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An introspective view of corporate governance issues within the structure of government Link companies (GLCs)

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This article explores the corporate governance issues pertaining to the Malaysian government owned companies. From the analysis, two governance issues have been identified to be connected to the structure of government link companies (GLCs). The first issue involves the extent to which the managerial agents have served in accordance with the judgment of the best interest of the company. The second issue relates to the expropriation of the minority shareholders' right arising from the prioritization of the government and national agenda over the minority shareholders' interest. As a result, governance within GLCs is relatively intractable as the conflicts had surged from disparity of objectives held by the substantial owner (the government) and other minority stakeholders. In a nutshell, a crisis may potentially emerge due to the ownership structure which leads to a quasi private-government type of entity, thus imposing unique challenges for its governance execution.

Keywords: State enterprises; Government link companies and Corporate governance.

INTRODUCTION

Corporate governance is an important issue in the government link companies (GLCs). Although Azmi (2008) found no consistent relationship between corporate governance variables and GLCs performance, corporate governance is indeed relevant for GLCs

operations as it reflects the responsibility and accountability of the government with respect to the administration of scarce resources.

This study attempts to explore corporate governance issues pertaining to the GLCs structure. This topic is relevant due to the uniqueness of GLCs which is relatively different as compared to other private firms in the market. Hence, it is expected that GLCs' governance would have its own domain of corporate governance issue due to its special context.

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Corporate Governance

Severe economic downturn has created an overwhelming concern towards improvement of corporate governance structure in most countries (Backman, 2006; Sridharan et al., 2002 and Setia-Atmajaya, 2008). The phenomenon occurs due to the negative effects of the crisis which threaten the survival of the organizations and stakeholders interests. In addition, globalization has made corporate governance an important determinant for the market attractiveness among investors (Skousen et al 2005). Thus, corporate governance structure will determine investors' willingness to participate in the particular market (La Porta et al., 2000).

Corporate governance has become an important feature for modern organizations due to the characteristic of modern organizations which includes separation of ownership. The separation of ownership from its control potentially leads towards manoeuvre behaviour by irresponsible agents (Hart, 1995 and Keasey and Wright, 1997). Furthermore, the asymmetric information may also increase the tendency for misusing of organizational resources as the management can filter some information from their stakeholders (Jones and Pollitt, 1996; Adams, 1994 and Loh and Ragayah, 2007). Hence, corporate governance has become central in overcoming the problem inherited within the ownership separation structures (Khongmalai et al. 2010 and Jensen and Meckling, 1976).

Corporate governance (CG) is defined as "the system by which companies are directed and controlled" (Skousen et al. 2005). The Malaysian Finance Committee on Corporate Governance has described CG as "the process and structure used to direct and manage the business and affairs of the company towards enhancing business prosperity and corporate accountability" (Finance Committee on Corporate Governance, 2001). The ultimate objective of CG is to realize the long-term shareholders value as well as taking into account other stakeholders' interest. Thus, corporate governance is meant to provide sufficient assurance on the rightful and proper administration of company's resources and to achieve pre-determined goal. However, Malik (2006) offered a different view on CG concept as he stated that CG is not entirely a question of legal design, but about genuine effectiveness problem.

Malik (2006) stressed on the misunderstanding of many managers and entrepreneurs towards the prevailing concept and strategy of CG. Accordingly, the wrongly asked questions of CG contribute to misleading direction of corporate governance thought. Corporate governance idea should not be based on the question of "whose interest to be pursued by company (whether the

shareholders or other stakeholders"), but on the questions of "what is the correct way of the corporate management?" and "what does it mean by strong and healthy company?" (Malik, 2006: 27). These alternative questions lead to accurate managerial behaviour which later promotes the best outcome for the company and not for the sake of other purpose. Simultaneously, a healthy company is able to produce other positive outcomes parallel to the promotion of shareholders and other stakeholders' interests. Boatright (2004) shared similar view as he contended the idea of shareholders' special rights. According to Boatright (2004), the managerial group is not entitled to any fiduciary duties for the shareholders on the premise of agency relationship. The duties are only regarded as instrumentalist to the process of upholding the company's interest. This is because the absent of managerial fiduciary duties towards shareholders' group can potentially lead to managerial absolute power and the loose of control over managerial behaviours.

