuals belonging to three distinct business networks. While none of the three networks complied systematically with the Competition Law,[200] each group had its own assessment of law's true purpose.[201] One network, composed of managers of state-owned enterprises, viewed the legal framework as a form of state economic management, compliance with which was negotiable.[202] The second network (composed of private-sector entrepreneurs from large manufacturers) looked upon the law favorably, but chose to violate it as they perceived the state's enforcing institutions to be corrupt and unlikely to enforce it against the state elite.[203] Finally, the third network (composed of small and medium entrepreneurs), considered the Competition Law to be a tool through which the political elite extracted rents. As a result, this last group colluded—fixing prices in violation of the Competition Law—to protect their respective businesses.[204]

Accordingly, in Vietnam, public perceptions of the legitimacy of the laws and institutions may be more impactful for legal reforms and compliance than public knowledge of law alone. These findings

196. *Id*. at 10.

197. Lee, *supra* note 43, at 447, 463.

198. *Id*.

199. *See generally* Gillespie, *supra* note 68.

200. This is perhaps indicative of the state of general regulatory compliance in Vietnam.

201. Gillespie, *supra* note 68, at 947.

202. *Id*. at 947–48.

203. *Id*. at 949–51.

204. *Id*. at 952–53.

are further substantiated by work on tax evasion in Vietnam, which found evidence that knowledge of Vietnamese tax law was actually associated with an increase in tax evasion, whereas the improved performance of local government actors resulted in increased tax compliance.[205]

3. Political Will

The universalist approach to law as flavored by the second law and development movement viewed neoliberal law as apolitical.[206] Putting aside the extent to which law is necessarily political as it disseminates ideology that inherently reproduces the state's hegemony,[207] attempting to deny the political nature of legal frameworks can seriously restrict the implementation of legal reform.

In effect, the commitment and dedication of the country's political leadership to carry out the law is of essential significance to the PPP Law's potential for positive developmental effects.[208] One of the principal obstacles preventing the legislation from succeeding in its goals is the fragmented nature of the Vietnamese State. Ultimately, it is unlikely that all the constituent parts of Vietnam's diffuse political leadership have the requisite political will to rigorously implement the law on public-private partnerships.

Following *Đổi Mới* in 1986, the transition from planned economy to socialist market economy has been carried out with an emphasis on decentralization.[209] These reforms have resulted in increased fiscal and administrative autonomy for Vietnamese provinces, providing local governments with a degree of independence in determining economic and developmental strategies and greater control over their

205. *See* Thu Hang Nguyen, *Determinants to Tax Evasion Behavior in Vietnam*, 7 J. MGMT. & SUSTAINABILITY 123, 130 (2017).

206. *See, e.g.*, Honor Brabazon, *Introduction: Understanding Neoliberal Legality*, *in* NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT 1, 6–7 (Honor Brabazon ed., 2017); Jaafar Aksikas & Sean Johnson Andrews, *Neoliberalism, Law and Culture: A Cultural Studies Intervention After 'The Juridical Turn'*, 28 CULTURAL STUD. 742, 758 (2014).

207. *See generally* LOUIS ALTHUSSER, IDÉOLOGIE ET APPAREILS IDÉOLOGIQUES D'ÉTAT: NOTES POUR UNE RECHERCHE [IDEOLOGY AND STATE IDEOLOGICAL STATE APPARATUSES: NOTES TOWARDS AN INVESTIGATION] (1970).

208. Lee, *supra* note 43, at 444.

209. *See generally* Edmund J. Malesky & Francis E. Hutchinson, *Varieties of Disappointment: Why Has Decentralization Not Delivered on Its Promises in Southeast Asia?*, 33 J. SE. ASIAN ECON. 125 (2016) (discussing decentralization and neoliberal economic reform in Southeast Asia).

budgetary resources.[210] Ultimately, the manner in which decentralization was pursued in Vietnam has led to duplicative projects and inefficiencies,[211] while incentivizing local officials to violate broader developmental policies in order to attract foreign investment.[212]

