VNCI
Vietnam Competitiveness Initiative

Land Law Reform in Vietnam 2004:

A Business Perspective

USAID
FROM THE AMERICAN PEOPLE

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ABBREVIATIONS

CONCETTI	Consulting and Research Company on Investment and Technology Transfer
DONRE	Department of Natural Resources and Environment
FGD	Focus Group Discussion
HCMC	Ho Chi Minh City
HSB	Hanoi School of Business
IZ	Industrial Zone
LUR	LUR
MONRE	Ministry of Natural Resources and Environment
SME	Small to Medium Enterprise
USAID	United States Agency for International Development
VNCI	Viet Nam Competitiveness Initiative
VYBS	Viet Nam Young Business Association

Chapter 1: Introduction

Research context and rationale

The revised Land Law of 2003, which came into effect on 1 July 2004, has been of considerable interest to a wide spectrum of groups and individuals in Viet Nam. The business community has focused in particular on various revisions to the law that differentiate it from the previous Land Law of 1993. However, these revisions will only come into full effect on the promulgation of an implementing decree, and other guidelines currently being developed.

This type of decree, as a legal document with a potentially strong and direct impact on business activity, needs to take into account – and reflect the expectations of – the business community. Although the agencies drafting the decree have already implemented a consultation process, the Viet Nam Competitiveness Initiative (VNCI), a project funded by the United States Agency for International Development (USAID), initiated a research study to gather additional comments from the business community. The aim is to provide an additional contribution to the issuance and design of the decree through the collection, collation and reporting of supplementary and in-depth feedback from individual businesses on a number of specific issues.

The survey work was conducted from July to September 2004, as a collaborative effort between VNCI, the Viet Nam Young Business Association (VYBS), and the Hanoi School of Business (HSB), Hanoi National University. The Consulting and Research Company on Investment and Technology Transfer (CONCETTI) provided the technical input.

Research objectives

Two specific research goals were identified in order to gather additional input and insight from businesses on a number of issues in the draft decree. They are:

i) to study and analyze specific issues in the draft decree that directly affect or relate to businesses, and their consistency with the new Land Law; and
ii) to obtain feedback on these issues, principally in terms of expectations and recommendations from the business community.

The research team sought to ensure that any recommendations to the draft decree are consistent with the new Land Law itself, as well as taking into account the need for consistency with other related pieces of legislation pertaining to investment, construction, etc.

To achieve these two goals, the research group focused particularly on three specific issues in the both the revised Land Law and the draft implementing decree:

i) The conditions and procedures for land rental and transfer of land use rights, as applied for production and business investment projects.
ii) The procedures and processes for site clearance, and land compensation for approved projects.
iii) The conditions necessary to ensure the effective utilization of land use rights by businesses.

Methodology

The research team applied a number of methodological approaches for information gathering: i) a desk study; ii) focus group discussions (FGD); and iii) in-depth interviews. Figure 1 depicts the application of these methods and the interaction between them.

The final output of the project is this report, which presents the principal findings of the study. A seminar was also held to disseminate the main findings of the research study, and to advocate for the inclusion of some recommendations in the impending implementing decree for Land Law.

Figure 1: Description of Methodological Approach

Desk-study	**Major activities**	**Outputs**
	i) Studied and compared the Land Laws of 1993 and 2003. ii) Studied and analyzed the current Draft Guiding Decree. iii) Studied related legislation (for example, Law on Investment, Construction, etc).	iv) A summary of major business-related revisions in the new Land Law was compiled. v) A description of the procedures and regulations related to the three focus issues was compiled. vi) Issues for discussion in Focus Group Discussions (FGDs) were identified.
FGD	**Major activities**	**Outputs**
	i) Held four FGDs in Ha Noi, Hai Phong, Ho Chi Minh City (HCMC), and Dong Nai (spanning 200 local business representatives). ii) Presented the main findings from the desk-study. iii) Obtained feedback and recommendations from business representatives.	iv) A summary of businesses' opinions on major issues of the new Land Law and the Draft Decree was compiled. v) A summary of expectations and recommendations from businesses was compiled. vi) Suggestions for in-depth interviews were gathered.
Interview	**Major activities**	**Outputs**
	i) Conducted 10 in-depth interviews with 10 businesses in HCMC and Ha Noi.	ii) More supporting evidence, to clarify issues realized in the desk-study and FGD, was compiled.

Chapter 2: Land legislation in Viet Nam

In Viet Nam, there is virtually no other issue that has witnessed as many disputes, petitions, accusations, lawsuits and conflicts as the issue of land. Similarly, there has hardly been any law that has taken such a long gestation period as the Land Law. Legislation regulating land issues in Viet Nam is quite different from that of many other countries. This can be attributed to the particular characteristics of the country's political system and the concept given to land ownership in Viet Nam, as well as to various socio-economic conditions. The issues referred to in this study, though confined to specific topics with direct pertinence to business, are nonetheless part of a wider legal framework, and therefore should be viewed in the context of the distinctive characteristics of this framework. Chapter 2 provides a historical background to land legislation, and describes the administration of the land use system. Both are essential to the understanding of more specific land-related issues.

Land use in Viet Nam

The underlying concept of land ownership is one of the foremost determinants of the land legislation system in Viet Nam, and affects its principal characteristics. There is no private ownership of land in the Socialist Republic of Viet Nam. Instead, land is regarded as an asset of the whole population, and the State – as authorized by the people – manages and oversees all land. Individual members of society, either as natural or legal entities, only have **land-related rights,** which give them the right to use, transfer or lease land. All specific regulations relating to land must abide by this guiding principle.

Under the 1960 Constitution of the Democratic Republic of Viet Nam (subsequently renamed the 'Socialist Republic of Viet Nam' in 1980), the State still allowed private ownership of land. Article 14 of the Constitution stipulated that: 'the State guarantees the ownership of lands and production materials of farmers and national capitalists'. Since the issuance of a revised Constitution in 1980, along with the outlawing of the private sector, land (as the most important production material) was comprehensively nationalized. Specifically, under Article 14: 'land, forest, rivers, [and] lakes' all came under the ownership of the whole people.

However, from the mid-1980s, primary reforms in land use started in certain sectors and areas in Viet Nam. The first milestones were 'Directive 10' and 'Directive 100', issued by the Central Committee of the Communist Party, which allowed farmers to cultivate their own 'assigned' land, on the condition that they gave part of their collective harvest to the State.

The 'economic renovation' process officially commenced after the Sixth Congress of the Vietnamese Communist Party in 1986. In line with a new 'open policy' in foreign economic relations, the Foreign Investment Law was enacted in 1987, and for the first time it became possible for the government to officially lease land to a foreign 'non-State' business entity. Under this law, a foreign investor was entitled to rent land from the Government when establishing a wholly foreign-owned company or a joint venture with Vietnamese partners. Under the 1992 Constitution, which came into effect in January 1993 and superseded the 1980 Constitution, Article 18 stipulates: 'the State assign lands to persons and organizations for stable and long-term usage'. By virtue of this constitutional stipulation, companies were able to receive Land Use Rights (LUR) from the State for business purposes. Private sector

companies were also able to obtain land from the State for investment projects, which was previously a benefit enjoyed only by state-owned enterprises.

In accordance with the 1992 Constitution, the 1993 Land Law, and the Ordinance on the Rights and Obligations of domestic land users (both individuals and organizations), detailed regulations specify how business organizations may obtain LUR, using the following methods:

i) Land allocation, without payment for LUR.
ii) Land allocation, with payment for LUR, to the Government.
iii) Land rent from the Government.

However, there continues to be a very basic principle, maintained throughout both the 1980 and 1992 Constitutions, that the ownership of land remains under the control of the people, using the State as the sole representative with full rights of administration and determination. This makes the legislation on land in Viet Nam materially different to those in most other countries, and brings with it some specific issues pertaining to the acquisition and utilization of land by Vietnamese companies.

Applying Land Use Rights

Under prevailing land legislation in Viet Nam, business organizations may acquire LUR through:

i) land lease or allocation by the State;
ii) LUR transferred from other entities, through civil transactions; and
iii) LUR auction by the State.

Pursuant to Article 34 of the 2003 Land Law, business organizations shall be entitled to receive land through a direct payment for LUR, in the following cases:

i) Construction of residential housing, for rent or sale.
ii) Investment projects in infrastructure, for lease or transfer to a third party.
iii) Construction for production or services, or public utilities for business purposes.
iv) Agriculture and aquaculture production.

The right to use land, though clearly not an ownership right, does bring some benefits that are in fact very similar to those of ‘semi-ownership rights’. Companies are entitled to:

i) mortgage the LUR to other legal entities;
ii) exchange the LUR with a third party;
iii) sell or lease LUR to a third party;
iv) make capital contributions in the form of LUR; and
v) grant LUR to a third party.

Another, more limited, form of LUR is when a business organization leases land from the state against an annual rental payment. In these cases, companies may use the land for implementation of investment projects in the fields of agriculture, forestry, aquacultural

production and salt making, for business projects, or for the construction of public utility works with business purposes. When land rental is paid annually, companies are entitled to:

i) mortgage the LUR to other legal entities; and
ii) sell the LUR to a third party.

In addition to LUR acquired through land leasing or allocation, business organizations may obtain LUR through normal civil transactions via a third party, such as:

i) LUR transferred from other entities.
ii) LUR as a capital contribution in kind to business organizations.
iii) LUR leased from other entities.

Auctioning of LUR has been enacted by the Government since 2000, and this process of acquisition is stipulated in the 2003 Land Law. However, the auctioning of LUR has been applied only on a trial basis, in limited cases related to land plots with high business potential, in the centre of cities (in the case of land for business purposes) or for land plots for living quarters in urban areas. This process is still uncommon as a means by which businesses may acquire land for investment projects.

The land administration system

The two agencies in charge of land administration at the central level are the Government (the highest administrative body with general authority) and the Ministry of Natural Resources and Environment (MONRE). On issues relating to land use by business organizations, the rights and responsibilities of these agencies consist of:

i) preparing and approving the land use master plan;
ii) deciding on administrative boundaries; and
iii) issuing legal documents to guide the implementation of Land Law.