The execution of CG concept falls into two dominant models, known as the Anglo-Saxon Model and the European Continental Model (Ooghe and Langhe, 2002; Dwivedi and Jain, 2005 and Setia-Atmajaya, 2008). Both models differ in their control mechanism. The Anglo-Saxon model emphasizes on the use of external control (market mechanism) such as role of institutional investors and the threat of merger and take-over; while the European Continental Model relies on internal control mechanism such as directors' remuneration, board composition and management performance based-reward (Setia-Atmajaya, 2008). Nevertheless, board of directors (BOD) is recognized as the main governance players for both models. BOD is considered as the institution which mitigates the effects of organization's agency problems (Khongmalai, 2005; Dwivedi and Jain; Setia-Atmajaya, 2008 and de Andres et al., 2005). Though BOD has been a central institution in the internal governance of company, it is unnecessarily effective as in the cases of Enron and WorldCom (Khongmalai, 2005).

Most studies on corporate governance have been focusing on the relationship of various governance mechanisms and companies' performance or shares' prices (Heaney, 2009; Dwivedi and Jain, 2005; Setia-Atmajaya, 2008 and de Andres et al., 2005). Such relationship will lead to the instrumentalist perspective rather than ethical responsibility of the entrusted management. Therefore, it is necessary to explore CG issues related to the specific context before plunging into the discussion of effective corporate governance. According to Lamoreaux (2009), there are two types of

CG problems encountered by companies. The first threat, Type I is the internal threat which involves expropriation by greedy managers. Type II is the external threat which involves the expropriation by greedy rulers or the state. The two problems affect one another. When a company is vulnerable to Type I, it is usually less expropriated by the states, however, in the situation of low Type I, the company will be exposed to some degree of Type II threat. Although Type I problem has been recognized by most governance models, Type II is also not to be under-estimated as noted by Lamoreaux (2009: 34): "But the Type II problems also have victims. They are not so visible perhaps, because they are dispersed throughout society, but they are very real nonetheless. Moreover Type II problems produce a cynicism that, because it extends to government officials as well as business leaders, can even be more socially corrosive, undermining faith in democratic political institutions at the same time as it inhibits economic growth".

In summary, CG is required by all types of enterprise including the government enterprises (GLCs). With their special characteristics, GLCs governance is expected to be more complex than other ordinary firms.

Public Enterprises

Public enterprises (also known as government link companies) play important roles to the development process of many countries including western countries such as the U.S.A. and Germany (Puthuchery, 2004; Kaldor, 1980; Walters and Monsen, 1977; Gale, 1981; Rudner, 1975; and Thillainathan 1976). According to Zuthshi and Gibbons (1998) public corporation is adopted as the favoured mechanisms by many governments in order to distance the management decision-making of its production and service oriented activities from the ministerial control while retaining a measure of accountability for their activities. For example, Singapore has used public enterprise mechanism to corporatize certain activities and promote the industrial growth since 1960s. Furthermore, King (1975) also emphasized on the increased burden of modern government which led to the enlarging scope of public sectors roles, thus justifying for some level of government intervention in the commercial entities. GLCs are recognized as the hybrid or quasi-government organization since the companies carry multiple objectives comprising economics, social and politics (Hsueh, 2010; Khongmalai et al. 2005; PCG 2006; Abdullah, 2005; Zuthshi and Gibbons, 1998; Md Zabid, 1991). Despite their significant roles and

contributions, many GLCs encountered severe financial performance (Ip 2003; Majumdar 1998; Lin et.al 1998; Gale 1981; Walters and Monsen 1977 and Sheerwood 1971).

