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BREAKING DOWN BARRIERS TO U.S. INVESTMENT IN VIETNAM'S REAL ESTATE MARKET

Stephanie L. Strike[†]

Abstract: Despite great progress in Vietnam's general investment environment, barriers exist which impede U.S. investment in Vietnam's real estate market. While Vietnam remains a socialist country, drastic liberalization of its market structure and investment laws have made Vietnam a more attractive environment for most U.S. investors. However, barriers remain for U.S. investors seeking to invest in Vietnam's real estate, specifically property developers wishing to build tourism complexes. These barriers include weak transportation infrastructure, financial and humanitarian issues posed by site clearance, and lack of accountability in the real estate licensing system. To facilitate U.S. investment in Vietnam's real estate, Vietnam should strategically target transportation infrastructure projects and improve infrastructure financing schemes; decrease the issues posed by site clearance through increased government participation; and increase accountability in its licensing system by reconciling the conflicting ideologies of the local and national governments and by reducing corruption. With implementation of such changes, Vietnam may attract greater U.S. investment in its real estate market.

I. INTRODUCTION

In Vietnam's Quang Ninh province, tourism has boomed.¹ In 2002 the number of tourists in Quang Ninh increased thirty-six percent over 2001,² and another ten percent from 2002 to 2003.³ One million of these tourists were foreigners,⁴ drawn to the beautiful landscape and convenient location close to the Vietnam-China border.⁵ Capitalizing on this tourism boom, Hong Kong investors have pledged to invest US\$36 million to build a resort, including a five-star hotel, eighteen-hole golf course, and other tourism oriented facilities, in the region.⁶

Early in Vietnam's socialist history, the United States and its investors refused to economically deal with Vietnam. Over the past twenty years, reforms to Vietnam's investment laws created an environment generally attractive to U.S. investors. Today, Vietnam's overall economy is seeing

[†] The author would like to thank Professor Veronica Taylor.

¹ See Vietnam-Korean JV Invests \$7.3MLN in Building in Ha Long City, VIETNAM NEWS BRIEFS, Jan. 28, 2005.

² Quang Ninh Receives 2.3MLN Visitors in 2002, Up 36% On-Year [sic], VIETNAM NEWS BRIEFS, Dec. 27, 2002.

³ Hong Kong Firm to Build \$36MLN Resort in Northern Vietnam, VIETNAM NEWS BRIEFS, Dec. 21, 2004.

⁴ Mostly from China, Europe, and ASEAN countries. *Id.*

⁵ See *id.*

⁶ *Id.*

great success with healthy U.S. investment. With implementation of recent reforms, including the new Common Investment Law, largely formulated with the intent to satisfy the United States' trade interests, U.S. investment in Vietnam's general investment market may increase further.

However, many U.S. investors believe that barriers remain which impede their participation in Vietnam's real estate market. Much of Vietnam is plagued by weak transportation infrastructure, creating difficulties for tourists attempting to travel from one attraction to the next.⁷ Property developers avoid investing in areas where strong infrastructure is not available to facilitate their projects.⁸ The financial⁹ and humanitarian issues that investors face from site clearance pose another barrier to U.S. investment. Lack of undeveloped land means that many development sites are already occupied and must undergo site clearance, which requires relocating and compensating present occupants prior to construction.¹⁰ Site clearance can be costly both from potential development delays and compensation to occupants. A third major obstacle is the lack of accountability in Vietnam's licensing scheme.¹¹ Vietnam's national licensing scheme, which supports foreign investment, is often undermined by its implementation at the local level.¹² Additionally, corruption pervades the government authorities' administration of Vietnam's real estate licenses.¹³

While these barriers all may impede U.S. investment in Vietnam's real estate, reforms can be made to create a more appealing environment. Vietnam should target the development of transportation infrastructure, create successful financing schemes, alleviate the difficulties associated with site clearance through increased government involvement, and resolve the lack of accountability in its real estate licensing system posed by disparate governmental goals and corruption.

Part II of this Comment will briefly outline Vietnam's general investment environment, past and present. Part III will analyze the barriers which U.S. investors believe remain to investment in Vietnam's real estate

⁷ See Vietnam Still Unattractive to French Tourists, VIETNAM NEWS BRIEFS, May 18, 2005.

⁸ See Thien Nhan, *Sound Infrastructure Vital to Developing Thu Thiem*, THE SAIGON TIMES DAILY, Apr. 6, 2000.

⁹ See VIETNAM DEVELOPMENT REPORT 2006, Business, Joint Donor Report to the Vietnam Consultative Group Meeting, Dec. 6-7, 2005, at 82.

¹⁰ *Id.*; see also *HCM City Short of Land for Investors*, VIETNAM NEWS BRIEFS, Mar. 3, 2004 (Ho Chi Minh City is likely to face a shortage of land for investors in the near future).

¹¹ See *infra* Part III.C.

¹² See Luke Aloysius McGrath, Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi, 18 FORDHAM INT'L L.J. 2095, 2098-99, 2108 (1995).

¹³ See *Vietnam: Reasons for Bullishness*, GLOBAL NEWS FUND, Dec. 19, 2005, at 9(1) v. 11.

market. Part IV presents suggestions for how Vietnam may effectively break down these barriers.

II. VIETNAM'S GENERAL INVESTMENT ENVIRONMENT SUPPORTS U.S. INVESTMENT

Vietnam's real estate investment environment is impacted, in no small way, by the overall investment environment in Vietnam. While Vietnam remains a socialist country, drastic liberalization of its market structure and investment laws have made Vietnam a more attractive environment for many U.S. investors.¹⁴ Vietnam initiated a drastic economic restructuring in 1987, largely in order to attract foreign investors.¹⁵ In recent years, Vietnam's efforts intensified leading to reforms, such as the new Common Investment Law, which make Vietnam's investment environment even more attractive to U.S. investors.¹⁶ Today, Vietnam's economy is flourishing¹⁷ with the support of foreign investment in many economic sectors.¹⁸

A. *Historically, Vietnam Provided an Investment Environment Unattractive to U.S. Investors*

Historically, U.S. investors avoided any type of investment in Vietnam. Following the United States' involvement in Vietnam from 1961-1975,¹⁹ its economic relations with Vietnam were strained. Vietnam reunified into a single country in 1976,²⁰ adopting socialism, a highly invasive economic scheme under which the State, not the market, controls the economy.²¹ With Vietnam's adoption of socialism, the United States imposed economic isolation on Vietnam²² as a means to pressure economic reform.²³ In order to preserve good relations with the United States, other

¹⁴ See David Dollar & Borje Ljunggren, *Vietnam*, in GOING GLOBAL: TRANSITION FROM PLAN TO MARKET IN THE WORLD ECONOMY 439, 448 (Padma Desai, ed., 1997).

¹⁵ See Magali Matarazzi, Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and Gas Industry under the 1995 Land Law, 19 NW. J. INT'L L. & BUS. 364, 367 (1999); Laura A. Malinasky, Rebuilding With Broken Tools: Build-Operate-Transfer Law in Vietnam, 14 BERKELEY J. INT'L L. 438, 438 (1996).

¹⁶ See New Laws Help Accelerate Vietnam's Accession to WTO, THAI PRESS REPORTS, Jan. 24, 2006.

¹⁷ See Vietnam Targets US\$6BLN in FDI in 2006, ASIA PULSE, Jan. 9, 2006.

¹⁸ See Vietnam Attracts US\$1.3BLN in FDI in Two Months, ASIA PULSE, Feb. 27, 2006.

¹⁹ United States State Department, Bureau of East Asian and Pacific Affairs, Background Note: Vietnam (2005), <http://www.state.gov/r/pa/ei/bgn/4130.htm> (last visited Apr. 12, 2006).

²⁰ Malinasky, *supra* note 15, at 440.

²¹ Geoffrey Murray, Vietnam: Dawn of A New Market 21 (1997).

²² Pamela L. Polevoy, Privatization In Vietnam: The Next Step in Vietnam's Economic Transition From a Nonmarket to Market Economy, 23 BROOK. J. INT'L L. 887, 902 (1998).