At the provincial level, the authority in charge of land administration is the People's Committee (as the administrative body with general authority) and the Department of Natural Resources and Environment (DONRE) (as the administrative body with specialized authority). On issues relating to land use by business organizations, the rights and responsibilities of these agencies consists of:

i) preparation, management and execution of the master plan for land usage in the province;
ii) acting as a focal point in the appraisal and approval of applications for LUR by business organizations; and
iii) provision of administrative services related to the issuance of land use certificates, and the registration of any change in land users.

Typically, there are four sequential steps in the allocation of land by the government:

i) **Step 1:** Preparation and submission of the Application File for land allocation or leasing, to the relevant authorities.

ii) **Step 2:** Appraisal and approval of the application for land allocation or leasing, by the relevant authorities.
iii) **Step 3:** Compensation paid for LUR and site clearance.
iv) **Step 4:** Issuance of the Decision for land allocation or lease, by the provincial People's Committee.

When a business organization gains a LUR from another non-government entity, in a civil transaction, it is obliged to fulfill the registration procedures for, and changes to, the LUR by:

i) completing the related civil transactions, in accordance with the Civil Code; and
ii) registering the change of land user and land at the provincial DONRE.

Conclusion

Due to the specific characteristics of the existing legislation, Vietnamese businesses have, thus far, largely obtained their LUR from the State, through either land allocation or rent. This 'one-way' relationship between companies and the State, which is not a wholly equitable market relationship between buyers and sellers, has resulted in a number of undesirable situations for businesses:

i) It creates the existence of an 'ask-give' mechanism in land rent and allocation, as well as a non-transparent process that is vulnerable to malpractice by corrupt people who take advantage of their positions.
ii) State agencies, with their 'monopoly' position, often ignore the responsibilities they are supposed to assume in the allocation and renting of land. In most cases, the land allocated or rented to businesses is already occupied, which then requires site clearance and compensation for the occupants. This is a very complicated and time-consuming task, and the State agencies in charge often avoid their responsibilities. This entails more delays and sometimes the payment of substantial unofficial fees by businesses in order to move the process along. In some cases, conflicts with the current land occupants do occur and this can cause real difficulties for businesses.

Chapter 3 describes in more detail some of the shortcomings of the existing legislation.

Chapter 3: Current Land Law: problems and consequences

Identifying the nature of land

The first and foremost problem in land legislation in Viet Nam is one of misperception about the very nature of land. Land is, in essence, a kind of natural resource; in the way that it is a natural endowment that human beings can make use of to meet their own needs (similar to minerals, water, etc). However, once accessed, appropriated and exploited, such a natural resource begins to take on a value. Thus, 'land-natural resource' becomes 'land-property', with all the attributes of a property that is owned by those who access, exploit and appropriate it using their labor. Accordingly, within the territory of Viet Nam, land could be defined as an invaluable national property under the absolute ownership of the Vietnamese people.

However, in the Constitution and Civil Code, land is specified as 'Property' but also categorized under 'Natural Resources'. Indeed, the previous Land Law states that: 'Land is a natural resource'. Although the revised Land Law does not refer to land as either being a natural resource or property, land is still treated as the former. From a legal perspective, this is an erroneous starting point. Within the territory of a country, land should not be regarded as a natural resource, but rather as **property.**

Many countries in the world deem land to be property. In others, whilst not defined as property or a natural resource, land is regulated as an asset in legal terms. Defining land as a natural resource, as is the case in Viet Nam, leads to a range of major shortcomings and, as a consequence, fundamental principles in property management have been ignored or neglected, or are even contradictory:

i) For a long time, the measurement, categorization, registration, and updating of changes or transfer of user rights over land, was not conducted systematically, or was completely neglected. In contrast, similar work was conducted much more diligently for other assets of a much lower value, such as bicycles, cars, motorbikes, steel, spare parts in a factory, or fabrics, thread and needles in garment factories, etc.

ii) One rudimentary principle that has been overlooked (in terms of both legislation and practice) is the proper delegation of authority between company officers, such as the general manager, accountant, warehouse manager, and so on. In the absence of proper delegation, legislation has assigned land management and allocation – as well as LUR and jurisdiction – to a cluster of administrators at several levels in various sectors, thereby generating ideal opportunities for corruption. In some cases, both the State and the people suffer losses, as the authority to issue travels from 'ledger' to 'subordinate book' and is manipulated by a number of individuals. No one is blamed or called to account for any subsequent problems.

iii) The legitimate and legal title to land, and illegal and unreasonable 'land use' practices, has become confusing and complicated. Before the 1980 Constitution, every lot of land in the North used to belong to a specific landowner, who was a natural or legal entity (for private-owned land), or the State (for public-owned land). The natural or legal entity could become a landowner via: a) allocation or recognition by the Revolutionary Government; b) inheritance; c) purchase; and d) reclamation by labor force, with the authorization and approval of the Government. Such ownership is, in essence, a legal and legitimate property right with a well-

defined origination. However, since unification and the new constitution, the ownership of land by organizations and individuals is nullified because, regardless of their title of ownership, they will lose their property rights if they are not using the property. By using the land, they can have quasi-ownership over the property, even when they do not formerly own the land, or the land's origination is not adequately defined.

iv) The Law, by defining land as a 'natural resource', has created a misunderstanding that land is a natural endowment. This leads to the perception that land can be 'collected', like fish in the river or wild animals in the forest, as they all are natural resources. Consequently, people take every chance to 'collect' land, by assigning the in-use status to every land lot through such measures as: cutting down forest land and planting several cassava branches on it; placing a temporary cottage in a site that is expected to be cleared; planting a bamboo cluster in a public-owned area; or encroaching public land by removing fences, etc. Others may resort to the 'ask-give' relationship, or combine various measures to attain this goal.

The latter problem is further exacerbated by the stipulation that constantly and continuously used – and undisputed – land will, after a certain number of years, be eligible for a 'Red Book'. As a result, publicly owned land has been lost, and 'private land' has been associated with numerous troubles. This is not easy to address because the criteria and basis for jurisdiction over land title has become confused.

In short, the incorrect definition of land in Viet Nam is the root cause of many shortcomings and negative consequences. Land is property and must be managed under the principles of property management. Land relations should be perceived and regulated as property relations, which is the only way to establish a sound system for land issues.

The role of the State

Article 5, Point 1, of the 2003 Land Law states that 'Land is under the ownership of the whole people and under integrated management by the State'. Thus, the State is authorized to represent the people in executing ownership over land, and regulating the relations regarding land rights among society's members, through legislation and policy instruments. For the State to successfully assume its role, and for the people and the National Assembly to monitor (and be assured about) the execution of that role, stipulations concerning the State's management role need to meet a certain number of minimum requirements, notably in terms of adequacy, appropriateness and transparency. In this context, the new Land Law still has some substantial shortcomings and constraints.

Adequacy of the Law

'The State executes an integrated management over land' (Article 6, Point 1), means that the people assign this massive asset to the State. It is required that this asset must bring maximum benefit to the whole people, whilst not being downgraded, lost or taken advantage of by individuals for their own purposes or interests. As such, the assignment of the asset must include an adequate definition of the obligations of the assignee, which at minimum should include the obligation to:

i) preserve and promote the interest of the owner (i.e. the whole people), to make sure that such ownership, at any time and any place, is a nominal right;
ii) optimize the utilization of the land resource, within the constraints posed by the market, science and technology;
iii) ensure equality in the distribution of the land use title for society's members, including the right to use land for investment and development, and the right to earn returns (for example, rent) from land in various ways; and
iv) recognize and protect the legitimate asset-related rights of society's members (i.e. legal LUR), and prevent, redress and sanction the misuse of land for illegal purposes.

Unfortunately, there are no such stipulations in the new Land Law. In the section on 'State Management Over Land' (Article 6, Point 2) there is only a narrative listing of tasks to be undertaken by the Government in land management, such as: 'to issue legal documents', and 'to survey and measure land.'

Worse still, the draft implementing decree fails to accurately define the tasks of the State, such as 'The State manages the zoning and planning over land use', or 'The State manages the assignment, lease and retrieving of land'. This may cause the misperception that the zoning and planning – as well as the assignment, lease and retrieving of land – is done by **someone,** and only 'managed' by the State. In addition, the list of tasks is not fully inclusive. For instance, by saying the State 'settles disputes, petitions, claims about infringements in land use and management', the Law ignores the responsibility of the State in pro-actively detecting and dealing with disputes and complaints, especially when the violators collude with each other and do not make authorities aware of disputes or complaints. Chapter II ('State's Authority in Land Management and State's Management over Land') does not mention the obligation and responsibility of the State in this regard. As such, it misses an important principle: not only are people to abide by the law, but the State itself has to comply with – and be responsible to – the Law.

Additionally, Article 6, Point 2 specifies 13 tasks to be undertaken by the State regarding 'State management', including:

i) to issue legal documents on land use and management, and instructions on the implementation of such documents;
ii) define administrative boundaries, prepare and manage administrative boundary records, and draw up administrative maps;
iii) conduct surveys, measurements, ratings and categorization of land, and draw up cadastral map, current land use map and land use planning map;
iv) manage the zoning and planning of land use;
v) manage the assignment, rental and retrieving, and change of the purpose of use of the land;
vi) register the land use right, prepare and manage the cadastral record, and grant the land use certificate;
vii) complete statistics and inventories of the land;
viii) be responsible for financial management of the land;
ix) manage and develop the land use right market in the real asset market;
x) monitor and manage the implementation of the rights and obligations of land users;

xi) inspect and monitor the observation of land legislation, and respond to land-related infringements;
xii) settle land-related disputes, and handle petitions and complaints about infringements regarding land use and management; and
xiii) manage administrative services regarding land.

Chapter II covers a further eight tasks:

i) Preparation and management of records on administrative boundaries and cadastral maps.
ii) Land use zoning and planning.
iii) Land allocation, lease and change of use purpose.
iv) Land retrieving;
v) LUR registration;
vi) Finance and pricing regarding land;
vii) LUR in the real estate market;
viii) Organization of land management.