While decentralization reduced the extent of the central government's control over local economic and social matters, fragmentation within the central government—among competing ministries and agencies—further limited its effectiveness in implementing long-term plans for development.[213] Agencies will often co-opt legislative processes to jockey for increased power and reduce that of rival institutions, leading to further functional duplication and growing intra-ministerial conflicts.[214] Moreover, with weakened formal institutions, there has been significant opportunity for informal institutions—powerful networks of kinship and patronage—to emerge and subsequently steer the political landscape.[215]

As a result of (1) the central state's internal conflicts and its poor penetration at the local level, (2) incentives across all levels of governance to subvert national policy, and (3) the development of influential patronage networks, it is difficult to envisage a scenario in which the PPP Law on public-private partnerships would benefit from the unified and systematic commitment from Vietnam's political leadership. Deep discord has already been observed with regard to the minimum revenue and foreign exchange guarantees proposed in the legislation, with internal disputes even making their way into the national media.[216] Moreover, though the law aims to curb the many abuses associated with ineffective PPP projects, such abuses are what enable patronage networks to grow and be maintained.[217] Ultimately, without greater legal and institutional reform, the political will to

210. *See generally* Vu Thanh Tu Anh, *Vietnam: Decentralization Amidst Fragmentation*, 33 J. SE ASIAN ECON. 188 (2016).

211. *Id*. at 192.

212. *See generally* Yong Kyun Kim, *When It Rains, It Pours: Foreign Direct Investment and Provincial Corruption in Vietnam*, 19 J.E. ASIAN STUD. 141 (2019). *See also* Vu, *supra* note 210, at 193–94.

213. *See* Benedikter & Nguyen, *supra* note 75, at 14–15.

214. *Id*. at 15.

215. Simon Benedikter, *Bureaucratisation and the State Revisited: Critical Reflections on Administrative Reforms in Post-Renovation Vietnam*, 12 INT'L J. ASIA PAC. STUD. 1, 26 (2016).

216. *NA Standing Committee Discusses Draft PPP Law*, VIET NAM NEWS (Sept. 17, 2019) [https://perma.cc/DDG7-DXNH].

217. *See* Gillespie et al., *supra* note 175, at 591.

realize PPP-related reform is likely to be too diffuse to engender even a modest quality of implementation.

B. The Instrumentalization of Development Law

Law's instrumentalization in a quest for development was a prominent feature of the failed efforts of the previous law and development movements.[218] This ends-means approach identifies and defines a desired state of affairs and subsequently proposes a legal reform that may effectively yield the anticipated outcome. Using law as a vehicle in such a manner presents three significant issues: (1) the ends-means process does not specifically require inquiry as to the sources of societal problems, and as such, reforms may simply treat symptoms of dysfunction rather than underlying causes;[219] (2) it discourages alternative approaches that may not match up with assumptions that inform the goal;[220] and (3) the evaluation of these projects' success analyzes the performance of the means rather than the validity of the ends.[221]

1. A Focus on Superficial Treatments Instead of Foundational Deficiencies

It is somewhat puzzling that international financial institutions, development aid groups, and Western states promote ends-means legal frameworks in the context of economic liberalization to the extent that the process functions as a command economy for law-making. The

218. A key example of this is the greater legal reform program—frequently known as "shock therapy"—that Russia undertook following the collapse of the USSR. The supreme goal of shock therapy was to build a market economy and excise Soviet and state influence from economic affairs. Rather than working to gradually build up the conditions and incentive structures that would support long-term economic development, reformists pursued their aims by rapidly enacting legal frameworks aligned with neoliberal theory. It was believed the legal and economic reforms would eventually yield the socio-political features of developed democratic states. ANDERS ÅSLUND, HOW CAPITALISM WAS BUILT: THE TRANSFORMATION OF CENTRAL AND EASTERN EUROPE, RUSSIA, THE CAUCASUS, AND CENTRAL ASIA 1–2, 144–46 (2d ed. 2013). Though Åslund, who was intimately involved with Russian privatization, asserts that the program was successful, other scholars do not share his view. *See, e.g.*, Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1736 (2000).