²³ McGrath, *supra* note 12, at 2108-09.

industrialized nations followed suit, leading to Vietnam's economic isolation from nearly the entire international community.²⁴

The United States' isolation tactic proved effective, forcing Vietnam's government to implement quasi-market economic reforms by the mid-1980s.²⁵ A particularly significant piece of reform was the Foreign Investment Law ("FIL"), passed in 1987.²⁶ The FIL sought to infuse foreign investment dollars²⁷ into Vietnam's desperately struggling domestic market.²⁸ The FIL proved remarkably successful,²⁹ with foreign investors taking advantage of the new investment opportunities in Vietnam's increasingly open market.³⁰ By the mid-1990s, Foreign Direct Investment ("FDI") accounted for more than one third of Vietnam's Gross Domestic Product ("GDP").³¹

Following the FIL, the United States moved closer toward establishing normal economic relations with Vietnam.³² Significant U.S. investment in Vietnam rapidly ensued.³³ The United States now constitutes a major source of foreign investment in Vietnam.³⁴ Many experts expect the interest of U.S. investors to continue to grow as the Bilateral Trade Agreement ("BTA") with the United States becomes fully implemented³⁵ and Vietnam accedes to the World Trade Organization ("WTO").³⁶

²⁴ With the exception of the communist nations of Eastern Europe. See Polevoy, *supra* note 22, at 902.

²⁵ See Norman Brown IV, *The Long Road to Reform: An Analysis of Foreign Investment Reform in Vietnam*, 25 B.C. INT'L & COMP. L. REV. 97, 97 (2002).

²⁶ Matarazzi, *supra* note 15, at 367; Malinasky, *supra* note 15, at 438. Further reforms to the FIL occurred in 2000 that allowed foreign investors to mortgage their land-use rights. Brown IV, *supra* note 25, at 100.

²⁷ Throughout this Comment, foreign investment refers to foreign direct investment ("FDI"). FDI is the reinvesting of foreign profits into a foreign nation's economy. FDI may aid developing economies by increasing capital available for investment. Brown IV, *supra* note 25, at 99.

²⁸ See *id.* at 97.

²⁹ From 1988-1993, Vietnam's GDP growth was higher than at any period since reunification. DOLLAR & LJUNGGREN, *supra* note 14, at 448; *contra Goodnight, Vietnam*, THE ECONOMIST, Jan. 8, 2000 (circa 2000, foreign investment had fallen below 1992 levels).

³⁰ See DOLLAR & LJUNGGREN, *supra* note 14, at 448.

³¹ *Goodnight, Vietnam*, *supra* note 29.

³² McGrath, *supra* note 12, at 2109.

³³ See Polevoy, *supra* note 22, at 910.

³⁴ See McGrath, *supra* note 12, at 2099. The United States was Vietnam's largest investor in 2004. *Report Shows US to be Largest Investor in Vietnam in 2004*, THAI PRESS REPORTS, Feb. 24, 2006.

³⁵ After the BTA was initially implemented, Vietnam increased exports to the United States by 450% over one year. *U.S. Bilateral Trade Agreement is a Stepping Stone Toward the WTO*, VIETNAM NEWS, Dec. 15, 2004, <http://vietnamnews.vnagency.com.vn/2004-12/14/Stories/17.htm> (interview with Steve Parker, director of the STAR-Viet Nam project).

³⁶ See *id.*; Thai Thanh, *Foreign Funds Target Ambitious*, SAIGON TIMES MAGAZINE, Jan. 20, 2006; *NZ Concludes WTO Negotiations With Vietnam*, NEW ZEALAND PRESS ASSOCIATION, Jan. 25, 2006.

Recent reforms to Vietnam's investment laws resulted from efforts to implement the BTA and gain accession into the WTO.³⁷ Since the signing of the BTA in 2000, Vietnam has modernized its legal and judicial systems, improved the transparency of its legislative and administrative procedures, and enhanced its dispute resolution process.³⁸ Successful implementation of the BTA is considered a stepping stone to Vietnam's accession to the WTO since much of the BTA is built upon WTO principles.³⁹

B. Vietnam's General Investment Environment Today Is Conducive to U.S. Investment

After years of economic reform, Vietnam's investment environment is now conducive to general investment from the United States. In 2005, Vietnam's economy was stronger than it had been in nearly a decade, and forecasts for 2006 indicate that Vietnam's economic strength will continue into the future. Bright projections are further supported by the passage of the Common Investment Law,⁴⁰ which successfully alleviates many former investment concerns of U.S. investors.⁴¹

1. Vietnam's General Investment Environment Appears Strong

Vietnam's economy is flourishing.⁴² In 2005, Vietnam's economy experienced healthy growth in its GDP,⁴³ with year-on-year growth of thirty percent.⁴⁴ FDI inflows⁴⁵ reached an eight-year high,⁴⁶ contributing fifteen percent of the GDP.⁴⁷ Vietnam's GDP growth is now the second fastest in Asia.⁴⁸

³⁷ U.S. Bilateral Trade Agreement is a Stepping Stone Toward the WTO, *supra* note 35.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ Law 59-2005-QH11 on Investment.

⁴¹ New Laws Help Accelerate Vietnam's Accession to WTO, *supra* note 16.

⁴² *Vietnam Economic Fruits From International Integration*, THAI PRESS REPORTS, Jan. 26, 2006 (FDI has become one of the most important capital sources for the country's development, helping speed up the restructuring of its economy towards industrialization and modernization).

⁴³ Amy Kazmin, *Rapid Vietnam Growth 'Likely to Continue'*, FIN. TIMES, Jan. 4, 2006, at 10.

⁴⁴ *Vietnam Targets US\$6BLN in FDI in 2006*, *supra* note 17.

⁴⁵ Most foreign investment in Vietnam has been in the manufacturing and tourism arenas from Taiwan, Singapore, Japan, and South Korea. *See Taiwan Implements 1,408 Projects in Vietnam*, ASIA PULSE, Jan. 9, 2006.

⁴⁶ Almost US\$4 billion of 2005 FDI went to fund 771 newly-licensed FDI projects. *Vietnam Targets US\$6BLN in FDI in 2006*, *supra* note 17.

⁴⁷ *FDI Firms Honoured at VN Forinvest*, VIETNAMNET, Nov. 3, 2005, <http://english.vietnamnet.vn/biz/2005/11/507536>.

⁴⁸ Behind China. *NZ Concludes WTO Negotiations With Vietnam*, *supra* note 36.

Forecasts for 2006 indicate that Vietnam's investment environment will remain strong. According to the Vietnamese Ministry of Planning and Investment, Vietnam will yield more than US\$6 billion in FDI in 2006,⁴⁹ a twenty-nine percent increase over 2005.⁵⁰ FDI investment⁵¹ was up twelve percent in January 2006 against the same period in 2005.⁵² The United States is one of the biggest investors, with most capital going into real estate.⁵³

Another reason to believe that Vietnam will continue to see strong FDI is that developed nations are trying to diversify their investment risks beyond China to countries such as Vietnam.⁵⁴ Many of Vietnam's new investors have moved their operations from China due to concerns about economic and political uncertainty in that country.⁵⁵ As a result, foreign investment in Vietnam has increased, with FDI dollars rising to the level of popular investment destinations such as India.⁵⁶

Many in the international community are encouraged by these positive economic forecasts. The World Bank Country Director for Vietnam, Klaus Rohland, has stated that in the next five years, Vietnam will shift from low-income to middle-income.⁵⁷ Vietnam hopes to shed its poor-country status by 2010.⁵⁸

2. *Vietnam's New Common Investment Law Encourages U.S. Investment*

Vietnam's new Common Investment Law, which will come into effect in July 2006,⁵⁹ marks a major step toward addressing key concerns of U.S. investors.⁶⁰ The Common Investment Law has been described as an "extremely important bill for the investment environment in Vietnam, which has a direct and immediate impact on all investors and all investment

⁴⁹ Vietnam Targets US\$6BLN in FDI in 2006, *supra* note 17.