The 13 state-management tasks, and the further tasks covered in Chapter II, do not specify who should do what. This gives those involved in administration opportunities to interpret and execute the law in their own way and therefore take advantage for their own personal gain.

Inappropriate provisions

Chapter II comprises 49 articles, with many detailed provisions that are more appropriate as technical guidelines rather than in the body of a law. Yet, despite these details, the law is lacking any stipulation on the land survey work that the State must conduct, and in which all land users must participate. The Law only specifies that the commune/ward level and town level authorities are responsible for collecting statistics and inventories of land, while the land users do not have to assume any responsibility. The Law also lacks a requirement that land inventories and statistics are an obligation to be undertaken by those who manage and use the land.

The setting up of an integrated national land management information system is not mentioned in the law. Such an absence means a lack of assurance that the State can successfully assume its tasks (from long-term strategic tasks to daily operational tasks). Because of the various procedural loopholes, there is a high possibility of malpractice.

Zoning and planning of land use have a vital role, and serve as a basis for land allocation, lease and retrieving. While the new law puts forward eight principles guiding land zoning and planning (in Article 21), it misses out the criteria (or requirements) for the master plan, turning this regulation into something that is more like an operating procedure without basic policy guidelines. Thus, there is no formal basis for checking and evaluating the quality and soundness of these plans, and, worse still, it is much more difficult to ‘invite comments and feedback from the people’.

Lack of transparency

No matter what is discussed in theory, land and LUR are, in fact, still a type of asset or commodity (albeit special ones), which can be transferred and exchanged. There is therefore the accompanying risk of mistakes, abuse and fraud. As a principle, the management of such assets requires the clear and transparent assignment of responsibilities to all parties, so as to ensure cross monitoring and control which will minimize situations where conflicts of interest or collusion might occur (or situations where the 'referee plays the game').

Bearing this in mind, the section on 'Organization of Land Management' (Article 64, 65) is not clear enough. There is a very general and vague stipulation in the law that: 'land management agencies are set up in an integrated system from the Central to the grass roots level'; 'the land management agency at each level is under the management of the State administrative authority of that level'; and the 'land officers of commune, ward and town are appointed or dismissed by the commune, ward and town people's committee respectively'. These stipulations leave all decision-making authority in the hands of a cluster of people at a few administrative agencies who are 'elected by the people'. Working for fixed terms, these people can walk away from their liabilities and responsibilities at the end of their term, leaving behind any ongoing troubles.

In the new law's section on 'organization of land management', there is a complete absence of assignment and delegation of specific tasks, which would define the responsibility and authority of pertinent agencies at different levels. These responsibilities are therefore left to an interpretation of the implementing decree. As a consequence, there have been cases where a request is made from a higher authority to retrieve a land lot, but the official has issued a decision to allocate the lot for themselves or for their relatives. The guiding principles for resolving this problem have not been articulated, let alone specific regulations put in place.

Conclusion

It is widely agreed that land is an important natural resource and a valuable asset of the country. Therefore, land should be assigned to people and organizations that are capable of efficiently exploiting the value of the land. Although there have been some improvements over time, the problems above mean that this situation does not exist yet in Viet Nam. However, all the difficulties of land-use in Viet Nam cannot be changed overnight just by revising individual legal documents, as the problems relate to fundamental concepts about ownership, and a range of other important issues. It is unrealistic to expect a radical and far-reaching change in the land legislation, as this will also require substantial changes to the underlying concepts. Therefore, this study has focused on specific topics that are deemed important to businesses, such as the application process for LUR, site clearance and the conditions that will ensure effective land use by businesses.

Box 1 What does the TAF-VCCI Economic Governance Survey tell us about SME access to land?

In 2003-04, The Asia Foundation and Vietnam Chamber of Commerce and Industry carried out a survey on economic governance in seventeen provinces in the Red River Delta and North Southeast of Vietnam. Among the most important factors in assessing governance was access to land. Provincial policies for allocating land use rights certificates, converting agricultural land to industrial usage, and providing transparent information regarding available plots of land for business expansion proved to be key determinants in assessing private sector performance.

Of the 488 firms surveyed, only 44% had received their official LUR certificate (quyền sử dụng đất) at the time of the survey. Another 11.5% had completed the necessary formalities and were in the process of receiving their red books as the certificates are often called, but the rest of firms surveyed were functioning without formal title to their land. These firms were either sub-letting land from state owned enterprises, renting from other private firms, or using informal land titles that had not been sanctioned by the provincial government. In all three cases, firms are highly limited in their ability to access capital, as they are unable to use their present land as collateral. Moreover, as sub-letters these firms are in a more precarious business in regard to the security of their business operations. Though there was no clear regional pattern, in regard to land use rights acquisition, a few provinces in both the North (Hai Duong and Vinh Phuc) and South (Binh Duong and Binh Thuan) certainly outperformed their peers.

Firms with land use rights certificates can be divided into two types: those operating on household land of their own or a close relative and those who purchased specifically for their business operations. Firms operating on household property must only convert their informal land holding to formal holding in order to receive a LUR, while firms who purchased land must engage in the procedures outlined this VNCI report. Obviously, firms who purchased land must wait longer for their LURs, because of their more cumbersome procedures. TAF-VCCI researchers were interested in exactly how long these waiting periods were in order to assess the transactions costs firms suffered while waiting to break ground on their business operations. There was a high degree of variation both across time, as firms who registered in the early nineties generally had to wait longer, and across provinces. Waiting periods ranged from a minimum of ten days in Binh Duong province to a maximum of ten years in Ha Tay province.[1] Overall, the median waiting period was sixty days for a firm to receive an LUR on land it hoped to purchase--much higher than the maximum of 23 days outlined in the amended version of the land law (page 7).[2]

Nevertheless, difficulties in obtaining official LURs mean very little if firms are simply able to make do without them. It was important to find out whether firms felt constrained in their business activities because of problems with land acquisition. They certainly did! Seventy-four percent of all firms agreed that if land were easier to obtain they would expand the business operations. As expanding business operations usually entails new investment in factories, input purchases, and the hiring of new labor, we can surmise that Vietnam is missing out on a great deal of growth potential due to the artificial space barriers. A much smaller though notable 129 firms (26%) felt that lack of access to land limited their ability to expand into new business operations. Interestingly, one quarter of this latter group are based in Ha Tay province.

The TAF-VCCI study took place prior to the promulgation of the amended Land Law detailed in this study, but it is worth noting that even at that early date, 55% of firms complained that implementation of the older version of the Land Law was an obstacle or major obstacle to their business operations. Firms tended to be aware of the early versions of the Land Law, but believed their provinces had not been effective at implementing its provisions. This finding should serve as a reminder to provinces presently digesting the 2004 Land Law that it is not so much the letter of the law that matters, but how it is eventually carried out. Southern firms tended to believe their provincial administrations had done a good job of implementing, while Northern firms were much more critical of their local governments.

Firms were also very critical of their provincial governments' proposed solutions to the lack of available land. Only 22% of firms ranked the policy of converting agricultural land to industrial usage somewhat good or better and only 25% felt positively about plans for industrial zones or industrial concentrations as a solution to the lack of available land. Many firms actually expressed frustration at industrial zone construction, because they believed they were being forced to move into industrial zones when land out of the zones may have been more suitable for their business.

[1] A limited liability company with some state ownership actually received land in three days in Ninh Binh province.

[2] We use median to avoid problems caused by outliers in measuring central tendency. The mean waiting period was 252 days.

Finally, TAF-VCCI researchers probed into the transparency of land use maps and allocation plans. Some Vietnam observers have hinted that one of the reasons that land speculation is so profitable in many provinces is because of the limited transparency of the real estate market.[3] Only a few knowledgeable insiders know the location of future infrastructure projects and industrial zones and can make one-way bets by buying up the land ahead of time.[4] The result is that land prices are driven up in some provinces, pricing firms without insider information out of the market. Indeed, TAF-VCCI found that only 41% believed these documents could be obtained without difficulty, while another 38% believed access to the documents was possible but very difficult (likely requiring a good relationship with an official or persuasive negotiation). Once again, provinces in the North Southeast tended to have more transparent access to land use maps.

In sum, the TAF-VCCI study found that many firms across the country believe there is a great deal of room for improvement in the way the Vietnamese national government and provincial government deal with land allocation. As so many firms are poised to make major investments once they can acquire new land, a quick and efficient solution to these dilemmas should have an immediate impact on private sector growth.

Prepared by Edmund Malesky, VNCI and TAF consultant

[3] Nguyen Dinh Cung, Pham Anh Tuan, Bui Van, and David Dapice, 2004. *Why Don't Northern Provinces Grow Faster?* Ha Noi, Vietnam: Central Institute for Economic Management and United Nations Development Program

[4] The recent arrests in Phu Quoc island of Le Minh Be and Do To, the District People's Committee Chairman and People's Council are illustrative of this point. According to *Thanh Nien*, these officials were arrested for taking bribes to hand over land documents that should have been available legally (*Thanh Nien*, 8 September, 2004).

Chapter 4: Major findings

Land User Rights

The 2003 Land Law and draft Decree guiding the Implementation of the Land Law stipulates three formats for acquiring land usage by business organizations, as follows:

i) Land Assignment or lease by the State (Chapter 11).
ii) LUR transfer from other entities (Chapter 12).
iii) Auction of LUR (Article 61).

The contents of the draft Decree guiding the implementation of the new law include, at a detailed level, the procedures and conditions for businesses to acquire LUR under formats i) and ii) above. However, there are only two articles in the draft decree pertaining to the auctioning [iii)] of LUR.

The term for land usage by businesses is defined as a maximum of 50 years. This is unchanged from the previous (1993) law.

For utilization of LUR as a business property, businesses generally have the following rights:

i) Lease or sub-lease LUR to other entities.
ii) Transfer LUR to other entities.
iii) Make capital contributions to business projects in kind, using LUR.
iv) Mortgage or guarantee LUR as a security for loans and liabilities of the business organization.

There is therefore no fundamental change to the rights of businesses, compared with the 1993 land law.