219. ANN SEIDMAN & ROBERT B. SEIDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS: PROBLEM SOLVING AND INSTITUTIONAL CHANGE IN THE THIRD WORLD 70 (1994).

220. *Id.*

221. *Id.*

central authority, in prescribing an outcome, dictates treatment and allocates targets—neither of which may be in line with the reality of the situation. As a result, ends-means legal reform often provides superficial treatment to existing issues rather than tackling the root causes of the problem the law is intended to resolve.[222]

PPPs are most frequently used as instruments to enable budgetarily constrained public actors to find alternative sources of financing for infrastructure projects.[223] Accordingly, it is perhaps unsurprising that the chief goal of the Vietnamese law is to attract private actors to provide the capital that the public authority cannot or will not invest itself in infrastructure.[224] The goal may alternatively be framed as solving the problem of insufficient private investment under the existing framework for private financing of public infrastructure. The legislative lodestar is manifest in provisions touching on minimum revenue guarantees,[225] explicit bidding procedures,[226] and the use of international arbitration for dispute settlement.[227] The effect is to provide private investors with greater certainty as to project returns, fair opportunities, and enforceable contract rights.

While the three components may indeed generate increased investment from private actors, they do not effectively tackle the underlying reasons for which private financing has been scarce. The result is ultimately to the Vietnamese state's detriment. Though the private sector incentive scheme limits project sponsors' exposure to risks that could result in financial losses, it does so by shifting the risks entirely to the public authority rather than by developing a framework to mitigate them.[228] The situation would perhaps be unproblematic in

222. Examples of alternative "guiding baseline legal perspectives" might include generating job growth, enhancing the technical skill and international competitiveness of the local workforce, or streamlining government processes for selection, approval and implementation of infrastructure projects.

223. Marco Buso et al., *Public-Private Partnerships from Budget Constraints: Looking for Debt Hiding?*, 51 INT'L J. INDUS. ORG. 56, 81–82 (2017).

224. Bich Thuy, *Latest Draft Law on PPP Sees Positive Changes*, VIET. INV. REV. (Aug. 27, 2019) [https://perma.cc/LC83-X52Q].

225. PPP Law, art. 82.

226. PPP Law, arts. 28–43.

227. PPP Law, art. 97.

228. Admittedly, not all risks can in fact be mitigated by either public or private actors. However, many of the risks that plague PPPs in the Vietnamese context are endogenous to the projects and the jurisdiction, rather than being the result of external phenomena over which neither actor possesses any degree of control. Thi Trang Pham & Cao Tho Phan, *Risk Management: Awareness, Identification and Mitigation in Public Private Partnerships of*

jurisdictions with high levels of accountability and technical skill, strong internal controls, and well-structured incentives for public officials. This does not, however, describe the present reality of Vietnamese governance. Without moving beyond the goal of attracting private capital, the reform efforts ignore the reasons for which few private actors flocked to Vietnam's infrastructural investment opportunities in the first instance.

The most widely discussed changes are to the risk-sharing mechanisms in PPPs and the ability for project sponsors to receive minimum revenue guarantees ("MRGs") and foreign exchange guarantees.[229] MRGs are sovereign guarantees by which states agree to provide funds to private investors in the event that revenues generated by a project fall below a contractually agreed upon threshold. For projects involving revenue-funded infrastructure, such as toll-roads, in which an investor's returns (and ability to repay project loans) depend on uncertain levels of demand, MRGs may be offered as a method to reduce the financial risk borne by the private party and thus incentivize private sector investment.

It is notoriously difficult to accurately predict demand (and subsequently, revenue) for many of the types of revenue-funded infrastructure projects, notably in the transportation sector.[230] Accordingly, MRGs may have severe fiscal consequences for the state. For example, as of 2011, Colombia was required to disburse funds to investors in order to satisfy the guarantees for nine of the eleven projects in

Technical Infrastructure Projects in Da Nang, 4TH INT'L CONF. ON GREEN TECH & SUSTAINABLE DEV. (GTSD) 18 (2018).