Sherwood (1971) related GLCs' poor performance to ecological argument. Ecological refers to the environment surrounding the GLCs operation, specifically the community structure. Sheerwood (1971) proposed that state enterprises as unnecessary mechanism for certain countries arguing that state enterprises are prone to being destructive if implemented by third world countries. This is due to the significant ecological differences between the third world and western countries. The third world countries inherit some form of instability due to prismatic society which lie between the fused and diffracted type of societies which represent the transitional phase between the two extreme community phases (Sheerwood, 1971). Fused society refers to the society with little role differentiation, few specialized subsystems and a simplified hierarchy of power, while diffracted society refers to the extensive labor specialization with interdependence and existence of markets, money and price system. The most obvious deficiency of the prismatic society lies in the lack of effective market system (Sheerwood 1971). Thus, the absence of effective market system forces the government to pursue the interventionist path in the condition that all other considerations (than economic) had become important to determine the balance of power, prestige and solidarity. In addition, the prismatic society also has deficiency in political ecology. The prismatic society has simultaneous collective aspirations and individual demands which lead to problematic system maintenance especially when the political leader gives priority to their political survival (Sheerwood 1971).

Walters and Monsen (1977) have different perspectives on the underperformance of state enterprises. According to Walters and Monsen (1977) the problems arise because of two reasons. First, the nationalization usually occurred at the point of company's bankruptcy. Thus, the government have to bear the cost and losses although the companies were in their worst condition. The second reason is due to government intervention in the companies' objectives as explained by King (1975): "Due to the intense electoral competition, when the government hold themselves responsible for the management of the economy as a whole, it cannot not to intervene in the affairs of nationalized industries. On the other hand, the affairs of the nationalized industries impinge directly on the lives of voters and for what happens in the industries the voters hold the government of the day to be responsible, not the chairmen of the

boards....., even if the government is not held responsible for the nationalized industries, it will be held responsible for managing the economy as a whole" (King 1975: 287). As a result, the government always has to intervene in the matters of the nationalized firms. However, such political interference inevitably deflects the nationalized firms from achieving economic goals efficiently (King, 1977 and Hsueh, 2010). Hsueh (2010) also suggested that minority government ownership may be beneficial in the context of newly industrialising countries such as Taiwan since it provides some advantages in terms of credits, liquidity and cost of capital to the government owned firm.

For this study, the discussion has been framed within the government ownership justification in order to provide more managerial implications and in line with the function of corporate governance. The ecology reason is more related to the issue of the macro environment, thus not parallel to the micro aspect pertaining to the delivery of effective governance. In Malaysia, GLCs transformation programme started in 2004. The aim of the transformation programme is to improve GLCs performance and the results are expected to be accomplished in 2015. The transformation plan has outlined five thrusts policy which consists of (PCG 2006): Clarifying the GLC mandate in the context of national development; Upgrading the effectiveness of boards and reinforce the CG of GLCs; Enhancing GLC capabilities as professional shareholders; Adopting corporate best practices within GLCs; and Implementing the GLCs Transformation Program.

The upgrading of BOD effectiveness and the corporate governance of GLCs are identified as the necessary catalysts for the GLCs transformation (PCG 2006: 15-19). Thus, this study justifies the need for addressing corporate governance issues encountered by the government owned companies. The originality of this study lies in its attempt to understand the nature of corporate governance challenges that surrounds the GLCs.

METHODOLOGY

Zutshi and Gibbons (1998) used contextual approach to recognize specific environment pertaining to the studied context. Similarly, this study also used case-study to identify relevant corporate governance issues for GLCs.

The cases were presented merely to provide contextual background to assist the identification of governance issues pertaining to GLCs. Both cases contain corporate governance issues due to several reasons:

Corporate governance surges within the framework of strategic decision-making process such as the merger and acquisition (Meier et al., 2011). In this study, both cases involve the strategic type of decision-making with the first case relating to take-over bidding process and the second case is about the strategic business choices.

BOD is the control authority that constitutes the effective governance role especially in the strategic decision making process such as adoption of the sustainable development policies within companies' operation (Wolff, 2011). The role of board of directors and influence of BOD on the strategic business decision-making process are embedded in both cases.

From the case analysis, relevant governance issue for GLCs structures are highlighted. This is also parallel to the aim of this study to identify possible corporate governance issue underlying the GLCs.

Case overview

AAA Berhad

AAA group is the largest toll expressway operator in South-East Asia and one of the largest in the world in terms of market capitalization. It is listed on the Main Board of Malaysia stock exchange and the company is involved in investment holding and provision of expressway operation services in Malaysia and abroad.