⁵⁰ New capital expected to come mostly from northeastern Asian countries, especially Japan. *Foreign Investment to Rise with New Law*, ASEM CONNECT, Dec. 23, 2005, <http://www.asemconnectvietnam.gov.vn/detail.aspx?id=7230>.

⁵¹ South Korea, Japan and Taiwan were the biggest investors, especially in the real estate market. *Vietnam Attracts US\$444 MLN FDI In Jan.*, ASIA PULSE NEWS, Jan. 25, 2006.

⁵² *Id.*

⁵³ Vietnam Attracts US\$1.3BLN in FDI in Two Months, *supra* note 18.

⁵⁴ *Investors Look Beyond China*, HINDUSTAN TIMES, Jan. 27, 2006; *see also* George Wehrfritz, *Vietnam Revs Up*, NEWSWEEK INT'L, Nov. 28, 2005.

⁵⁵ Wehrfritz, *supra* note 54.

⁵⁶ *Id.*

⁵⁷ *Rethinking the Five-year-plan*, VIETNAMNET, Oct. 14, 2005, <http://english.vietnamnet.vn/news/2005/10/500094>.

⁵⁸ *Id.*

⁵⁹ New Laws Help Accelerate Vietnam's Accession to WTO, *supra* note 16.

⁶⁰ *Id.*

activities in the economy.”⁶¹ Under the new law, investors' rights are protected by an article prohibiting the government from forcing investors into certain market-unfriendly activities.⁶² This provision is a shift from the past, when government dictates trumped market demands.⁶³ In addition, Vietnam shifted its policy from one that outlawed anything not explicitly permitted, to one that permits investment in all sectors, industries, and trades not prohibited by law.⁶⁴

The Common Investment Law further benefits investors by streamlining administrative procedures.⁶⁵ By reorganizing administrative procedures to require only a single investment-business license,⁶⁶ the business license registration process is expected to be much quicker than in the past.⁶⁷ Investors can complete all the necessary paperwork online, confirmed by electronic mail, without going to a registration body.⁶⁸

Vietnam's drastic economic and investment reforms have generally made Vietnam a more attractive environment for U.S. investors.⁶⁹ Recent reform efforts, including the new Common Investment Law, alleviate many of the former concerns with investment in Vietnam held by potential U.S. investors.⁷⁰ The strong investment environment in Vietnam today further supports foreign investment in many economic sectors.

III. BARRIERS PERSIST WHICH IMPEDE U.S. INVESTMENT IN VIETNAM'S REAL ESTATE

Despite Vietnam's improvements to its general investment laws, barriers persist for U.S. investors seeking to invest in Vietnam's real estate market. Property developers interested in developing tourism complexes are particularly affected by weak transportation infrastructure, issues posed by

⁶¹ *Investment Law: Unfavourable for [sic] More Favourable?*, VIETNAMNET, Nov. 7, 2005, <http://english.vietnamnet.vn/biz/2005/11/508703>.

⁶² Tran Anh Duc & Jesse Lieberman, *Laws to Provide Equal Footing for Investors*, TALKING LAW, Dec. 28, 2005, <http://vietnamnews.vnagency.com.vn/showarticle.php?num=01TAW281205>.

⁶³ See generally *id.* (new law contains “an article prohibiting the Government from forcing investors into certain market unfriendly activities”).

⁶⁴ *Id.*

⁶⁵ See Vietnam's Investment Ministry to Give Depts New Licensing Right, ASIA PULSE, Jan. 20, 2006.

⁶⁶ *All Comments on Investment Bill to Be Examined Carefully*, VIETNAMNET, Nov. 6, 2005, <http://english.vietnamnet.vn/biz/2005/11/508413>.

⁶⁷ Registration can be completed in seven days. *Investment Law: Unfavourable [or] More Favourable?*, *supra* note 61.

⁶⁸ See *id.*

⁶⁹ See generally McGrath, *supra* note 12 (discussing Vietnamese legal and institutional reforms). See also generally Polevoy, *supra* note 22 (discussing Vietnam's transition to a market economy).

⁷⁰ See New Laws Help Accelerate Vietnam's Accession to WTO, *supra* note 16.

site clearance, and a lack of national accountability in the real estate licensing system.

Many of the problems facing potential real estate investors are evidenced by Vietnam's Lam Dong province. Since 2003, Lam Dong has attracted FDI for tourism services.⁷¹ However, the number of real estate investment projects in the region does not match its potential for development.⁷² Under-investment is due to the barriers facing real estate investors, including inadequate funding for infrastructure development, extra financial costs from paying local citizens for site clearance, and an overly cumbersome administrative process.⁷³ Such burdens have dissuaded some potential investors from investing in the province's real estate.⁷⁴

A. *Vietnam's Weak Transportation Infrastructure Dissuades Many U.S. Investors from Developing Vietnam's Real Estate*

Weak transportation infrastructure constitutes a significant hurdle for real estate investors in Vietnam. A recent survey found that about twenty percent of investment firms view infrastructure provisions as a serious obstacle to the growth and operation of their business.⁷⁵ Of particular concern are transportation infrastructures.⁷⁶ Many potential investors have dismissed certain projects due to the high site-preparation costs associated with the poor state of the roads and bridges.⁷⁷

The neighboring provinces of Hue and Danang demonstrate how infrastructure can affect investment in the tourism industry. Both the coastal provinces of Hue and Danang possess significant natural assets to attract tourism.⁷⁸ However, the two differ greatly in the availability of land with suitable infrastructure.⁷⁹ Danang provides much better access to roads.⁸⁰ In 2003, Danang spent about sixty percent more per capita than Hue on large

⁷¹ See Vietnam Lam Dong Strives to Improve Investment Environment, THAI PRESS REPORTS, Jan. 9, 2006.

⁷² *Id.*

⁷³ See *id.*

⁷⁴ *Id.*

⁷⁵ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 98.

⁷⁶ See *id.* at 99; Mai Anh, *Low Labour Costs Lure Korean Firms*, VIETNAM INV. REV., Jan. 2, 2006, at 7(1) (Korean investors face difficulties with the weaknesses of Vietnam's infrastructure, including road systems and electricity supply).

⁷⁷ Thien Nhan, *supra* note 8.

⁷⁸ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 140.

⁷⁹ See *id.* at 141.

⁸⁰ *Id.* at 140.

investment projects.⁸¹ As a result, Danang has attracted more FDI⁸² and “is one of the most popular tourist destinations in Central Vietnam.”⁸³

Strong transportation infrastructure is particularly important to potential investors in tourism-friendly real estate. Vietnam's most attractive tourism destinations are spread widely across the country, making accessible transportation to and from these destinations a key component of successful tourism ventures in Vietnam.⁸⁴ However, Vietnam's transportation infrastructure has been particularly slow to improve.⁸⁵ For example, after twenty years of reform, Vietnam has yet to build a national expressway consistent with international standards.⁸⁶

Vietnam's national government has made some improvements to its transportation infrastructure.⁸⁷ For instance, Vietnam's Prime Minister has approved a project to build an inner-city railway route in Ho Chi Minh City.⁸⁸ The Prime Minister also approved a project to build an expressway⁸⁹ in Quang Ninh to enhance the province's tourism industry.⁹⁰

Vietnam is also working to improve its aviation sector. It hopes to become the fourth largest aviation market in the region by 2025.⁹¹ Improvements chiefly include upgrades to airport facilities and ground services.⁹² The aviation sector has increased its passenger transport capacity from little more than 1 million in 1990 to 13 million in 2005.⁹³

Problems in Vietnam's infrastructure remain, however, and the resources to rectify them are scarce. Vietnam has attempted to locate resources for infrastructure projects in a variety of ways, including issuance of infrastructure bonds, partnerships with the private sector, and dependence on local governments.⁹⁴ Although some of these attempts have produced success, these methods are not as effective as they could be. The

⁸¹ *Id.* at 141.