229. *See, e.g.*, Bich Thuy, *Transformation Ahead in PPP Investment Risk Mechanisms*, VIET. INV. REV. (Nov. 16, 2019) [https://perma.cc/Q78X-2FXP] ("At last week's roundtable . . . revenue risk sharing mechanism, foreign currency convertibility guarantee, . . . and state funding [were] the areas of focus."); Tung Anh, *National Assembly Deputies Give Voice as Law on PPP Takes Shape*, VIET. INV. REV. (Nov. 28 2019) [https://perma.cc/3Q5J-B3ML] ("After months of revisions and expectation, the National Assembly has officially voiced support for the revenue risk sharing mechanism in the long-awaited draft Law on Public-Private Partnerships[.]"); *Latest Draft Law on PPP Sees Positive Changes*, H.K. BUS. ASS'N VIET. [https://perma.cc/TY3Q-UGR7] ("There are several positive changes in the draft law regarding the government guarantee mechanism and risk-sharing.").

230. In a study surveying 210 rail projects across fourteen nations, Flyvbjerg, Holm, and Buhl found that ninety percent of projects overestimated user traffic by an average of 106 percent. Bent Flyvbjerg et al., *How (In)accurate Are Demand Forecasts in Public Works Projects?: The Case of Transportation*, 71 J. AM. PLAN. ASS'N 131, 132–33 (2005). The authors found that such overestimation was often a result of political causes, with actors deliberately skewing forecasts to ensure project implementation. *Id*. at 139.

which the Colombian government had agreed to provide MRGs.[231] Between 1995 and 2004, the total public contribution resulting from the MRGs was equal to seventy percent of the total private capital initially committed to the eleven projects combined.[232] It is worth noting that the Republic of Korea—whose PPP Act is referenced directly several times in the footnotes of draft versions of the PPP law[233]—originally used a minimum revenue guarantee in its legislation.[234] However, the MRGs were phased out partially in 2009 and fully in 2008,[235] as a result of government losses related to demand overestimation.[236]

MRGs and offtake agreements, as such, allay investors' fears through compensation—a benchmark of assured returns—rather than an actual reduction in overall project risk. Sovereign guarantees are already dangerous because of their potential to be enormously expensive to states. Inadequate mitigation of the risks that might trigger state payment to the project or its creditors, moreover, increases the chances of a given PPP ravaging state finances. An alternative approach may have been to examine the causes of inadequate investor returns, which would likely include, among others: (1) poor project selection, (2) overoptimistic and unrealistic demand forecasts in feasibility studies, (3) delays in project preparation and land transfers, as well as (4) the inadequate technical skills and ineffective coordination of state bodies involved in projects.[237]

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231. Samuel Carpintero et al., *Dealing with Traffic Risk in Latin American Toll Roads*, 31 J. MGMT. ENG'G 05014016-1, 05014016-4 (2015).

232. *Id*.

233. May 2019 Draft PPP Law, arts. 3(2) n.1, 68(2)(a) n.12, 74 n.17; July 2019 Draft PPP Law, arts, 3(2) n.1, 70 n.5.

234. Soong Ki Yi et al., *Korea*, *in* THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW, *supra* note 169, at 100, 104.

235. For the argument that the Republic of Korea had gained the confidence of investors who were subsequently willing to consider alternative forms of support and that Vietnam should adopt MRGs until it has reached a comparable stage of development, see Donald Lambert & Sanjay Grover, *Eight Steps to Get PPPs Right in Viet Nam*, ASIAN DEV. BLOG (Oct. 7, 2019) [https://perma.cc/P3FJ-P58P]. The argument that Vietnam should imitate South Korea's PPP provisions only once it reaches the requisite developmental stages may ultimately undermine Lambert and Grover's overarching argument in support of a Vietnamese MRG and greater legal framework for PPPs, however. Indeed, South Korea did not enact its PPP legislation until 1994, by which time it had the eleventh largest GDP, a mere two years before it joined the Organization for Economic Co-operation and Development, an association of high-income countries.