Land Usage Terms

Under Article 25 of the new Land Law, the term of the master plan is set at 10 years, and this master plan may be reviewed and revised every five years. However, the duration of land allocation for enterprises' investment projects is up to 50 years. Prior to the 2003 Land Law, many enterprises had to move to other locations, and bear the costs and risks of changes in land planning. The price of land compensation was not sufficient to make up for the costs and risks entailed in resettlement. Consequently, enterprises have a tendency to pursue short-term investments, which can result in inefficient exploitation of land.

Case study 1: Saigon Plastic Joint Stock Company

Since 1989, the Saigon Plastic Joint Stock Company has moved its factory location three times. On one occasion, the company had to move to another place after its workshop and new equipment had been installed only four years previously. Consequently, the company had to bear additional costs. The average rate of amortization of workshops and equipment in the plastic industry is ten years. Following its most recent relocation, the company has been investing in, and operating, a factory in Tan Tao industrial park (Ho Chi Minh City [HCMC]). However, the company's management Board is quite concerned, as there is unofficial news suggesting that Tan Tao industrial park will be re-designed into a residential area by 2010. They are therefore worried about where they can settle down.

Recommendation

One of the most important bases for preparation of land planning is the 'Master Plan on Socio-economic Development, National Defense and Security, and Sectoral and Regional Planning'. However, this must be considered only on a 'theoretical basis', since it is widely known that the quality and suitability of such master plans has been mixed. Further, master plans have not adequately covered all sectors and regions, and should cover a longer timeframe. The quality of planning, including land use planning, is subject to many elements, the most important of which is the vision and capacity of the whole system of land management bodies, as well as staff capacity. It can be said that the current capacity of staff is not optimal, while capacity building is a long-term process. Thus, preparing for a 40 or 50-year land use plan is not feasible under current constraints. However, this should not be allowed to adversely affect the business environment, or entail losses for businesses. It is therefore recommended that the draft decree should include regulations and articles to protect enterprises' rights and benefits, in cases where they have to relocate, stemming from a change in land planning. Enterprises should be compensated adequately, for both physical and non-physical losses, and the valuation of land and land compensation should be carried out by an independent valuation company.

LUR through auction

As noted above, there are a few articles in both the new Land Law and the draft decree pertaining to land auction activities, particularly regarding:

i) the conditions for application of land auction between business organizations; and
ii) procedures at land auctions, and the administrative management of land auctions.

Recommendation

The draft decree should be supplemented with more detailed and complete regulations on land auctions. If this is considered to be out of the scope of the main decree, it will be necessary to issue another separate decree or decision regulating land auctions.

Applications for Land Lease or Allocation

Under the previous land law, businesses applying for land lease or allocation had to prepare an application file that consisted of the following documents:

i) An application for Land.
ii) Extract of Cadastral Map for the land plot.
iii) Approval by the Department of Land Administration (now DONRE) on the land boundary.

In addition, businesses commonly had to supplement the Application File with at least six more documents, as depicted in Table 1.

Table 1: List of Common Supplementary Documents

No	Authority	Type of Documents
1	City or Provincial People's Committee	Document for approving in principle the Investment Project and Land Allocation.
2	District People's Committee	Document for approval of project site, principles on site clearance and compensation for land.
3	Department of Planning and Investment	Appraisal document on the Feasibility Study of the Project.
4	Department of Construction/Architect and Urban Planning	Document for approval of project site, ratification of architectural layout.
5	Department of Pricing and Finance	Document on approving the land rental/rate for compensation for land.
6	Other line department and authorities on commerce, transportation, environment management	Approval documents on - Commercial condition of projects - Environment protection and safety - Conditions for infrastructure services (transportation, telecommunication, wastewater treatment, etc).

The number of supplementary documents in the Application File has tended to vary from province to province. For example, the People's Committee of Vinh Phuc requests the applicant to submit 18 documents, while the Ha Noi People's Committee requires just 12 documents.

Case study 2: Application for Land Lease

Nam Tuong Ltd is now implementing an investment project to establish an Industrial Zone (IZ) for Small to Medium Enterprises (SMEs) in Binh Chanh District, HCMC. The Managing Director revealed that it has taken nearly three years from the date of submission of the Application File to the HCMC authority to get a decision on the land lease by the People's Committee. When requested to present the Application File, the Director furnished the consultant team with a thick set of 11 different documents. Nam Tuong Ltd had to contact and get approval or agreement from eight different state agencies, from the local commune People's Committee through to DONRE.

Under the new Land Law, and Articles 88 and 89 of the draft decree (with a few exceptions for investment projects in such areas as mining exploration and exploitation), businesses that are in need of land lease or assignment must prepare an application file comprising:

i) an application form for land assignment or lease;
ii) an Investment Decision, or certified copy of investment license; and
iii) a certification letter from DONRE, on the historical effective utilization of land by the applicant.

According to the draft decree, DONRE shall appraise the application file and give a decision to the applicant (approval or rejection) within three working days from the date of application submission.

Compared with the former Land Law and its guiding documents, the new regulations on procedures for land lease or assignment have removed the need to submit the following documents from the Application File:

i) Extracts of the cadastral map or extracts of the site survey.
ii) Feasibility study for the investment project.
iii) Plan for payment of compensation and site clearance.
iv) Written approval and opinions of relevant agencies.

Most of the representatives at Focus Group Discussions (FGDs), and other interviewees, expressed concern that the 'simplified procedures' contained in the draft decree may become too simple and 'risky', due to the following:

i) The draft decree does not include any articles to clarify the criteria by which DONRE should appraise applications for land assignment or lease.
ii) Normally, in accordance with domestic investment law, investment projects by private sector businesses will not be appraised State agencies. In cases where private companies apply for land, the investment decision should be made by a company's Board of Directors, not a State agency.
iii) With just an Application Letter and Investment Decision, businesses will not have an adequate opportunity to show their technological and financial capabilities, and so competing applications for land assignment or lease between different businesses may not be equitable. This runs a risk of corruption, and wasteful or inefficient usage of land.

Recommendation

If land allocation or leases for enterprises' investment projects are carried out in compliance with the proposed procedures for land Appraisal and Allocation, then the application file prescribed in Article 113 does not provide a sufficient basis for appraisal. A common question is: What kind of information should be included that will be the basis for DONRE to appraise enterprises' demand for land use?

The authors of this report recommend that the application file should consist of the following documents**:**

i) Rationale for the investment project.
ii) A Selection of Investment form.
iii) Production plans and conditions that are required to be met (for projects involving production).
iv) Site planning (or planning of site area, constructions line) compatible with construction planning (including documents on site selection with proposed measures to minimize the environmental and social impacts).
v) Plan for site clearance and resettlement plans (if any).
vi) Analysis and selection of technical and technological solutions.

vii) Architectural and construction solutions, and preliminary designs for the proposed solutions for management and protection of environment.
viii) Clear determination of capital resources (or types), financial capacity, and total investment and demand for capital according to implementation process. Plans to refund the investment capital (for projects requiring the recovery of investment capital).
ix) Plans on labor employment and project management.
x) Analysis of investment efficiency.
xi) Major time targets for investment implementation. Group C projects require immediate elaboration of bidding plans. For Groups A and B projects, the bidding plans may be drawn up after the issuance of investment decisions (depending on specific conditions of projects). The time to start the construction (at the latest), and the time for completion and putting projects into exploitation and use (at the latest).
xii) Proposing management form for project implementation.
xiii) Identification of investors.
xiv) Relationships and responsibilities of agencies involved in the projects.

The pre-feasibility or feasibility study should be considered the basis for the decision on land allocation, and the criteria for inspection of land use after it has been allocated. DONRE (in consultation with other line departments and relevant agencies) should be competent and capable of appraising the correctness of such data provided by businesses. When giving acceptance and certification, the officer in charge of the land allocation appraisal should be personally responsible for the investment project. (This is similar to the banks' appraisal of an investment project before lending). The boundary of personal responsibility extends only to the compliance with the committed purpose of the investment project rather than the success or failure of the investment. The officer 'in charge' is understood to be the person who signs off the allocation decision, namely the director of the DONRE and President of the People's Committee.

There should be set conditions and criteria for assessing land allocations or lease applications (specified for each land lot in each region), which are made available to the public. The system of criteria shall include, but not necessarily be limited to, the following issues:

i) Compliance between the goals and objectives of the investment project and those of the sector's/ region's development priorities.
ii) Compliance between the goals and objectives of investment projects with land use plans or land use planning.
iii) Scope of the project.
iv) Socio-economic impacts of the project. For example:
   - Labor/jobs created.
   - Expected contribution to the state budget, for example, income tax payments.
   - Solutions to any hygiene or environmental issues.

Procedures for Land Lease or Allocation

According to the 1993 Land Law, and the practical applications of this Law, enterprises should not only submit to DONRE but also negotiate with other pertinent agencies, in order to obtain the six required documents identified in Table 1. Table 2 lists these line agencies.

Table 2: Line agencies for land application procedures

N^{o}	Agencies	Tasks
1	People's Committee at Province or City level	Ask for permission to conduct the investment project.
2	People's Committee at District level	Initial agreement on location of land and site clearance.
3	Department of Planning and Investment	Agreement on appraisal of investment projects involving: - project's feasibility; and - project's suitability to Master plan on socio-economic development of local region.
4	Department of Construction/ Department of Planning and Architecture	Agreement on planning/ architecture issues (with respect to investment projects in urban area).
5	Pricing and Finance Department	Agreement on price of land rental and land compensation.
6	Line departments of trade, environment and transportation	Agreement on such issues as follows: - Commercial business lines. - Environment. - Infrastructure conditions of transportation and water supply and irritation sewage.