⁸² Accumulated investment by foreign companies is three times higher in Danang than in Hue. *Id.* at 141.

⁸³ Tien Dat, *Discounts to Attract Customers*, SAIGON TIMES MAGAZINE, Apr. 20, 2006.

⁸⁴ See Vietnam Still Unattractive to French Tourists, *supra* note 7.

⁸⁵ Thai Thanh, *Foreign Funds Target Ambitious*, SAIGON TIMES MAGAZINE, Jan. 20, 2006.

⁸⁶ *Id.*

⁸⁷ See *FDI Flows Into Service Sector*, VIETNAMNET, Nov. 7, 2005, <http://english.vietnamnet.vn/biz/2005/11/508833>; VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 98.

⁸⁸ Vietnam PM Approves US\$700 MLN Ho Chi Minh City Railway PJT, ASIA PULSE, Jan. 19, 2006.

⁸⁹ Mong Duong-Mong Cai Highway. *PM Gives Green Light To Mong Duong-Mong Cai Expressway*, VIETNAM NEWS BRIEFS, Apr. 27, 2005.

⁹⁰ *Id.*

⁹¹ *Asia Aviation*, ASIA PULSE, Jan. 6, 2006.

⁹² *Id.*

⁹³ Vietnam's Aviation Sector to Make Intensive Investment in Infrastructure, THAI PRESS REPORTS, Jan. 19, 2006.

⁹⁴ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 101.

effectiveness of infrastructure bonds is undermined by competition and implementation difficulties. Private participation has been limited by the perceived lack of profitability of infrastructure projects. Generally, the largest responsibility for rural transport infrastructure lies at the local level,⁹⁵ and efforts to encourage local governments to fill in the gaps are impeded by the lack of national government oversight.

Vietnam's government has issued infrastructure bonds for specific projects; however, it has found it difficult to raise capital this way.⁹⁶ Several reasons for this difficulty have been suggested. The first reason relates to the relatively low interest rate of the bonds compared to other investments.⁹⁷ The second is that local governments, such as those in Ho Chi Minh City and Hanoi, are creating competition by also offering infrastructure bonds.⁹⁸ Additionally, the federal bonds already face mobilization and disbursement problems; only three fourths of planned disbursements were expected to occur by the end of 2005.⁹⁹ Disbursement delays are blamed on complex investment procedures, site clearance, and poor supervision.¹⁰⁰

Another way that Vietnam should generate funds for infrastructure improvement is through privatization.¹⁰¹ Currently, private participation in the transportation sector is quite limited. With few exceptions¹⁰² all toll roads currently operational in Vietnam are owned and managed by the national and local governments.¹⁰³ Complex land acquisition procedures and difficulty in recovering costs have deterred private investors from developing new toll roads.¹⁰⁴

The national government's difficulty in generating funds for infrastructure has led it to encourage local provinces to take greater responsibility for financing infrastructure.¹⁰⁵ In response, thirteen provinces have already established Local Development Investment Funds

⁹⁵ See THE WORLD BANK, Project Appraisal Document on a Proposed Credit in the Amount of SDR 74.1 Million to the Socialist Republic of Vietnam for a Third Rural Transport Project, Jan. 25, 2006, at 19.

⁹⁶ Taking Stock: An Update on Vietnam's Economic Developments and Reforms by the World Bank in Vietnam, Consultative Group Meeting for Vietnam, Dec. 6-7, 2005, at 10 [hereinafter Taking Stock].

⁹⁷ *Id.*

⁹⁸ *Id.* at 11.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See generally VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 103-04 (transportation, ports and railways earn enough revenue to cover their operating expenses).

¹⁰² In Quang Linh, a private sector company built segments of road in exchange for LUCs along the road corridor, a model which has been replicated in other locations. *Id.* at 103.

¹⁰³ See *id.*

¹⁰⁴ *Id.*

¹⁰⁵ Taking Stock, *supra* note 96, at 31.

("LDIFs").¹⁰⁶ LDIFs are intended to support private participation in infrastructure development.¹⁰⁷ Support takes various forms, including direct financing of projects,¹⁰⁸ but thus far, lending constitutes the bulk of LDIF activities.¹⁰⁹

Some provinces have already succeeded in raising funds for infrastructure development projects. In 2002, the Quang Ninh province, one of the most popular tourist destinations in northern Vietnam,¹¹⁰ spent US\$54.96 million to upgrade infrastructure in its tourism sites.¹¹¹ In Thu Thiem, additional infrastructure is scheduled to be built in conjunction with the development of a new urban center.¹¹² These developments are estimated to require at least US\$600 million over the first ten years¹¹³ and will include a subway line and station, bus and waterbus services, and five bridges to link the region's districts.¹¹⁴

The inadequacy of national regulations pertaining to the implementation of LDIFs at the local level has stunted private participation in infrastructure development. In theory, LDIFs allow local governments to enter into infrastructure contracts with the private sector.¹¹⁵ However, there are no national regulations that govern the operation and functions of LDIFs,¹¹⁶ leaving provincial governments with significant discretion over LDIF operations.¹¹⁷ This allows local governments to disregard federal efforts to encourage private participation. As a result, direct participation of the private sector in infrastructure development remains minimal.¹¹⁸

B. *U.S. Real Estate Investors Face Excessive Financial Risks from Site Clearance*

U.S. real estate investors claim that they are discouraged from investing in Vietnam's tourism-friendly real estate due to the excessive

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 102.

¹⁰⁹ *Id.*

¹¹⁰ Hong Kong Firm to Build \$36MLN Resort in Northern Vietnam, *supra* note 3.

¹¹¹ Quang Ninh Receives 2.3MLN Visitors in 2002, Up 36% On-Year, *supra* note 2.

¹¹² Vietnam City's new Urban Center May Cost 10 Billion USD, THAI PRESS REPORTS, Mar. 8, 2006.

¹¹³ Nguyen Hong, *City to Prove Thu Thiem Doubters Wrong*, VIETNAM INV. REV., June 20, 2005, at 19.

¹¹⁴ US Firm Designs Urban Area for Ho Chi Minh City, ASIA PULSE, Nov. 5, 2004.

¹¹⁵ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 103.

¹¹⁶ *Id.* at 102.

¹¹⁷ *See id.* at 103 ("LDIFs offer an operational and legal structure for provincial governments to focus on infrastructure . . . [b]ut their governance and transparency need to be strengthened").

¹¹⁸ *Id.* at 102.

financial risks they face from site clearance.¹¹⁹ Unoccupied land available for development is scarce, particularly in the most populous areas, such as Ho Chi Minh City.¹²⁰ Thus, new developments often require site clearance and compensation for the current occupants.¹²¹ Site clearance often results in costly delays to development.¹²² As a result, businesses sometimes pay substantial unofficial fees to decrease the length, and thus the cost, of delays.¹²³ Prior to reforms, many investors were unable to implement projects due to the difficulties with site clearance.¹²⁴ According to a survey of foreign investors in the services sector, access to land is the most important constraint to investment in Vietnam, with twenty-eight percent reporting it to be a severe or major constraint.¹²⁵

Lack of access to land is of particular concern to real estate investors in the tourism industry. According to many commentators, Vietnam is in need of more luxury accommodations.¹²⁶ The demand for hotel rooms in large cities, such as Ho Chi Minh City and Hanoi, has been very high.¹²⁷ In Hanoi several luxury hotels on occasion have had to turn away fifty percent of potential reservations due to lack of available rooms.¹²⁸ However, in the larger cities the supply of available land to develop new hotels is too small to meet demand.¹²⁹ Therefore, investors must clear sites in the city or build in the countryside.¹³⁰

Reforms to Vietnam's site clearance regulations have somewhat eased the burden that investors face. Since 2004, regulations require provincial governments to provide housing in resettlement zones for households whose land has been recovered by the state.¹³¹ Moreover, foreign investors are no

¹¹⁹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 45, 55.

¹²⁰ See *HCM City Short of Land For Investors*, *supra* note 10; see VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9.

¹²¹ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 81-82.