236. Yi et al., *supra* note 234, at 104.

237. Anh Nguyen et al., *Managing Critical Risks Affecting the Financial Viability of Public–Private Partnership Projects: Case Study of Toll Road Projects in Vietnam*, 144 J. CONSTR. ENG'G & MGMT., 05018014-1, 05018014-4 (2018).

The bidding provisions, meanwhile, provide investors with the ability to detect egregious violations of fair play in which procuring bodies deviate from the specified procedural sequence. A transparently laid out tender process may act as a fire alarm for bidders to bring attention to corrupt conduct, but it does not address the structures that incentivize collusion. Due to weak state capacity and low levels of enforcement and compliance, foul play may not be discovered, and when it is, may not result in punishment.[238] The proposed solution is also impaired by the law's imprecise guidelines for evaluating project bids, which leaves procuring authorities wide discretion in awarding contracts.[239] The Authorized State Agency ("ASA") may thus follow tender requirements and still award a project as a result of corrupt motivations. Furthermore, no efforts are made to discourage collusion among private sector bidders, save for a brief mention of its impermissibility.[240] Accordingly, the law offers at best a partial solution to reduce the dissuasive impact of unfair and corrupted procurement auctions.

Finally, the law's explicit approval of international arbitration as an available dispute resolution mechanism guarantees only a forum in which investors may challenge violations of rights as set out in a project contract. The law does not ensure that such rights will be respected, nor does it ensure that Vietnam will accept enforcement of an

238. *See* Tam Thanh Tran et al., *The Impact of Public Procurement Rules and The Administrative Practices of Public Procurers on Bid Rigging: The Case of Vietnam*, 26 ASIA PAC. L. REV. 36, 46 (2018). *See also* Adam Fforde, *The Emerging Core Characteristics of Vietnam's Political Economy*, 31 ASIAN-PAC. ECON. LITERATURE 45 (2017); Ngoc Anh Nguyen et al., *Tax Corruption and Private Sector Development in Vietnam*, 15 EJOURNAL TAX RSCH. 290, 304 (2017).

239. Article 42 (and Article 41(2) by incorporation) sets up a framework for evaluating bids based on three criteria: (1) the investor's capability and experience; (2) a technical evaluation of the bid; and (3) a financial evaluation. PPP Law, arts. 41–42.

Taking the technical evaluation as an example, the only procedural requirement is that it must use either a 100-point, 1000-point, or pass-fail grading system. *Id*. art. 42(2). As to substantive requirements, the provision specifies nothing more than that the evaluation consider "project quality, capacity and performance standards; project operation, management, business, maintenance and care standards; environmental and safety standards; [and] other engineering standards." *Id*. The clauses on capability and experience are similarly vague, though Article 42(4) does leave open the prospect of a more detailed framework for evaluating bids, specifying that "the Government shall elaborate on this Article." *Id*. arts., 42(1), 42(3)–(4).

240. The law prohibits "bid rigging" between competing investors but defines this collusive behavior quite narrowly as either (1) an agreement between investors for one to withdraw their bid so the other may win or (2) an agreement under which an investor prepares the bid documents for a competing investor. PPP Law, art. 10(6); *see also* July 2019 Draft PPP Law art. 37.

arbitral award to the project sponsor.[241] A guaranteed forum can certainly calm investor anxieties as they relate to clashes with the state—or with well-connected local partners—but such disputes are costly endeavors. In the same vein, the provisions contain no incentive structures that would protect against opportunistic project sponsors who strategically file arbitration cases against financially strained states out of improper motives.

An analysis of failed PPP projects under Vietnam's past legal frameworks reveals that the law does not adequately address existing deficiencies regarding the guidelines for pursuing PPP projects or the messy organizational structure of procuring entities—core sources of increased public costs and low-quality works. The project preparation phase is an integral part of ensuring the success of a PPP, and insufficiently detailed frameworks and limited transparency can lead to the commencement of poorly structured and commercially unviable projects.[242] Such contracts can ultimately result in a significant cost borne by the taxpayer.[243] Clear procedures, therefore, are critical for the procuring government entity when carrying out a feasibility study to analyze a given project's potential.