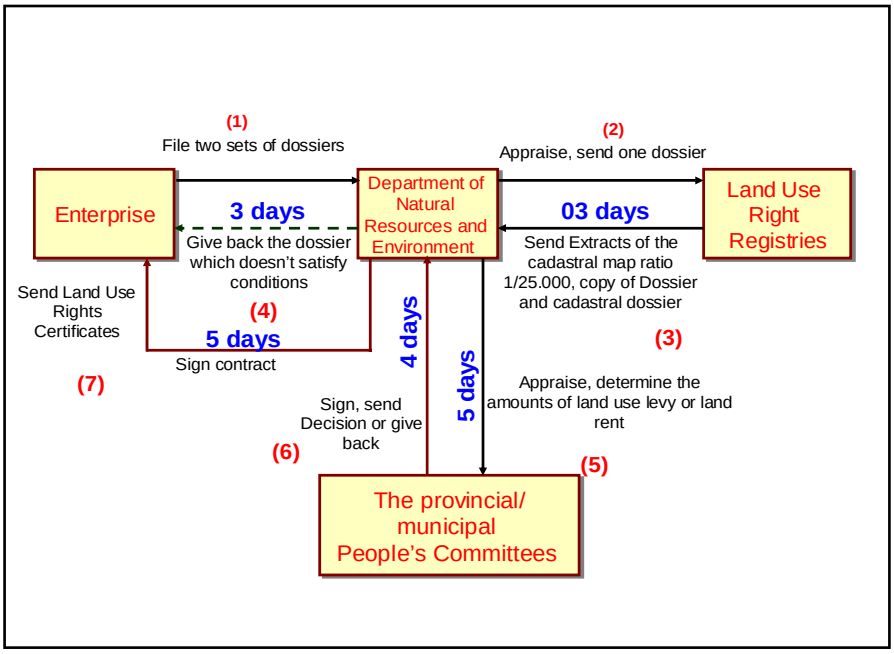
According to the interviewed enterprises, the participation of line agencies in the process of land allocation/lease is indispensable and unavoidable because of the reality in which state administrative agencies in the local region operate. Therefore, how to make the procedures simple and transparent is what concerns companies the most.

Procedures for Submission

Where ground has been cleared

Under Article 113, businesses must apply to DONRE for all applications pertaining to land where the ground has been cleared (see Figure 2).

Figure 2: Procedures for ground that has been cleared



Under Article 113 of the draft decree, the total time for carrying out procedures on lease or allocation of site-cleared land to businesses is 16 working days. The procedure for the application and appraisal for this type of land is comprised of the following steps:

(1) Businesses submit two sets of the application file to DONRE.

(2) Within three working days, DONRE shall be liable for appraising, reviewing and sending one of the application files to the Land Use Rights Registration Office, if the application is satisfactory.

(3) No later than three working days after receipt of the application, the LUR Registration Office shall be responsible for making an extract of the cadastral map of the land plot, or carry out the mapping measurement for the land plot (on a scale of 1:25,000 at a minimum). They should then submit the cadastral document, along with the application file, to DONRE.

(4) No later than three working days after receipt of the full application, DONRE shall appraise and review it. If it does not conform to regulations, then it shall be returned, clearly stating the reason for the return.

(5) No later than five working days after receiving a copy of the cadastral document, DONRE shall be responsible for re-appraising the cadastral document, defining the land use payment and rent, submitting a Decision of land rental or assignment to the People's Committee, signing a certificate of LUR, and notifying the applicant of the Decision. The applicant can then pay the land use payment and/or rent, fees and other charges.

(6) No later than three working days after receipt of the application file, the People's Committee of the city or province shall sign the Decision of land lease or assignment, and send it to DONRE if the application file conforms to legal regulations. Otherwise, it will be returned, clearly stating the reason for doing so.

(7) No later than five working days after the date of completion of the applicant's financial duty, DONRE shall sign a land rental contract (in cases of land rental) or

coordinate with the Division of Natural Resources and Environment, and the provincial and district People's committee. They then issue a certificate of LUR to the applicant, and send notification to the land use right registration office for cadastral file update.

From an enterprise perspective, these regulations are confusing. Firstly, the basis of appraisal of an application file by DONRE remains unclear. Secondly, many business people interviewed were concerned about the criteria of: 'effective utilization of the land that had been leased/allocated to the business organization'. The way 'effectiveness' is defined may differ from one person to another. It is likely that this criteria will give rise to secondary procedures that will incur additional time and costs for the applicant. Thirdly, the need for an accompanying certification letter from DONRE to be submitted with the application file to DONRE is problematic.

Fourthly, drawing on past experiences of cadastral work for investment projects, the time limit given for this process is unrealistically short, particularly for the work on mapping and measurement of the land plot. In practice, the cadastral mapping measurement for a land plot of 10 hectares would take at least seven to 10 days. In addition, the preparation of cadastral documents will entail some expense, and it is unclear whether DONRE or the applicant will have to incur these costs. Similarly, it is clear that the work related to preparation of the extract cadastral documents (as mentioned in Article 113 of the draft Decree) will also entail some expenses, but it is unclear whether the applicant or the State will pay for these expenses.

Finally, even when the land application and appraisal has been approved, other issues relating to urban or area master planning implementation, socio-economic development and investment management will still need to be taken into account during the process of appraising the application of businesses. The procedures and conditions set for the allocation or lease of land outlined in the draft decree seem far too simple, and too open to interpretation and opportunities for abuse. In addition, under Article 113, DONRE will have full authority to decide on land allocation or leases, without consultation with other relevant authorities. This is a serious shortcoming.

Recommendations

The convenience in allocating or leasing this type of land is that neither the applicant nor the State authority has to carry out site clearance, the most time-consuming and complicated task in the sequence of land allocation or lease. However, it still necessary to appraise and handle the process of land allocation or lease in conjunction with other related laws and regulations, to ensure efficiency and effectiveness in land utilization. The recommendations from the consultant team on this issue are two-fold:

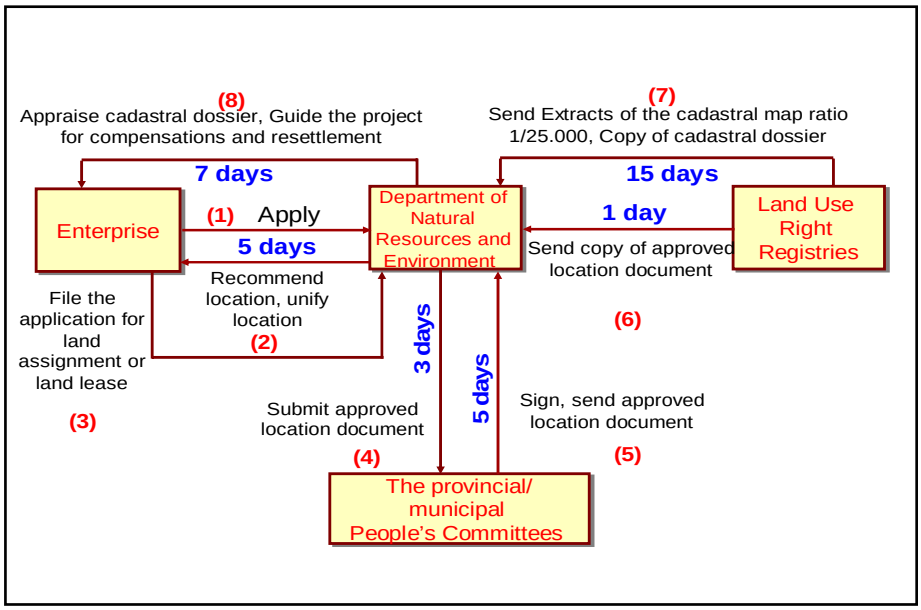
i) The application by businesses should be appraised and approved in the same way as those applying for land that has not been cleared.
ii) DONRE, as the focal point in handling applications for land by businesses, should consult other relevant authorities, before submitting the proposal for land allocation or lease to the provincial or city People's Committee.

Where ground has not been cleared

In the application for land where the ground has not been cleared, businesses should implement two steps:

i) Apply for the introduction of the site for investment projects to DONRE (see Figure 3); and
ii) then apply for land assignment or lease (see Figure 4).

Figure 3: Procedures for introducing land that has not been cleared



The procedure for the application and appraisal for this type of land is comprised of the following steps:

(1) Businesses in need of land shall contact DONRE to obtain an introduction to, and agreement on, land use location.
(2) No later than five working days after the date of contact, DONRE is responsible for providing such an introduction to, and agreement on, land use location to applicants.
(3) After being introduced, businesses should submit an application form for land lease or assignment to DONRE.
(4) No later than three working days after receipt of the application form, DONRE shall submit the document of location approval to either the municipal or the provincial People's Committee for signature.
(5) Within five working days of submitting these documents, the municipal or provincial People's Committee shall sign the document and send it back to DONRE.
(6) Within one working day after receipt of the location approval, DONRE shall send a copy to the land use registration office.

(7) No later than 15 working days after receipt of this copy, the Land Use Rights Registration Office shall be liable for extracting a cadastral map, and passing on the cadastral documents to DONRE.

(8) No later than seven working days after receiving a copy of the cadastral document, DONRE will re-appraise the cadastral document and define the land use payment and rent, thereby guiding the resettlement compensation plan.

The appraisal procedure for a land lease or assignment application, for land where the ground has not been cleared comprises the following steps:

(1) A business submits an application for land rental or assignment.

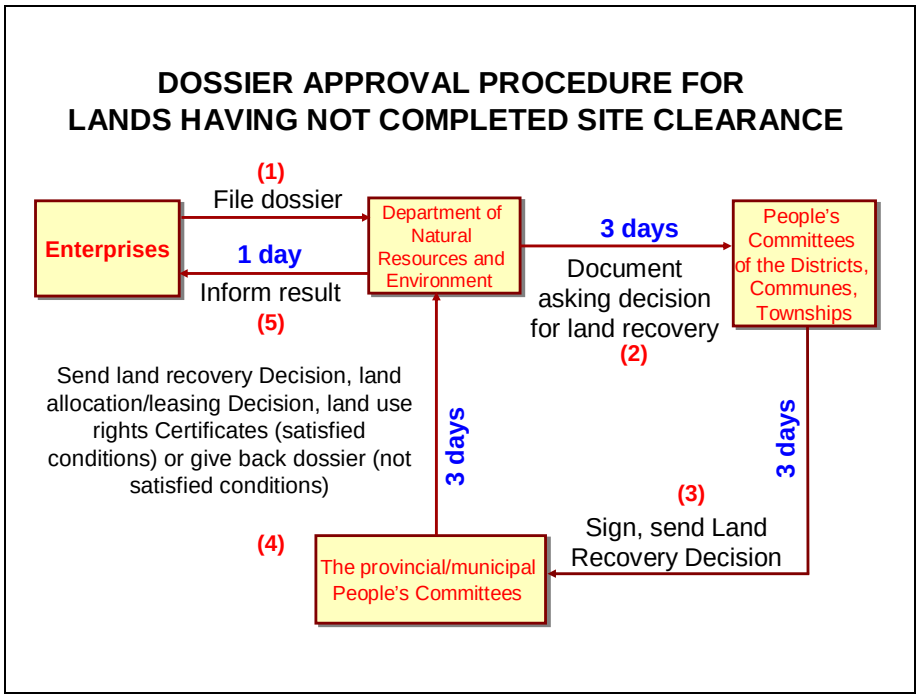
(2) No later than three working days after receipt of a full and satisfactory application file, DONRE will notify the Division of Natural Resources and Environment, so that it can submit the file to the municipal, provincial and district People's Committee for a decision on land revocation.