¹²² USAID, *Land Law Reform in Vietnam 2004: A Business Perspective* 9 (2004).

¹²³ *Id.*

¹²⁴ PHILLIPS FOX, VIETNAM LEGAL UPDATE, 12 (2001), available at http://www.vietnamlaws.com/vlu/nov_2001.pdf.

¹²⁵ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 45, 55.

¹²⁶ See *Tourism: Vietnam Could Double Tourism Targets*, VIETNAM NEW BRIEFS, Apr. 4, 2005; *Vietnam Still Unattractive to French Tourists*, *supra* note 7.

¹²⁷ *Vietnam Tourism*, *supra* note 120.

¹²⁸ *Id.*

¹²⁹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9; see also *HCM City Short of Land for Investors*, *supra* note 10.

¹³⁰ *Vietnam Tourism: Second to None*, VIETNAM BUSINESS FORUM, Feb. 20, 2006 http://vibforum.vcci.vn/news_detail.asp?news_id=4326.

¹³¹ Few zones have actually been created. VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 83.

longer required to pay for site clearance.¹³² Now, investors only pay for their lease on the land and the provincial government covers all resettlement and other expenses associated with site clearance.¹³³ If an investor incurs such expenses, it can deduct them from the cost of the land-use fees applied for the lease.¹³⁴

Despite these reforms, site clearance for developments, such as hotels, often leads to considerable costs and delays for investors.¹³⁵ For example, the cost of a major road construction project in Ho Chi Minh City rose from VND312.3 billion to VND831.6 billion when ninety houses needed to be cleared to make room for the project.¹³⁶ Not only did this delay affect the project itself, but it also affected another project under construction in the same area.¹³⁷ In another instance, to build the East-West corridor, Ho Chi Minh City had to move 7000 households and 360 offices.¹³⁸ It took eight years of preparation and site clearance before Ho Chi Minh City could begin construction.¹³⁹ Sometimes, by the time construction actually commences on a project, investors who previously signed land-leasing contracts have already waited years beyond what they had originally expected in order to acquire the land.¹⁴⁰

Disagreements with affected occupants over site clearance have resulted in considerable delays as well.¹⁴¹ For example, in 2002, a company in the Ha Tay province submitted a request to lease 6442 square meters of pond land behind the company's head office.¹⁴² The appropriate local authorities approved the company's application in 2004, after two years of

¹³² *Id.* (Previously, foreign investors who wanted to lease land had to compensate affected households, but many found this old regulation to be unreasonable); *Land Clearance Within Limits*, SAIGON TIMES MAGAZINE, Dec. 18, 2004.

¹³³ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 83; *Land Clearance Within Limits*, *supra* note 132.

¹³⁴ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 83; *Land Clearance Within Limits*, *supra* note 132.

¹³⁵ See PETER DONOVAN & ADAM MCCARTY, UNITED NATIONS DEVELOPMENT PROJECT, VIETNAM'S INTEGRATION WITH ASEAN: THE IMPACT ON FOREIGN DIRECT INVESTMENT (1997), at 14, available at <http://www.undp.org.vn/projects/vie95015/inter/intrep3.rtf>; VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 82 (site clearance has often lasted years); *Land Clearance Within Limits*, *supra* note 132.

¹³⁶ Song Nguyen, *Road Project Moves at Slow Pace*, THE SAIGON TIMES DAILY, May 4, 2004.

¹³⁷ Lack of road access caused delays. *Id.*

¹³⁸ Construction on East-West Corridor Begins Late Jan, VIETNAM NEWS BRIEFS, Jan. 31, 2005.

¹³⁹ *Id.*

¹⁴⁰ *HCM City Short of Land for Investors*, *supra* note 10.

¹⁴¹ See, e.g., VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 80 (communities of Chieng Dong have resisted site clearance vigorously). Disagreements over site clearance have also incited violence. In 2003, over a dozen Vietnamese attacked a local site clearance office due to a dispute over the government taking their land. U.S. Department of State, Vietnam: Country Reports on Human Rights Practices -2003 (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27794.htm>.

¹⁴² VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 82.

consultation and bargaining with the affected households.¹⁴³ The company agreed to pay compensation to the homeowners and contribute money in support of infrastructure building.¹⁴⁴ However, shortly after approval, local residents prevented the company from completing the agreed-upon project because they were afraid that the new factory would pollute their stream.¹⁴⁵ The dispute continued despite several new rounds of negotiations and assurances by the company that its factory would have a waste filter system compatible with international standards.¹⁴⁶

The resolution of site clearance issues is complicated by humanitarian issues which often arise regarding the relocation of current land occupants. Under Vietnam's socialist system, the national government holds the land in trust for its citizens.¹⁴⁷ While taking land for infrastructure projects can be considered "in the public interest" under Vietnamese law, lack of accountability in the land revocation and compensation systems leads to little guarantee that the public will benefit from such projects.¹⁴⁸ Some projects which result from site clearance may be of some benefit to current occupants.¹⁴⁹ However, many will also cause a severe detriment to citizens.¹⁵⁰ Citizens and government entities, including the National Assembly, have complained that relocated citizens are not compensated fairly or in a timely manner.¹⁵¹

The humanitarian concerns posed by site clearance are not necessarily being addressed by Vietnamese officials.¹⁵² In 2003, four people were sentenced "to jail terms ranging from 24 to 42 months after they disseminated . . . letters denouncing local land clearance policies."¹⁵³ Later that same year four people were sentenced "to prison terms of 30 to 42

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 82-83.

¹⁴⁷ See USAID, *supra* note 122, at 11.

¹⁴⁸ See HUMAN RIGHTS WATCH, *Repression of Montagnards: Conflicts Over Land and Religion in Vietnam's Central Highlands* (2002), available at <http://hrw.org/reports/2002/vietnam/viet0402-07.htm>.

¹⁴⁹ THE WORLD BANK, *supra* note 95, at 19 ("Improvements in rural transport have significant impacts on poverty, social participation, school attendance and health services").

¹⁵⁰ See, e.g., U.S. Department of State, *supra* note 141 (discussing reports that ethnic minority groups were forced to leave their homes without being provided with alternative places to live).

¹⁵¹ *Id.*

¹⁵² Vietnam's drastic economic changes to gain WTO accession are already thought by many to threaten the financial status of Vietnamese citizens. From 1993 through 2002, Vietnam successfully reduced the number of its people in poverty from 58% to half that number. Some critics fear that Vietnam's reforms to gain WTO accession may undercut its highly effective poverty reduction strategy. Aaron Glantz & Ngoc Nguyen, *U.S. Keeps Waiting at WTO Membership Door*, INTER PRESS SERVICE, Oct. 25, 2005.

¹⁵³ U.S. Department of State, *supra* note 141.

months for inciting fellow farmers to voice complaints over provincial land use policies.”¹⁵⁴

C. *The Lack of Accountability in Vietnam's Licensing System Undermines U.S. Investment in Vietnam's Real Estate*

A large barrier to investment in Vietnam's real estate sector is the lack of accountability in Vietnam's real estate licensing scheme. Vietnam's national licensing scheme is often undermined by its implementation at the local level.¹⁵⁵ Corruption pervades the government authorities' administration of Vietnam's real estate licenses.¹⁵⁶ The resultant delays in the licensing process prove costly to real estate investors.¹⁵⁷

In Vietnam, socialist principles dictate that private individuals have no right to own land.¹⁵⁸ Instead, the Vietnamese government acts as a sort of fiduciary to “the people”¹⁵⁹ by exercising its discretion to allocate land-use rights (“LUR”) to individuals and entities.¹⁶⁰ LURs grant individuals and entities the right to use, transfer, or lease a parcel of land for a specific period of time.¹⁶¹

The efficacy of national licensing laws is often undermined by interpretations at the local (provincial) level that are inconsistent with the national agenda.¹⁶² Vietnam's local authorities exercise “inordinate power.”¹⁶³ LURs are administered at both the national and local level,¹⁶⁴ with local governments playing a central role.¹⁶⁵ Ultimate control over LUR

¹⁵⁴ *Id.*

¹⁵⁵ McGrath, *supra* note 12, at 2098-99.