Further, past Vietnamese regulation on PPP projects has required that feasibility studies evaluate the advantages of selecting a PPP model over other forms of infrastructure investment but have not provided a detailed framework as to how such an evaluation should proceed.[244] Internationally, PPP potential is often evaluated through a VfM analysis, which looks to the overall utility and cost-effectiveness of structuring an undertaking as a PPP.[245] The use of specific guidelines, such as VfM, to evaluate projects can ensure the selection of (1) the proper form of infrastructural investment, and (2) the private investor contributing the highest net public benefit. Cost overruns and increased public expenditures have been associated with numerous PPP projects across Vietnam in the past decade.[246] There is also some suggestion that the adoption of VfM evaluation would allow procuring

241. Duc Tran & Adam Moncrieff, *Enforcement of Foreign Arbitral Awards in Vietnam*, ALLEN & OVERY (Nov. 21, 2013) [https://perma.cc/L5BM-4DGV].

242. U.S. AGENCY FOR INT'L DEV., *supra* note 187, at 5.

243. Lee et al., *supra* note 123, at 20.

244. *See* DECREE 15/2015/ND-CP ON INVESTMENTS IN THE FORM PUBLIC-PRIVATE PARTNERSHIPS, art. 25(1)(a) (2015) [hereinafter DECREE NO. 15]; DECREE 63/2018/ND-CP ON INVESTMENT IN THE FORM PUBLIC-PRIVATE PARTNERSHIP, art. 18(3)(a) (2018) [hereinafter DECREE NO. 63].

245. Fernandes et al., *supra* note 126, at 209.

246. *See* Nguyen et al., *supra* note 237, at 05018014-8.

entities to better assess the suitability of structuring infrastructure projects as PPPs versus other forms of investment.[247]

However, part of the problem at the project-assessment stage is that government bodies responsible for procurement lack financial resources, expertise, or structural organization necessary to generate accurate feasibility studies.[248] In the absence of detailed procedures, experience, and the requisite budget, there is room for significant error in calculating costs and user demand. The absence of a centralized and cohesive system for managing the country's PPPs is of particular relevance. While a centralized PPP institution was envisaged in initial iterations of the law, as well as the most recent governmental decree on PPPs, the relevant provisions were subsequently removed.[249] Accordingly, a PPP may be procured and subsequently managed by a large number of high and mid-level central government institutions, the Provincial People's Committees, or any other agency or organization to which the aforementioned entities choose to delegate such authority.[250]

A diffuse system of management can lead to inaccurate budgeting of public funds, non-cohesive developmental plans, and poor project preparation and monitoring. Take, for example, the Vinh Tan 3 Coal-fired Thermal Power Plant, a $2.7 billion PPP project initiated in 2010. Due to a lack of financial and technical support from the government, the ASA selected a private sector investor who prepared the feasibility study.[251] The procuring agency had no access to draft contracts or key provisions and so reached an agreement which the central government later deemed unacceptable, leading to costly renegotiations—still ongoing a decade later.[252] Further, without a centralized entity for PPPs to provide the requisite funding and direction, local ASAs may be unable to sufficiently monitor construction and

247. *See, e.g.*, Dinh Thi Thuy Hang, *Evaluating the Decision-Making on a Public-Private Partnership to Finance a Road Project in Vietnam*, 9 J. INT'L STUD. 124, 125 (2016). Hang uses a computational algorithm to assess the risks associated with the construction of the My Loi Bridge, a PPP which faced significant challenges. Hang finds that using a *quantitative* VfM analysis would have helped the State identify the strong likelihood of failure and the relative benefit of conventional public procurement. *See also* Dinh Thi Thuy Hang, *Evaluation of Qualitative Value for Money of Public Private Partnership Projects in Vietnam*, 10 J. INT'L STUD. 192, 193 (2017) (finding that *qualitative* VfM analysis would allow policymakers to better assess and boost the viability of potential PPPs for road construction).