Within its domestic operation, AAA has operated and maintained 973 kilometres of inter-urban toll expressways in Peninsular Malaysia stretching from the north to the south border of the country. Under its concession agreements, AAA is allowed to revise its toll rates every three years and the government is contractually obliged to give compensation if the rate is unrevised. AAA has not revised its rates since 2005 due to the accelerating inflation and financial crisis. As a result, the government paid RM 2.84 billion as gross compensation to AAA in the three-year period to 2008. It was reported that in 2009, almost 25.6 percents of AAA total revenues of RM 3.18 billion came from the compensation payments. Thus, the Malaysian government began to extensively review the previous concession agreement that has benefited AAA.

AAA is one of the GLCs in which the government held approximately 68 percent of collective interest through its three investment entities comprising ABC (12.4 percent), DEF (38.5 percent) and GHI, which is DEF parent's company (16.7 percent). On October 2011, DEF Group and ABC had made an offer to buy AAA assets and liabilities at RM 23 billion or RM 4.60 per shares. The undertakings would involve a takeover of all AAA assets

which include four Malaysian highway concessions and its overseas assets such as in Indonesia and India. As required through Section 132C(1) of Malaysia Companies Act 1965, in the event of a target company disposing its whole or substantially the whole of its undertaking or property, an approval must be obtained from the shareholders during the company's general meeting. The approval necessities require for a simple majority (this provision had been amended to a threshold of 75 percent and implemented in 2011). Due to the involvement in the matter, DEF-ABC was abstained from voting on the sale as specified in Section 131A and/or 132E (3) Companies Act of 1965. Consequently, the remaining non-interested shareholders entitled to vote were equivalent to 32 percents of AAA shareholding. This simple majority would refer to half of the non-interested shareholders votes which are equivalent to 16 percents. However, from the 32 percents of AAA non-interested shareholders about 15 percent are readily owned by various government-linked entities such as DDD, ATB and PBN. Only one percent is additionally required from other minority shareholders in order to approve the takeover deal.

Since the take-over deal is most likely to be approved, the next issue was the price offered to the shareholders. In addition to DEF-ABC proposal, two other bidders had showed their interest in AAA assets such as UBS that offered RM 26 billion and SAA for RM 50 billion. SAA was reported to finance the takeover through bonds instruments. Meanwhile, AAA had required the interested parties to place a deposit of RM 50 million to compensate the company in case the bidder chose to walk away from the deal. Eventually, only DEF-ABC had put up the required deposit and became the sole-bidder for AAA. Finally, in AAA extraordinary general meeting (EGM) on February 2011, DEF-ABC proposal of RM 23 billion had been approved by its majority shareholders which relates to the government portion of ownership.

XYZ Berhad

X, Y and Co. which was founded in 1910 started as rubber plantation in Malaysia. In 1958, the company is incorporated into XYZ Holdings Ltd. in the United Kingdom. Malaysian government involvement in XYZ started in 1976 through the acquisition of XYZ shares on the London Stock Exchange at market price of RM 23 million. In 1978, XYZ was reincorporated in Malaysia as XYZ Berhad and its office moved to Kuala Lumpur in 1979. Today, XYZ has become the largest conglomerate in Malaysia and one of the largest in South East Asia.

The company is broadly diversified into wide range of activities focusing on five core businesses; plantation, property, industrial equipments, motors and energy and utilities and healthcare in over 20 countries. Diversification has long been practiced in XYZ operation since its early years. In 1929, XYZ purchased ST, a franchise for heavy earthmoving equipment. The purchase of ST was also recognized as XYZ expansion into heavy equipments business. Also, in 1971, XYZ had also diversified into other crops such as palm oil and cocoa by acquiring Seafield Estate and the establishment of Consolidated Plantations Berhad. With such moves, XYZ became the leading force in the region's agricultural sector. As the demand for agricultural products soared, XYZ had accumulated excess cash and performing well throughout the relevant period.