(3) No later than three working days after receipt of the request document, the People's Committee of the city, province and district should sign a Decision on land revocation, and send it to the People's Committee of the city or province under central management.

(4) No later than three working days after receipt of decision for land revocation, the People's Committee of the city or province will sign and send the decision of land revocation, the decision on land assignment or renting, and the certificate of LUR to DONRE, as long as the application file conforms to regulations. If the application file does not conform, it should be sent back to DONRE, clearly stating the reason for its return.

(5) Within one working day of receiving the decision on land rental or assignment, DONRE will be responsible for notifying the business of the decision by the People's Committee of the city or province.

Figure 4: Appraisal Procedures where ground has not been cleared



From the land lease or assignment procedure outlined above, it is apparent that businesses will only need to come to one agency, namely DONRE (the land use registration office). Thus, they will no longer need to visit many different agencies, asking for various kinds of documents, as was the case under the previous Land Law.

Transparency in procedures for submission

It seems that the **'**asking and giving' mechanism is still present in an enterprise's application procedures for land. Through the provision of suitable land plots for the applicant, State officials at DONRE will, on behalf of the applicant, select the place that is best suited to their needs, and the project's technical and commercial features. Some applicants may receive an introduction to DONRE officials, through certain relationships, while others may have no introduction. In the application of the 1993 Land Law, this procedure has proven to be impractical. Most business people interviewed lamented that they had to explore and identify land plots by themselves, first through business or personal information channels, and then by going to the provincial authority to apply for an introduction letter for the very land plot that they had selected previously. This procedure usually takes some time and incurs costs. Yet this same procedure will be enshrined in the new decree guiding the implementation of the new Land Law.

Recommendation

The draft decree should be revised, so that businesses can be more active in selecting the optimum land plot for investment projects. It is recommended that these procedures be changed so that DONRE is clearly directed to appraise and accept applications for intended land plots for allocation or lease to businesses.

Participation of Relevant Authorities

With the exception of cooperation with the Department of Construction and Urban Planning, who will provide businesses with an introduction for land plots, the draft decree makes little mention of working relationships and cooperation with other State agencies in the land lease or allocation appraisal procedure. This may cause difficulties for businesses during and after the land application process, and business people expressed these concerns during the FGDs and interviews, particularly concerning the role of district authorities.

District Authorities

Regulations on the participation and responsibility of the district-level People's Committee in handing businesses' applications for land is unclear in both the new Land Law and draft Decree. Only one Article refers to the responsibility of the district authority in site clearance. Numerous business people expressed their concern over the removal of the role of the District People's Committee in the application procedure. In their experience, the participation of the District People's Committee in this process is still important, most notably in terms of:

i) preliminary surveys for land usage;
ii) organization of site clearance; and
iii) supplying the investment project site with public services (for example, transportation, electricity, etc).

Without the approval and assistance of district authorities, business organizations may be unable to access needed services and other infrastructure.

Urban and Area Master Planning Management

Under the new Land Law, the timeframe for land application appraisal and approval shall not exceed 30 days for site-cleared land, and 45 days for land that is not cleared. In addition, the applicant will only have to contact DONRE once during the whole process of application for land. Clearly, this is a marked improvement on the procedures set out under the 1993 Land Law. Indeed, most businesses surveyed did appreciate this reduced timeframe and one-stop policy. However, there was still some concern over the practical implementations of this regulation:

Can DONRE accomplish the appraisal and approval procedures within the timeframe stipulated by the draft decree?

In all provinces and cities, the master plan for land usage and development has not been available, or is in the process of being implemented. As a result, all company directors interviewed, and who had experienced the land application process, revealed that they had prepared the detailed site master plan by themselves, at a scale of 1:500 or 1:2,000, at the request of the provincial's urban planning and construction authority. This takes some time (up to 2 months for a land plot of 100 ha, for example) and a lot of expense. Yet the proposed time for acceptance of the land site is limited to five working days, and it is unclear in the draft decree whether the State or the business applicant will pay for the costs entailed.

Is DONRE's authority strong and effective enough for such decision-making?

At the provincial and municipal levels, the land allocation decision for an investment project is the result of a long and tough process of coordinating appraisals and approval work across a number of functional authorities, including:

i) Department of Planning and Investment on issues related to: compliance between project objectives and the master plan for socio-economic development of the province; and financial and social factors of the project, under the Domestic Investment Encouragement Law and Foreign Investment Law.
ii) Department of Construction (at the provincial level) or Department of Urban Planning and Architecture (in cities under the central Government) on issues related to compliance between the project construction work and the area or urban construction master plan, and issuance of a certificate of construction planning compliance, as provided in Construction Law.
iii) Department of Science and Technology on issues related to technology, expertise and patents utilized in investment projects.

There is no Article in the draft decree guiding the implementation of the Land Law in coordinating this type of liaison activity. Without a clear mechanism for coordination between different departments, most of the companies interviewed doubted whether this 'one-stop' policy could be practically implemented.

Recommendations

Almost all enterprises with experience in asking for land allocation or leases for their investment projects had doubts about the feasibility of the proposed procedures for land allocation or leasing as outlined in the draft Decree. Firstly, under current conditions, land is set as a high priority by the local authority, with a system spanning numerous relevant line agencies:

i) Construction or Urban planning management agency (issues relating to planning and architecture).
ii) Planning and Investment agency (master plan on sectoral and regional development).
iii) People's Committee of districts and provinces (master plan on land compensation and cite clearance).

City and Provincial People's Committees will only make decisions on land allocation after consulting pertinent departments. DONRE alone is not competent enough to allocate land to investment projects.

Secondly, there is no article in the draft Decree regulating the participation or cooperation of DONRE and other line agencies in the land allocation procedure for enterprises' investment projects. While participation of other line agencies is indispensable, the draft Decree does not contain any regulations on this issue. As a consequence, businesses may have to carry out many 'unofficial' activities, in order to get support from these line agencies, because there is no clear regulation on this matter. This will in turn cause time-consuming and costly problems for businesses during the process of land allocation or lease. The consultant team values the proposed 'one-stop' approach, and shortened procedures for land use applications, with a clearly defined time limit. However, in order to make this procedure feasible, we suggest including the following points in the Decree:

i) Extension of the timeframe for project appraisal (as normally it takes one to two months to complete the process for each type of project).
ii) Extension of time for DONRE to contact relevant agencies (such as the Department of Transportation and Public Utility, Department of Construction, the People's Committee at province and commune level) in order to agree upon conditions with these agencies.

The total time needed for appraisal and approval may reach five to six months. Whatever timeframe is set, it must be clearly set out in all procedures.

Apart from issuing the certificate of LUR for businesses, DONRE should provide a set of land allocation documents, including:

i) an agreement in principle from the District or Commune People's Committee on the objective, scope and contents of the investment project and DONRE's decision;
ii) an approval document from the Department of Construction on the construction work depicted in the feasibility study for the investment project;

iii) an approval document from the Department of Transport and public utilities for electricity and water supply, to assure provision of the necessary infrastructure necessary for the business's activities on the land; and

iv) requirements and conditions for the business when using land.

Compensation

Site clearance

Under the draft decree guiding the implementation of the new Land Law, the site clearance for investment projects by businesses shall be the responsibility of the:

i) Agency for Development of Land Fund at the provincial level (Article 10), for site clearance for public purposes; and

ii) District People's Committee (Article 89) for site clearance for investment projects by businesses.

In the draft decree, only Clause 8 of Article 118 stipulates the responsibility of the District People's Committee in carrying out site clearance. All the business people surveyed, and those who had experienced the land application process, lamented that site clearance was usually the most time-consuming and difficult step in this type of land acquisition. As noted earlier, it will probably be more difficult for businesses to mobilize the full support of district authorities because the draft decree does not involve the latter in certain elements of the land application appraisal and approval process. This is principally because an administrative authority will not normally give its support in the implementation of a decision if they were consulted during the decision-making process. In other words, it is very possible that district authorities will not help with site clearance if they do not have a voice in the appraisal of the land application. If so, this will force businesses to contact the district authority in unofficial ways during the application for LUR.

Case study 3: YS[5] Joint Stock Company

Three years ago, YS Joint Stock Company, specializing in wooden furniture production, applied for a land plot of 12,000 square meters in An Khanh district, Ha Tay province, in order to engage in a business cooperation contract with a Japanese partner. The company had to pay, in full, land payment and compensation to local people, with a total value of 800 million VND. Unfortunately, because the cooperation of the district authority was so poor, the site clearance could not be completed. The company had still not received the land 24 months after the date of the land allocation decision. In order to meet its commitments to the foreign partner, the company has been forced to move to a temporary location in Hung Yen province, while waiting for the land in Ha Tay. So far, there is still no sign of attaining the land, and the money paid is 'deep into water', said the company's managing director.

[5] Some companies interviewed requested that we did not cite their actual name in the report.

Land price and compensation

According to Article 56 of the new Land Law, the land price frames must be close to the actual transfer (or market) prices:

i) Land prices prescribed by the Government are equal to 75% of actual prices.
ii) Land prices prescribed by the provincial or municipal People's Committees may be applied, with up to a 20% variation according to differences in local conditions.
iii) Land price frames prescribed by the provincial or municipal People's Committees will be adjusted annually, and publicized in January each year.