248. U.S. AGENCY FOR INT'L DEV., *supra* note 187, at 5.

249. *Id*. at 51; *see also* DECREE NO. 63, art. 7.

250. PPP Law, art. 5.

251. U.S. AGENCY FOR INT'L DEV., *supra* note 187, at 11–12.

252. *Id*. at 12.

operation phases of a project, which may give rise to opportunistic behavior from private investors.[253]

Ultimately, without investigating the most common causes of PPP-related disputes and reducing their likelihood of occurring, the present law fails to foster a context in which PPPs are able to flourish. In this regard, the ends-means approach to legal reform yields only superficial treatments that may beneficially alter actor-specific outcomes but do not fundamentally improve the climate for development.

2. Immovable Assumptions and Alternative Solutions

Where law is purely an instrument to achieve some developmental goal, assumptions and values underlying that goal may restrict the perspective through which the means operates. Law, in this context, risks becoming a discreet solution that ignores the complexity of its effective context. In effect, where a law is guided by a singular frame of reference—the primacy of private actors in creating economic value, for example—it is unlikely to offer a comprehensive strategy to overcoming a given developmental obstacle.

Vietnam's law on PPPs, as with the majority of legal reforms promoted by international financial institutions and development aid agencies, is informed by the neoliberal precept that the private sector operates more efficiently than the public sector and should therefore be placed at the center of developmental transformation. The proposed legal framework for PPPs starts with the assumption that the private sector will more effectively organize and deliver infrastructure projects—particularly when public finances are tight—and seeks to maximize private investment in the process.

This assumption produces adverse effects to the extent that the legal reforms preclude approaches that begin their analysis from alternative vantage points. An understanding of what mechanisms motivate the private sector to allocate capital towards PPPs is indubitably of value but is only a partial consideration in the context of projects that require collaboration between state and private sector in providing public goods. Successfully incentivizing private investment through PPPs will certainly reduce the front-end costs of infrastructure that the public authority would ordinarily bear. However, by no means will it ensure the delivery of high-quality and cost-effective projects.

253. Nguyen et al., *supra* note 237, at 05018014-9 (discussing the degradation of PPP-built toll roads within months of operations due to private investors' use of low-quality construction materials to recoup more costs).

The ends-means approach often neglects the incorporation of past social experience in defining its means.[254] The present weakness of Vietnam's laws, legal frameworks and institutions will subsequently limit the law's ability to positively impact the country's economic and infrastructural development. As mentioned above, the diffuse management of PPPs in Vietnam is extremely problematic in the initial stages of a PPP, and both members of the Vietnamese government and the private investors involved with PPPs view the complications relating to land acquisition as well as the obtention of approvals and permits as the most critical risks burdening these infrastructure projects.[255] In both previous regulation and the current law, the provincial-level People's Committees are responsible for clearing, allocating and leasing the land intended for project-use, regardless of which public entity is the project's ASA.[256] The separation of roles and responsibilities among the involved public entities can result in serious delays and inefficiencies costly to both the State and private partner.[257] Permit delays, often due to the complexity of approval procedures, substandard expertise, and unanticipated changes in regulation and law have also played a role in undermining the viability of Vietnamese PPPs.[258]

The transaction costs resulting from poor institutional coordination are not confined to the preparatory stages of a project. A noteworthy example of this relates to Ho Chi Minh City's Phu My Bridge, connecting Districts 2 and 7 and intended to form a part of the city's planned ring road.[259] In addition to numerous other issues (caused by opportunistic behavior from both public and private actors), the project failed to achieve projected revenues.[260] The project company subsequently defaulted on its loans, at great cost to the city as the project's guarantor.[261] A significant factor contributing to the project's low revenue was the failure of the city to complete in a timely manner the portion of the ring road leading to the bridge. The public authority's inability to deliver promised infrastructural support ultimately made it

254. SEIDMAN & SEIDMAN, *supra* note 219, at 69.

255. Likhitruangsilp et al., *supra* note 174, at 223.

256. PPP Law, art. 56; DECREE NO. 63, art. 49; DECREE NO. 15, art. 45.

257. Likhitruangsilp et al., *supra* note 174, at 223.

258. *Id*.