¹⁵⁶ *Vietnam: Reasons for Bullishness*, *supra* note 13.

¹⁵⁷ Nguyen Hong, *City Seeks Funds to Build Up 'Frozen' Real Estate Market*, VIETNAM INVESTMENT REVIEW, Sept. 5, 2005.

¹⁵⁸ Under the 1960 Constitution of the Democratic Republic of Vietnam, the State allowed private ownership of land. However, in 1980, under the revised Constitution, private ownership was eliminated and land became the property of the whole people of Vietnam, under control of the State. USAID, *supra* note 122, at 6.

¹⁵⁹ See USAID, *supra* note 122, at 11.

¹⁶⁰ Foreign investors were first entitled to LURs with the Land Law of 1987. *Id.* at 6. Under the revisions to the Land Law of 2003 and 2004, land use rights are generally the same “semi-ownership rights” as under the 1993 law. *Id.* at 17. Companies were entitled to use LURs as a capital contribution to a business project, mortgage, or guarantee to other legal entities as security for loans and liabilities of business organizations. *Id.* Companies may trade, grant, sell, or lease LURs to a third party. *Id.*

¹⁶¹ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 72; USAID, *supra* note 122, at 6.

¹⁶² McGrath, *supra* note 12, at 2098-99.

¹⁶³ *Id.* at 2120.

¹⁶⁴ John Gillespie, *Land Law Systems? Urban Vietnam as a Case Study*, 7 PAC. RIM L. & POL'Y J. 555, 570 (1998).

¹⁶⁵ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 75, at 142.

legislation and policy is retained at the national level;¹⁶⁶ however, local authorities¹⁶⁷ possess broad discretion to allot land use rights.¹⁶⁸ Acting independently from the national government,¹⁶⁹ local authorities have been known to interpret national laws to further local, as opposed to national, goals.¹⁷⁰ The result is proper real estate titling differing from one province to the next.¹⁷¹

The attitude of public officials toward businesses, and how they choose to exercise their discretion as a result, makes an enormous difference in the provincial investment climate.¹⁷² The ability of investors to get access to land and protection from corruption is largely determined by the attitudes of local authorities.¹⁷³ Local licenses can be more or less burdensome, depending on the inclination of local authorities toward pursuit of the national government's goals.¹⁷⁴

Local implementation of laws can lead to delays that result in significantly increased costs to investors.¹⁷⁵ A long waiting period for businesses to get their LURs diminishes the desire of U.S. investors to invest in Vietnam. This is true largely because it increases the transaction costs investors suffer while waiting to commence business operations.¹⁷⁶ In a recent survey, seventy-four percent of all firms agreed that if land was easier to obtain they would expand business operations.¹⁷⁷ The median time for

¹⁶⁶ Gillespie, *supra* note 164, at 570. National level authorities are the Government and the Ministry of Natural Resources and Environment (MONRE). USAID, *supra* note 122, at 8.

¹⁶⁷ The two local level authorities in charge are the People's Committee, with general authority, and the Department of Natural Resources and Environment (DONRE), with specialized authority. USAID, *supra* note 123, at 8.

¹⁶⁸ See Gillespie, *supra* note 164, at 570; USAID, *supra* note 123, at 8.

¹⁶⁹ McGrath, *supra* note 12, at 2102.

¹⁷⁰ *Id.* at 2117. For example, the Ministry of Planning and Investment (MPI) is responsible for producing a national five-year socio-economic Development Plan; however, this plan is not designed to reproduce the detail of the individual ministry and province plans. Taking Stock, *supra* note 96, at 30. As a result, there is considerable leeway given by the decentralization process to local authorities in the implementation and interpretation of supposedly common national policies. VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 141.

¹⁷¹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 73.

¹⁷² See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 139. See, e.g., *id.* at 139 (considerable variation in extent to which land has been titled (or not) from one province to the next); *Ho Chi Minh City to Boost Tourism Promotion Activities in 2006*, available at www.vietnamtourism.com/e_pages/news/index.asp?loai=2&uid=2696 (Ho Chi Minh City has tourism promotion policies such as exempting foreign visitors from tourist visa requirements for 15-day stays and opening low cost tours); *contra* Vu Huyen, *Tourism Improving Lives; Helping to Reduce Poverty*, VIETNAM INVESTMENT REVIEW, Dec. 19, 2005 (Dien Bien, where local police still charge each foreigner \$10 for a visit to the province).

¹⁷³ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 139.

¹⁷⁴ *Id.* at 142.

¹⁷⁵ See Vietnam's Real Estate Sector in Crisis, THAI PRESS REPORTS, Dec. 21, 2005.

¹⁷⁶ USAID, *supra* note 122, at 15.

¹⁷⁷ *Id.*

obtaining an LUR was sixty days, significantly higher than the twenty-three days outlined in the law.¹⁷⁸ However, in some provinces it can take even longer. In the Ha Tay Province, it has taken as long as ten years to obtain an LUR.¹⁷⁹

A 2003-04 survey on economic governance in seventeen provinces in Vietnam found that of 488 firms surveyed concerning access to land, only forty-four percent received their official LUR certificate;¹⁸⁰ only 11.5 percent had completed the necessary formalities and were in the process of receiving their certificates.¹⁸¹ All others were functioning without formal title to their land by either sub-letting land from state owned enterprises, renting from other private firms, or using informal title not sanctioned by the provincial government.¹⁸²

Due to the discretionary nature of LUR allotment, corruption continues to be a problem in Vietnam's government.¹⁸³ According to a survey by the ruling Communist Party, more than thirty-two percent of all government officials would accept a bribe if offered one.¹⁸⁴ The most common reason for corruption is the desire to 'speed up' bureaucratic delays.¹⁸⁵ Corruption has a particularly negative effect on real estate investors. Among Vietnam's most corrupt authorities is the land administration agency.¹⁸⁶ Thus, land transfer is particularly vulnerable to corruption.¹⁸⁷

Vietnam's political structure allows local officials, or even local agencies, to ignore their designated responsibilities in implementing laws.¹⁸⁸ In addition, local tasks and assignment of responsibility and authority are inaccurately defined, presenting an opportunity for corruption.¹⁸⁹ For example, officials have been known to issue decisions allocating lots to themselves or to their relatives.¹⁹⁰

Corruption is more prevalent because firms generally avoid Vietnamese courts. The decisions of Vietnamese courts are "considered

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Vietnam: Reasons for Bullishness*, *supra* note 13.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 137.

¹⁸⁸ *See* USAID, *supra* note 122, at 9.

¹⁸⁹ *Id.* at 14.

¹⁹⁰ *Id.*

arbitrary and enforcement mechanisms ineffective.¹⁹¹ Instead of the courts, foreign companies use the privileged access to Vietnam's government afforded them through their business associations and embassies to solve disputes.¹⁹² Such access increases the opportunities for Vietnamese officials to exploit the system by working on their own terms outside of the law.

Vietnam's national government must promulgate laws that ensure that "those breaking rules have less incentive to pay bribes."¹⁹³ One example of such a law is the Civil Code amended in 2005, which requires all property owners to register non-liquid assets.¹⁹⁴ Prior to the new civil law, Vietnam lacked property ownership laws, allowing unofficial transactions to control the real estate market.¹⁹⁵ This provided incentives for those desiring real estate licenses to pay bribes. The recently amended Civil Code attempts to counteract that trend.¹⁹⁶

Vietnam's government has "vowed to reduce corruption."¹⁹⁷ An important first step was the law on corruption, approved late in 2005.¹⁹⁸ This new law strengthens accountability by holding senior officials "responsible for the prevention and control of corruption" occurring on their watch.¹⁹⁹ Civil servants and their immediate families may be monitored under the law, as well.²⁰⁰ The law specifically targets increased public disclosure and transparency in areas relevant to real estate investment, such as "public procurement[,] construction activity, . . . [and] management and use of land."²⁰¹

The lack of accountability in Vietnam's licensing system has had a negative effect on business. Title to land increases investment and access to credit.²⁰² Real estate investors who do not have a formal license to their land are highly limited in their ability to access capital because they are unable to use their present land as collateral to other business operations.²⁰³ This issue

¹⁹¹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138.