Case study 4: US$ 50 for a Square Meter of Land

CH Limited Company is a private company specializing in mechanical mold production and plastic products. They are applying to lease land for their new investment project in an IZ for SMEs in the Thanh Tri district of Ha Noi. In all, the company intends to invest US$ 800,000 in this project. Based on a primary estimation, the expense for each square meter in this IZ would be around US$20, and this is regarded as an appropriate 'price' for the company partner. However, both the time and expenses required for the land application have exceeded the company's expectations. For official and unofficial expenses, the company has paid US$50 per square meter. Consequently 10,000 square meters of the ground for the new investment project cost US$500,000, accounting for more than 60% of the investment capital of the project.

Many business people interviewed were confused about the mechanisms for the land price framework, and the time for adjusting this frame. In their opinion, the market price should be changed monthly, so they wonder how this frame will be adjusted on an annual basis, yet match the price fluctuations on the real estate market. In addition, it will be a potentially dangerous precedence if the new Land Law and draft decree fixes the land price frame to the real estate market. The value of land use rights in Viet Nam, especially for urban areas, has reached high levels, and may continue to escalate without the interference of the State through the use of the land price frame.

Responsibilities of the State in assuring the rights of businesses

The granting of land rights itself cannot guarantee the effectiveness and successful implementation of an investment project. An investment project also needs the legal protection inferred by LUR in order to deal with difficulties arising from the violation of LUR by other persons or organizations during legitimate land use.

Basic infrastructure is another clear need, and an area that causes many problems for enterprises. Problems arise when there is no application procedures or agreement for usage of public services when businesses lease land outside industrial zones, particularly in regard to the lack of coordination between relevant state organizations, such as the power supplier, Post Office, People's Committee, etc. Even when a business has received a LUR certificate, there is still a long way to go before the business can actually put the land in to use. In any cases of negotiating land use, businesses often having to spend a lot of time and expenses on public services, of which the most difficult issues may include: road connections and access to nearby national road for transportation purposes; electricity and water supply for manufacturing; and access to public waste treatment and water sewage.

In the FGDs and interviews, the guarantee of supplying infrastructure services was recognized as one of the most troublesome issues. It is essential to define the responsibilities of the Government authority (as lessor or assignor of land) to businesses (the lessees or assignees of land) to ensure necessary infrastructure services, so that firms may utilize their land usage rights effectively. However, in practice, this issue is commonly considered to be the responsibility of businesses. Indeed, businesses have to apply to the relevant parties for the provision of basic infrastructure services to their investment projects. These primarily consist of the services identified in Table 3.

Table 3: Type of infrastructure services and suppliers

No	Agency	Type of infrastructure services
1	Dept. of Transportation and Public Utility; Department of Road Transportation	Connection between the project site and national roads Connection between the project site and public drainage system
2	Local Electricity Branch	Electricity supply
3	Post Office	Telecommunication

In fact, the indifference of Government authorities on issues related to basic infrastructure services has created many difficulties for businesses and resulted in bottlenecks in project implementation on allocated land, even though businesses have paid in full for all of the expenses and fees for LUR. Such difficulties have not been duly resolved under the draft decree guiding the implementation of the new Land Law.

Case study 5: Access to national highway

HB Joint Stock Company has leased a land plot of 10 hectares in Hai Phong for its garment workshop. The company has finished all the procedures related to site clearance and issuance of the land use certificate, and was preparing for a ground-breaking ceremony for the new garment workshop that will employ 2,000 workers. However, an unexpected problem has arisen. The company cannot get a license from the Department of Road Transportation (Ministry of Transportation) to open a gate connecting the workshop and National Highway No. 10 (the only available road in the area). For some time now, the company has asked the Hai Phong authorities to assist them in addressing this problem, but there has been no reply so far. It has been six months, and the new equipment for the new production lines is in a warehouse, awaiting a decision from the Department of Road Transportation.

Recommendations

The draft Decree should be supplemented with an Article clearly stipulating the responsibilities of the relevant authorities to businesses on the provision of basic infrastructure services. Those Articles need to clarify the following:

i) The right to access basic infrastructure services, as a legitimate right by business organizations. Accordingly, this is the responsibility of Government authorities, once they decide to allocate or lease land to business organizations.
ii) Detailed responsibilities of State agencies in charge of allocating or leasing land to

businesses to adopt policies, administrative procedures and legal regulations in order to provide basic infrastructure services to businesses after land has been allocated or leased.

iii) The principles, procedures and guidance for businesses to exercise their rights in this regard.

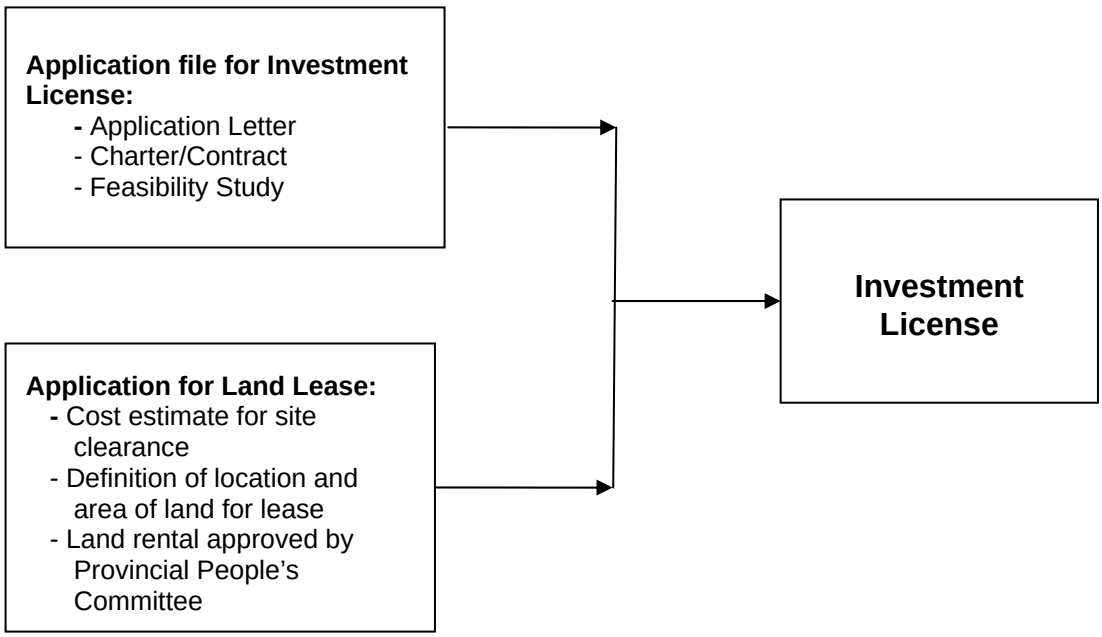
Inconsistencies with other laws

It is recognized that some of the regulations on land usage are in conflict with several prevailing laws regulating specialized subjects.

Conflict with the Law on Foreign Investment

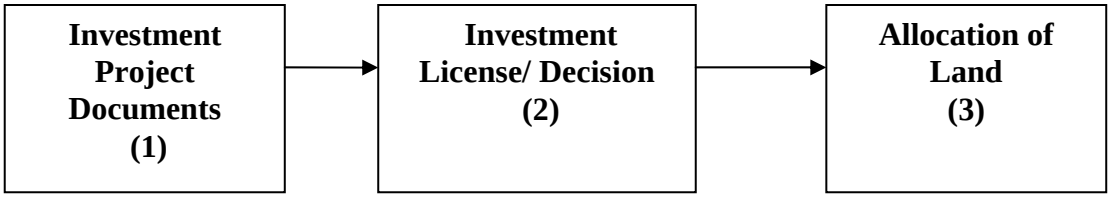
Article 89 of Decree 24, guiding implementation of the Law on Foreign Investment, requests that foreign investors prepare an Application File for land lease in parallel with the application for an Investment License (see Figure 5, below).

Figure 5: Application for land and Investment Licenses



It can be understood that the Application for Land Lease by a foreign investor will be appraised and approved at the same time as the Investment License is appraised and approved. Yet Article 88 of the draft decree guiding the implementation of the Land Law provides for a different order of project appraisal, whereby the allocation decision is made only once the project has been approved and the Investment License has been issued (see Figure 6).

Figure 6: Order of implementation



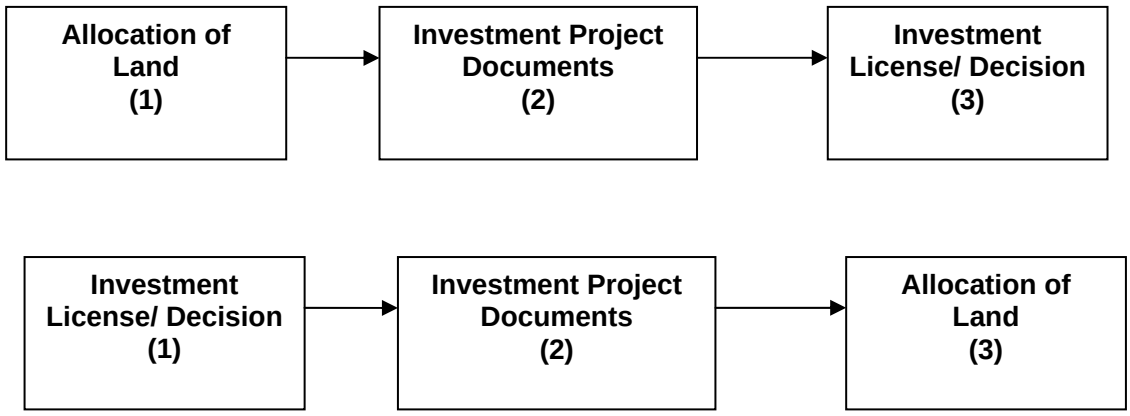
Conflict with Construction Law

For all investment projects entailing construction work, the investor should prepare the Investment Project documents for appraisal and approval by the investment authority (under Article 35 of the Construction Law). Pursuant to Article 37 of the Construction Law, the Investment Project documents should consist of:

i) explanatory information on the project (economic and social impact, technology, environment, financial effectiveness, etc); and
ii) basic designs for the construction work.