After gaining control over of XYZ in 1976, the Malaysian lead-board had jettisoned some of its' poorly performing assets throughout the late 1970s and early 1980s. At the same time, the company continued its diversification into new ventures such as the purchase of tire-making operations in Philippines in 1981 and the franchise rights for selling Apple Computers in Southeast Asia in 1982. In 1984, XYZ extended its operation into the property development sector by purchasing large stakes in the MMM Berhad (later renamed as XYZ MMM Properties Berhad). By early 1980s, XYZ had controlled the agricultural, manufacturing and real estate industry. However, up to this point its diversification effort had been emphasized to the safe and low risk investment and thus considered as the favourite safe investment among investors.

In 1992, the company's sales plunged and it was accused to be impacted from its staid diversification strategy. Under its new CEO, XYZ had undergone turn around process. During the late 1980s and early 1990s, under the new management team, XYZ had invested into different range of ventures such as insurance, property and tourism. For example, through its subsidiary, it had bought a full-service resort with condominiums in Florida and hotels in Australia. Due to the intense diversification effort under the leadership of CEO, Mr. H, XYZ's sales and profits had bolted during those years. Unfortunately, XYZ was then criticized as relying too much on its commodity-based investment and falling behind in holding progressive companies participating in high-tech, brokering and manufacturing sectors in the region.

Under new management, XYZ started to increase its investment in business such as power generation, oil and gas, and heavy equipment exporting in mid-1990s. This period had been an aggressive expansion era for XYZ. For instance in 1994, XYZ gained 40 percent interest in

PD Power and acquired a UK based company which is involved in manufacturing, marketing and servicing refrigeration equipment and related products. In 1995, it acquired 60.4 percent interest in JJJ Banking (fourth largest bank in Malaysia in terms of assets) at US\$520 million and was soon recognized as XYZ Bank Berhad together with its brokerage firms known as XYZ Securities Sdn. Bhd.

Following the impact of the financial crisis, the management eventually determined to return to its core areas such as plantations, property development, tire manufacturing, heavy equipment and motor vehicle distribution and power generation. Eventually, XYZ would most likely to return to relatively prudent style of conservative management.

RESULTS AND DISCUSSION

This section highlights relevant governance issues and problems pertaining to the GLCs context. The discussion is presented in terms of “what could potentially occur” rather than “what exactly occurred in the particular GLCs”. This is parallel to the purpose of this study which aims at investigating the relevant and accurate governance issues for GLCs structure.

From the context discussed, two governance issues can be highlighted such as: Ability to promote the best interest of the company ; and Expropriation of minority shareholders rights. Subsequently, both of the issues involve the role of company's BOD. Then, each of the governance issue is further described as follows.

Upholding the best interest of the company

The obligation to perform for the best interest of the company is a mandatory requirement as described in Section 132(1) Malaysia Companies Act 1965: “A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company”.

From the statement, the word for the best interest is recognized as the fiduciary duty of the entrusted management. The term “director” also comprises all individuals responsible for the operations and financial management of the company by whatever name called. The entrusted management ought to act in their utmost prudence, diligence and knowledge in order to serve the best outcome for the company which the individual is currently representing. This is clearly outlined in section 132(1A) which states: “A director of a company shall

exercise reasonable care, skill and diligence with: The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and any additional knowledge, skill and experience which the director in fact has”. Furthermore, Section 132(1B) outlines the proper ways for disposing the directors' responsibility in order to ensure business judgement is compliance to section 132(1A). Section 132(1B) includes requirements of: The business judgement is made in good faith for the proper purpose; Does not have material personal interest in the subject matter of the business judgement; Is informed about the subject matter of the business judgement to the extent the director reasonably believes to be appropriate under the circumstances; Reasonably believes that the business judgement is in the best interest of the company.

Inaccurate business judgement can lead to huge losses for any company. Unless the decision was made based on prudent and diligence judgement, the loss shall be attributed to other uncontrollable factors inherent in the industry and also market forces. Although the responsibility to act in best interest of the company is mandatorily described, however, its implementation poses a range of possibilities as it requires for agents' subjective evaluation and choices. For example in the case of AAA takeover, the requirement of RM 50 million deposit was recognized to be in line with the preservation of the company's value as it limits the bidder to only serious and credible entities. However, it also violated the best interest of the company as the strict requirement had limited the availability of offers for such a cash cow company.