¹⁹² *Id.* at 138.

¹⁹³ *Id.* at 137.

¹⁹⁴ Tran Ngoc, *Civil Code Clears Up Asset Confusion*, VIETNAM INV. REV., July 18, 2005.

¹⁹⁵ *Id.*

¹⁹⁶ Deputy Justice Minister Dinh Tung describes the amended code as "a legal mechanism that aims to create a healthier and more transparent real estate market that can secure owners' rights when properties are traded." *See id.*

¹⁹⁷ *See Vietnam: Reasons for Bullishness*, *supra* note 13; VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 137.

¹⁹⁸ Anti-Corruption Law 55-2005-QH11, Nov. 29, 2005.

¹⁹⁹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138; Taking Stock, *supra* note 96, at 32.

²⁰⁰ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138.

²⁰¹ Taking Stock, *supra* note 96, at 32.

²⁰² The World Bank, World Development Report 2006: Equity and Development 165 (2005).

²⁰³ Nguyen Hong, *supra* note 157.

is exacerbated by local government failure to grant LUR “certificates unless site clearance and infrastructure are complete.”²⁰⁴

U.S. investors believe that barriers persist which impede their investment in Vietnam’s real estate.²⁰⁵ Vietnam’s weak transportation infrastructure, issues with site clearance, and lack of national accountability in the real estate licensing system may undermine U.S. investment potential in the real estate sector.

IV. VIETNAM CAN ALTER SOME POLICIES TO FACILITATE U.S. INVESTMENT

To facilitate U.S. investment in Vietnam’s real estate, Vietnam should implement reforms to alleviate barriers identified by U.S. investors. Suggested reforms include strengthening the transportation infrastructure, decreasing financial risks and humanitarian issues stemming from site clearance, and increasing accountability in its real estate licensing system. Such reforms would address many of the concerns held by U.S. investors and may encourage further investment in Vietnam’s real estate sector.

A. *Vietnam Should Reform Its Laws Affecting Implementation and Funding of Transportation Infrastructure Projects*

Vietnam’s infrastructure, particularly in regions ripe for tourism development, should be strengthened to smooth the progress of U.S. investment in Vietnam’s real estate. With physical barriers to travel decreased, more tourists may venture into and around Vietnam and enjoy tourism-friendly real estate.²⁰⁶ To facilitate such development, Vietnam should strategically target infrastructure projects and reform its laws affecting financing sources, including infrastructure bonds, privatization, and local investment.

Infrastructure spending would most effectively enhance real estate investment if used in regions strategically targeted for tourism development.²⁰⁷ Successful real estate investment is closely tied to successful infrastructure development.²⁰⁸ Strategically targeting infrastructure improvement may further the success of infrastructure

²⁰⁴ *Id.*

²⁰⁵ While most investors are able to invest in Vietnam’s market without concern for real estate issues, the very nature of a property developer’s investment is in real estate.

²⁰⁶ See *Vietnam Still Unattractive to French Tourists*, *supra* note 7.

²⁰⁷ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 139 (appropriate budget allocations could be provided for provinces with stronger needs); *id.* at 149 (poorer provinces need more resources to make investments in infrastructure and social services in order to attract foreign real estate investors).

²⁰⁸ *Infra* Part III.A.

projects. Thus, real estate investment would benefit from strategically targeting infrastructure development.

To determine which regions should be strategically targeted for tourism development, Vietnam should carry out feasibility studies. Feasibility studies should address several issues which are key to successful development. One such issue is whether tourism is likely to flourish in a particular region if the infrastructure is strengthened. Sub-issues might include how hospitable local residents might be towards tourists, the availability of workers who are properly trained in hospitality, and the region's proximity to other points of interest. Another issue is whether development in the particular region would be the most effective use of investors' capital. Such a determination should be based on factors such as whether investors are likely to recoup their expenses by developing in the region, and whether investors could, or perceive that they could, accomplish the same for a greater profit elsewhere.

By strategically targeting infrastructure projects, Vietnam may be able to substantially improve transportation in regions targeted for tourism development. Strategically targeting improvements serves to concentrate the scarce financial resources available for infrastructure development into specific regions either identified as or targeted to become ripe for tourism development. Thus concentrating financial resources reduces the risk of spreading scarce infrastructure financing too thinly to allow substantial improvements in any one region.

With concentrated infrastructure improvements, targeted regions may be more attractive to real estate investors. With Vietnam pre-targeting regions for development, investors may be less likely to face the initial challenges or costs associated with implementing infrastructure development on their own. Infrastructure development often must precede real estate development. With strategically implemented infrastructure development, at least some regions will have strong infrastructure. By concentrating infrastructure development in targeted regions investors are likely to face less infrastructure development responsibility than if development were more widely and thinly spread.

In addition to merely targeting regions for tourism development, Vietnam's national government also should facilitate infrastructure development by strategically implementing policies aimed at promoting development. By implementing such policies, Vietnam may increase development in certain regions. Such policies might include tax incentives, reduction in the cost of LURs, and subsidies. As an example, Vietnam's Prime Minister recently designated the resort island Phu Quoc as a "special

investment area.”²⁰⁹ Phu Quoc is considered to have great potential in tourism,²¹⁰ and Vietnam instigated the island’s special designation in “an effort to spark development.”²¹¹ Investors in sectors including real estate,²¹² infrastructure, and tourist services will benefit from preferential investment and land use policies.²¹³

Reforming financing sources for infrastructure development may also improve infrastructure development, and consequently may improve the chances for U.S. real estate investment. The success of infrastructure projects financed through bonds should be enhanced by improving project evaluations.²¹⁴ Attracting private participation in infrastructure development is another way that Vietnam may increase infrastructure financing. Reducing corruption in locally implemented projects is also important.

Improving bond project evaluations should enhance the success of infrastructure projects financed through bonds.²¹⁵ Improved evaluations may allow common obstacles associated with infrastructure development, such as clearing infrastructure sites²¹⁶ and low traffic flow, to be identified and avoided. It may also assist in identifying alternate locations for infrastructure projects where such obstacles are less onerous.

Vietnam should also improve infrastructure financing through attracting private participation. Private participation can be drawn to the area through “promoting competition” within the private sector.²¹⁷ This may be achieved by implementing a transparent and honest bidding scheme. In addition to promoting competition, Vietnam should improve investors’ confidence in the ability to recoup their expenses on infrastructure investments.²¹⁸ One way to increase investor confidence in the ability to recoup expenditures may be to conduct project appraisals assessing the traffic volume, and thus the likely profit, from transportation investment projects. This is similar to the feasibility study.

²⁰⁹ Vietnam Statute Offers Incentives for Investors in Phu Quoc Island, THAI PRESS REPORTS, Feb. 22, 2006.

²¹⁰ Infrastructure UK, German, US Constructors Want Int’l Airport in Phu Quoc Island, VIETNAM NEWS BRIEFS, Mar. 20, 2006.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Vietnamese Government Encourages Investment in Tourist Potential Island, THAI PRESS REPORTS, Feb. 22, 2006.

²¹⁴ Taking Stock, *supra* note 96, at 10.

²¹⁵ *Id.*

²¹⁶ *See id.* at 11.

²¹⁷ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 98.

²¹⁸ Malinasky, *supra* note 15, at 447-48.