259. *See generally* Vinh-Thang Hoang, *Public-Private Partnerships with Government-Induced Demand Risk: A Case Study from Vietnam*, PARIS DAUPHINE UNIV. 1, 4 (2015) [https://perma.cc/BGN8-EPJU].

260. *Id*. at 31.

261. *Id*. at 34.

impossible to reach the anticipated traffic to which the project's revenues were tied.[262] These costly organizational deficiencies are not isolated events in Vietnamese PPPs.[263]

Without acknowledging the deficiencies of specific assumptions, an ends-means process for pursuing development precludes the solutions that alternative approaches to a problem may offer. If the values motivating the legal reforms were shifted from private sector primacy to a focus on growing the capacity of state institutions, the chances for successful PPPs and long-term development might ultimately be improved. A law under these hypothetical circumstances could seek to streamline the institutional organization for PPP procurement and strengthen internal controls. The resulting enhancements in public actor coordination and reduced transaction costs would positively affect PPPs as well as other developmental aims. A shift in focus could facilitate the development of institutions' technical ability and evaluation methodologies. This could serve to ameliorate the identification and implementation of those projects likely to benefit from a PPP structure and thus minimize the risks borne by both public and private sectors. Moreover, it could also yield cost-effective strategies such that ASAs are better able to monitor ongoing projects and thwart attempts by project sponsors to cut corners and deviate from project plans.

Ultimately, the ends-means use of legal reform with a neoliberal slant does little to cultivate an environment in which the public authority can judiciously manage a PPP project. Nor does it dissuade rent-seeking and opportunistic behavior from either the public or private spheres—a common feature of infrastructure works in Vietnam and the developing world at large. Further, the law fails to incentivize private actors to provide high-quality works and services, work effectively with local partners, or disseminate know-how and technology to the general public. Most significantly, it precludes recourse to non-

262. *Id*. at 7.

263. An additional example is the Đèo Cả Tunnel, a PPP sponsored by the Ministry of Transport that aimed to improve accessibility to a planned special economic zone near Vân Phong Bay. Financial returns—generated from tolls—were impacted after the National Assembly put an indefinite hold on the special economic zone leading to a forty percent decrease in traffic. *See* Khanh An, *Deo Ca Tunnel Enters the Light*, VIET. INV. REV. (Nov. 19, 2012, 4:34 PM) [https://perma.cc/K4PP-EZ6X] (explaining organizational and financing structure of Đèo Cả Tunnel); *Law on Public Private Partnerships—A Breakthrough in Investment*, VIET NAM NEWS (Nov. 23, 2019) [https://perma.cc/688B-XR2K] (discussing Đèo Cả's decrease in traffic and uncertainty faced by private investors in PPPs); Tom Fawthrop, *Public Criticism Pressures Vietnam to Back Down on New Economic Zones*, CHINA DIALOGUE (Mar. 26, 2019) [https://perma.cc/Y7JB-BBTG] (commenting on the National Assembly's decision to pause plans for special economic zones in Vân Phong and two other locations).

legal means of affecting prospects for development and ensures a continued market for the services of development law drafters.

CONCLUSION

In the context of their neoliberal propagation, PPPs are a paradox. The models promoted require a legal framework which explicitly delineates the public and private spheres, while by their very nature distorting this distinction. Legal reforms to erect PPPs in the developing world have fallen short of hopes. This is largely a result of the international reform community's inability to shake off the theoretical legacy of their predecessors. For Vietnam, the attempts to use PPPs to attract private investment and develop infrastructural works are unlikely to be successful. The Vietnamese law, supported by USAID, does not adopt a contextual approach to solving developmental challenges, nor does it expend much effort solving the underlying causes of the socio-economic problems the Vietnamese state seeks to bridge with development law.

*Connor Vignali Steelberg**

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