The situation became worst when the conflicts converged between the company's best interest and the nation's best interest. As projected in AAA case, the takeover could be part of the government effort to restructure the tariff for the citizens, but with unreasonable value for the company. In XYZ case, the diversification might be conducted parallel to the best interest of the company or it could also be against the best interest of the company. The improper diversification judgement could lead to immense financial losses, thus deteriorating the company's intrinsic value. For example, after the 1997 financial crisis, XYZ Bank had suffered a major loss in Malaysian banking industry and was sold in 1999. In the same year, the golf resort in Florida was also sold. Furthermore, in the first half of 2010 the company plunged into another loss due to cost overruns in one of its business division. The governance issue arose as the BOD was responsible to decide the best strategic choices for the company and should

continuously monitor the management actions in all matters.

The absence of prominent individual owners probably lead to the vulnerable situation of governance for such government entities. If specific prominent owners are present, the persons would be able to align managerial behaviours to act in the best interest of the company as it affects their interest too. Similarly, Boartwright (2004) emphasized the importance for retaining the special status of the shareholders in order to execute effective governance over the company's management. But, in the case of GLCs, the power of minority shareholders or any independent watchdog group to secure the company's best interest may vanish especially when the issue converges with the government agenda or policies.

Expropriation of minority shareholders right

The government equity is relatively significant in GLCs structure that entitles the government to be the substantial owner and to exert significant control over the company's board and management. Therefore, the possibility of Type II problem may increase although the management is supposed to act in accordance to the interest of the entire company including the minority shareholders.

The fiduciary duties' of directors and management are to promote the rights' of all stakeholders and not merely the government. Although the government do not exercise its privileged power through the "golden shares", the ownership structure has sufficiently paved the way to prioritize the government interest. For example, the government intention to review the organization's strategies or policies can be achieved through various routes. As depicted in the AAA case, a significant review on the concession terms without seeking approval from other shareholders could potentially be the underlying basis leading to the DEF-ABC take-over move. Due to the significant holding of the government in its GLCs, the government motive is relatively prioritized in most situations as shown in AAA case. The DEF-ABC proposal had finally been approved in the AAA extraordinary general meeting (EGM) despite unsatisfactory reactions from some of its minority shareholders (Leong, 2011).

As demonstrated from AAA case, the take-over decision might have been done to promote the well-being of the people. This could be true if the takeover would lead to the review to include provisions for reasonable toll rates in the future. Hence, this action would definitely benefit the people and finally increase the image and credibility

of the government pertaining to upholding the people's rights. Government income could then be channelled to other development plans. Nevertheless, some elements of expropriation to the minority shareholders were unavoidable due to the conflicting obligations. Thus, King's argument (1975) of substituting the financial accountability with political accountability as detriment to GLCs profitability is indeed relevant in the case of minority interest expropriation.

From the analysis, the main challenge to execute effective governance in GLCs is largely due to the government equity ownership as proposed by Walters and Monsen (1977). Although the GLCs have been recognized as the government corporate entities, the social burden of the government is invisibly embedded within GLCs structure. Government function is not commercially-oriented, thus any entities connected to it will inherent some of its roles and responsibilities. Thus, in order to exercise good governance, the prime objective of the entities must first be identified and recognized. For ownership concern, GLCs are exposed to the question of whether its management has been acting in the best interest of the company; and whether expropriation of other stakeholders' interest has been considered in its strategic decision-making. The issue is also related to the ability of BOD to perform their best judgement for the good of the company.

RECOMMENDATION

Future study is recommended to integrate GLCs from other countries in order to enrich the scientific knowledge of the GLCs governance problem. From such identification, further research can be conducted precisely by focusing on the accurate and relevant governance issue pertaining to GLCs environment. Thus, this study serves as an exploratory study aiming to facilitate holistic understanding on the governance issues faced by GLCs.

Conclusion

Corporate governance is important for all organizations including GLCs. However, GLCs possess specific characteristics which contribute towards different domains of governance issues concerned. The problem occurs from the government control which limits the ability of the organization to act purely from the commercial and profit perspectives. Hence, the governance issue within GLCs structures should be

recognized within the scope of two relevant issues: the ability to uphold the company's best interest in light of the absence of specific significant individual owner(s) other than the government; and the expropriation on other shareholders in the pursue of government interest.

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