Reducing the risk of corruption in LDIFs is another issue that Vietnam should address. One way that Vietnam may be able to reduce corruption is to ensure that LDIFs are operated independently from the provincial governments.²¹⁹ Vietnam may also benefit from strengthening LDIF regulations at the national level²²⁰ and improving the transparency of these regulations.²²¹

B. Vietnam Should Conduct Strategic Site Clearance in Order to Decrease the Excessive Financial Burdens and Humanitarian Concerns Associated with Investors Conducting Site Clearance

Provinces should strategically implement site clearance and set aside land designated for development in order to increase access to land for real estate investors.²²² Vietnam may be able to ameliorate some of the excessive financial burdens and humanitarian issues associated with investors conducting site clearance by conducting site clearance on its own prior to luring investors. It currently takes an average of 231 days for an investor to acquire land from the government.²²³ The length of this process is a result of needing to clear the land of all current occupants and issue compensation to resettle the current occupants.²²⁴ It is likely that this waiting period could be drastically reduced if land were set aside and cleared by the government ahead of time.²²⁵

To increase the effectiveness of government-conducted site clearance, site clearance must be strategically implemented by Vietnam in areas likely to attract investors.²²⁶ As with strategically targeting areas for infrastructure development, Vietnam can determine which areas are likely to attract investors by carrying out feasibility studies. Such studies should focus heavily on the issue of whether tourism is likely to flourish in a particular area. Thus, the sub-issues of how hospitable local residents might be towards tourists, the availability of workers who are properly trained in hospitality, and the area's proximity to other points of interest should be

²¹⁹ Taking Stock, *supra* note 96, at 31 (referring to current shortcomings in transparency).

²²⁰ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 975, at 103.

²²¹ *Id.*

²²² See, e.g., Bich Ngoc, *Capital Land for Hotels*, VIETNAM INV. REV., Feb. 6, 2006, at 19(1) ("The Hanoi People's Committee has set aside 10 hectares and called for investment to develop new hotels.").

²²³ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 47.

²²⁴ *Id.*

²²⁵ For example, investors who get land in an industrial zone, as opposed to engaging in site clearance, would reduce the time it takes to acquire their land "on average from 231 days to 83." *Id.*

²²⁶ Previous efforts to create industrial zones failed to attract investors. *Goodnight, Vietnam*, *supra* note 29.

examined. The study should also determine whether developing in the area will maximize investors' capital.

Humanitarian concerns may also be addressed by conducting strategic site clearance. Vietnam is more attuned to the needs of its citizens than are U.S. investors. Therefore, the concerns of Vietnam's citizens will likely be better addressed by their own government, rather than U.S. investors. Vietnam may be able to work within its own country and with its own citizens to identify regions ripe for tourism development which will have the least negative impact on its citizens.

In instances where the government is unable to set aside and clear land ahead of time, it should take a more involved role in site clearance to ease the burden on investors and citizens. A recent example is the popular foreign investment project in the Thu Thiem Peninsula where 10,000 households are expected to be displaced by development.²²⁷ To reduce the burden on investors, the city government is expected to negotiate with the inhabitants to acquire land for the project and has said it will directly issue compensation to those households affected.²²⁸

C. *Vietnam Should Increase the Accountability of Real Estate Licensing Authorities*

Increasing the accountability of real estate licensing authorities may improve U.S. investment in Vietnam's real estate. In order to increase accountability, Vietnam should shore up local support and implementation of national real estate licensing policies. In addition, Vietnam should implement and properly execute laws aimed at breaking down the rampant corruption currently present in Vietnam's real estate licensing system.

Vietnam should implement laws that encourage local governments to support the real estate investment goals of the national government.²²⁹ Practical concerns require that local governments play a central role in the actual implementation of the national government's real estate licensing policies. Thus, local governments are likely to retain a high degree of discretion concerning to whom and how these licenses are distributed. The challenge for the national government, therefore, is to encourage local governments to use their discretion in ways that support the national government's goals.

²²⁷ Nguyen Hong, *supra* note 112.

²²⁸ *Id.*

²²⁹ See VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 148.

Vietnam's national government should implement laws that will encourage local governments to align their policies with the national goals. The key is for the national government to implement policies that attract local support, thus bringing local goals more in line with national goals. A system of incentives to local governments could accomplish this. For example, the national government could implement laws that reward local authorities for furthering the goals of the national licensing scheme.²³⁰ Rewards might include providing subsidies to local public works projects and promoting investment in the region.

Such a system of incentives may also persuade local public officials to exercise their discretion in conformity with national goals. Through a system of incentives, local public officials may be more likely to promote national policy goals. Incentives could include promoting local officials who succeeded in issuing licenses in a timely manner.²³¹ An expedited licensing process is likely to result, thus decreasing the burden of costly delays that investors currently face.

Vietnam should also engage in reforms aimed at reducing corruption. Reforms should focus primarily on local governments and local government officials who are responsible for administering the real estate licensing system at the local level. Additionally, while Vietnam is unlikely to make significant reforms to its judicial system in the foreseeable future, judicial officers who engage in corrupt activities should be influenced by anti-corruption laws.

Vietnam's current system should be reformed such that the cost to local officials who engage in corrupt activities outweighs the benefit. Increased costs should take the form of dependable sanctions. Sanctions could include reduction in pay, demotion, fines, or imprisonment. To be effective, these sanctions must be consistent and proportional to the corrupt action.

While the imposition of sanctions is essential to an anti-corruption strategy, additional methods are necessary to effectively reduce corruption.²³² To accomplish Vietnam's goal of reducing government corruption it is necessary to reduce the discretion of government officials.²³³ One way to decrease such discretion while minimizing invasive national oversight would be to increase the role of fixed computer programs.²³⁴

²³⁰ *See id.* at 149.

²³¹ *See id.* at 139.

²³² *See id.* at 137.

²³³ *Id.*

²³⁴ *See id.*

Fixed computer programs should be written by the national government and then given to the local governments to use when assessing a license application. If used properly, such a program may increase transparency and ensure accountability, two important components of reducing corruption.²³⁵

While Vietnam has implemented a new anti-corruption law, its efficacy depends on the way it will be implemented. The new law is more comprehensive than typical anti-corruption legislation, which also leads to "implementation challenges."²³⁶ To resolve these implementation challenges, conventional wisdom dictates that implementation should be phased in.²³⁷ For instance, asset declaration should be particularly focused on the most corruption-prone agencies and senior officials first.²³⁸ This strategy of "low coverage but close scrutiny"²³⁹ may decrease the risk of overwhelming the inspector, thus diluting the law's efficacy.²⁴⁰

V. CONCLUSION

Vietnam's investment environment has come a long way toward attracting U.S. investors. With several additional reforms, U.S. investors may find Vietnam's real estate a particularly attractive investment. Vietnam's current investment market is generally attractive to U.S. investors, with the overall economy experiencing significant growth. Vietnam's tourism industry is likewise growing. However, many U.S. investors believe that barriers remain which impede investment in Vietnam's real estate market.

One barrier identified by U.S. investors is Vietnam's weak transportation infrastructure, which often makes travel difficult for tourists hoping to enjoy Vietnam's widespread attractions. Additionally, Vietnam's small land area and dense population create a lack of access to land, leading investors to face the financial and humanitarian issues associated with site clearance. Potential real estate investors believe that insufficient local implementation of national goals and inherent corruption further undermine real estate investment ventures.

²³⁵ See *id.* at 134; see also Steven R. Salbu, The Foreign Corrupt Practices Act as a Threat to Global Harmony, 20 MICH. J. INT'L L. 419, 446 (1999), Balakrishnan Rajagopal, Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship, 14 CONN. J. INT'L J. 295, 498-499 (1999),

²³⁶ Taking Stock, *supra* note 96, at 32.

²³⁷ See *id.* at 33; VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138.

²³⁸ See Taking Stock, *supra* note 96, at 33; VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138.

²³⁹ VIETNAM DEVELOPMENT REPORT 2006, *supra* note 9, at 138.

²⁴⁰ See Taking Stock, *supra* note 96, at 33.

Vietnam has the opportunity to address U.S. investors' concerns by implementing reforms. Vietnam should create a financing scheme to facilitate targeted infrastructure development. Difficulties associated with site clearance may be diminished by Vietnam's creation of designated tourism zones. The lack of accountability created by the inefficient delegation of responsibility and corruption in its licensing system should be reduced through increased transparency and a system of rewards for compliance. Implementation of these reforms may create a more appealing environment for U.S. real estate investors.