As a matter of course, the investor will be not able to prepare the Investment Project documents for approval and licensing without the land being available for the project. The implementation process of an investment project under the Construction Law could be depicted as in Figure 7.

Figure 7: Differences in Implementation Under Draft Decree and Construction Law



The Land Law and draft Decree guiding its implementation has effectively reversed the order for implementing this process. Article 122 of the Land Law and Article 86 of the draft decree request that the Application File for land allocation include the following documents:

i) An application letter.
ii) Investment License or Investment Decision.
iii) Investment Project Document.

It therefore can be interpreted that investors should have the investment project licensed prior to applying for land allocation. Yet this sequencing is in conflict with the newly adopted Construction Law.

Chapter 5: Conclusion and Recommendations

The recommendations of this research project and report are based on: i) a desk study; ii) comments and recommendations by businesses at FGDs; iii) in-depth interviews with businesses; and iv) the consultant's own judgments. The research team also took into account the following:

(i) All the recommendations regarding the draft decree should conform to the new Land Law. In other words, the recommendations should focus on clarifying and finalizing the stipulations of the Law, instead of proposing changes to the Law. During the desk study, and particularly during the FGDs and interviews, it was realized that a number of points in the Law itself are inappropriate and need to be changed, at least from the viewpoint of businesses. However, the consultants did not include these recommendations in this report, as these will be more proper when the Law itself is under review.

(ii) The consultants tried to reflect the opinions and expectations of businesses in the preparation of these recommendations, but in selected ways. Not every comment from businesses is well-grounded or appropriate, as sometimes these stem from businesses' own interests and do not represent the opinion of the majority.

With the above in mind, the report provides the following recommendations, which the author's hope will be taken into consideration during the finalization of the draft decree. These recommendations correspond to the three clusters of focus issues addressed in the study, and are as follows:

1. There needs be more detailed guidelines on the application file for LUR. The application file sample, as provided in the current draft decree, is poorly-specified, and therefore i) gives insufficient basis for government authorities to properly appraise applications; and (ii) takes away the opportunity for businesses to prove their capacity and eligibility for being granted land-use rights. This leaves a 'loop-hole' in the procedures, providing an opportunity for some officials to take advantage of the approval process.
2. The impending decree should be more specific about the requirements to be met by businesses applying for LUR. These include requirements regarding capital, technology, organizational capacity, social and environmental aspects, etc. There should also be a list of supporting documents that businesses are required to submit in the application file, to prove their eligibility. This point is of particular importance to ensure transparency in the approval process.
3. The time limit for assessing the application file and granting land-use rights (45 days in the draft decree) should be reviewed. In the opinion of businesses, this period is not long enough when one considers the amount of administrative and technical procedures. It is recommended that the duration needed to fulfill every step of the application process should be reviewed and, based on this review, the time limit should be revised.
4. The draft decree should not only set a specific time limit for various activities and stages in the decision-making process, but should also state the required time within which site clearance and compensation must be finished, from the date of granting land-use rights to a company. While this is always a complicated and time-consuming issue, if the decree sets out a time limit for site clearance and compensation, this will certainly be a positive move to oblige local authorities to be more responsible and committed.

5. While the draft decree makes a very positive step forward by stipulating a ‘one-stop-shop’ framework in granting land-use rights, the approval process still requires a lot of work and costs, for both government authorities and businesses. Again, to enhance transparency and avoid any possible delay and harassment, there should be a concrete stipulation that clearly demarcates the responsibilities for both sides, in terms of workload and costs.
6. The draft decree should be supplemented with stipulations that help ensure businesses’ effective use of their land-use rights. In many cases, businesses cannot make use of their rights, in the absence of supporting conditions, such as an access road to the land lot, the provision of infrastructure, electricity and water supplies, etc. It is therefore suggested that the Decree should set out the requirement for local authorities in order to ensure the availability of these conditions, or commit to providing them, when granting land-use rights.
7. The revised law and the draft decree, whist making a leap forward by appointing one focal point (i.e. DONRE) in the application screening and consultation process, should go further by making concrete: (i) the coordinating procedure and principles between DONRE and other key relevant agencies; and (ii) the authority DONRE has in coordinating with these agencies.
8. Last but not least, it is strongly recommended that a review of related legislation (including laws and sub-laws) should be made, so that revisions can be made, where necessary, to the draft decree, in a bid to ensure that it is consistent with the existing legal regime. Major pieces of legislation to be reviewed would include those on domestic investment promotion, foreign investment and construction.

Appendix 1 - Comments from organizers, participants and other interested parties

Focus Group Discussions

The Hanoi School of Business (HSB), in cooperation with and through the sponsorship of the Viet Nam Competitive Initiative (VNCI), organized four focus group discussions (FGDs) held in Ha Noi, Hai Phong, Ho Chi Minh City (HCMC) and Dong Nai province. The discussions were held to explore constraints and difficulties regarding Land Use Rights (LUR) for businesses.

The first FGD was held on July 14, 2004 at the Hanoi School of Business, 144 Xuan Thuy, Cau Giay, Hanoi. The discussion was co-chaired by Madame Pham Chi Lan from the Prime Minister's Research Commission, Mr Truong Gia Binh, Dean of HSB and Chairman of the Viet Nam Young Business Association, and Mr Han Manh Tien, Director of the Consulting and Research Company for Technology Transfer and Investment (Concetti). Twenty people from a variety of businesses enthusiastically participated in the discussion, and voiced their concerns about procedures that are too simple, the low feasibility of land-allocating site-maps, transparency of land information and other issues arising from stipulations in the Draft Decree guiding the amended Land Law of 2003.

The second FGD took place on July 16, 2004 at the Tray Hotel, 43 Lach Tray, Hai Phong. Under the co-chairmanship of Madame Pham Chi Lan, Mr Han Manh Tien and Mr Dao Toan, Chairman of the Hai Phong Young Business Association, the discussion attracted nearly 30 businessmen and researchers who actively commented on the Draft Decree. The decree provides guidelines for implementing the 2003 Land Law. The comments focused on land pricing and site-clearance constraints that businesses must deal with in their daily practices.

On July 21, 2004 the third FGD was organized at the Rex Hotel, 141 Nguyen Hue Street, District 1, HCMC. Madame Pham Chi Lan and Mr Han Manh Tien were this time joined in their co-chairing duties by Mr Nguyen Duc Dien, Vice Chairman of the HCMC Young Business Association and Mr Ha Nguyen, a representative of HSB. Twenty-two people from the business and law sectors joined the discussion, and commented on the difficulties and obstacles their enterprises are facing in application procedures for land allocation and land use, site clearance and land planning.

The FGD in Dong Nai was held on July 22, 2004 at the Dong Nai Hotel, 57 Highway No 15, Bien Hoa City. It was chaired by Madame Pham Chi Lan, Ms Vu Thu Hang (Vice Director of the VCCI HCMC branch), Mr Han Manh Tien and Mr Ha Nguyen. Over 30 people attended, representing different kinds of businesses but sharing common concerns about land allocation, site clearance and compensation, and land pricing.

Problems in executing LUR by enterprises were reflected via the FGDs as follows:

Application procedures for land allocation and lease

Enterprises in Hanoi and Hai Phong were concerned about procedures that are too simple, and which might result in a non-healthy business environment. Consequently, corruption and land

speculation are likely to increase. In addition, landowners might not be real investors, while new firms wanting to invest do not have enough strong connections in order to apply for land. The Director of a Hai Phong-based limited liability firm proposed a mechanism for appraising land use purposes to avoid over-allocation and speculation of land.

Enterprises in Hanoi were of the opinion that the feasibility of the site-maps for allocated land was low because the boundaries of the land lots are, in fact, different in comparison to the boundaries described on paper.

According to a representative of a business support service company in Hanoi, the new procedures do not include decisions on temporary land allocation, so it therefore becomes impossible to establish site clearing councils, resulting in difficulties for enterprises. The Decree does not mention any criteria for (i) appraising the projects to which the land application applies; (ii) instructions for claims submissions; and (iii) the basis for approvals and rejections. Enterprises in Hanoi were also in doubt about the ability of those at commune level to appraise projects, when even those at provincial level had never participated in this kind of activity.

Recommendations made by the Hanoi business circle are to:

(i) establish or appoint an organization who aim is to protect enterprise benefits and facilitate their participation in the preparation of site maps;

(ii) stipulate clear criteria for appraising an enterprise's land use project;

(iii) standardize the capabilities of the project assessment system and that of officers involved in this process; and

(iv) implement a one-stop shop/one-door policy, or appoint just one authority to handle land application files for enterprises.

The Director of a shareholding company in Hai Phong commented that the new Decree stipulates the time limit for local authorities to issue responses but does not do the same for other related bodies such as ministries and departments. The representative of another firm in this locality commented on the requirement to include detailed resettlement plans. This might create difficulties for, and require more expenses from, enterprises. The fact is that enterprises cannot work out specific resettlement plans without a land allocation, or at least master plans for land use.

In Dong Nai, concerning the requirement for appraisals by the Department of Natural Resources and Environment (DONRE) for projects that do not use the State Budget and without foreign investment, an official from the Dong Nai Industrial Park Authority raised a question about the rationale for this stipulation, and the specific criteria for appraisement. He also wondered if there were any provisions for land re-lease applications for industrial zones because he only found stipulations on this for high-tech parks and economic zones.

According to firms in HCMC, the Decree did not stipulate any sanctions for State agencies in case they failed to reply to land applicants in time. They added that the introduction of sites to investors should not be regarded as the right of the DONRE. It should be their obligation to introduce sites to outside investors. A lawyer in HCMC commented that the Decree did not

stipulate any time limit for people's committees from provinces or cities under the central government to approve a project's sites. The advisable duration might vary depending on each locality, but should be not more than 20 days.

Land planning

Enterprises in all four localities shared the same complaint that the land plans were regularly changed without notifying enterprises in advance, let alone consulting them. This has had huge impacts on businesses in several cases.

The representative of a business group in Hai Phong believes that it is not appropriate to allocate the task of land use planning to the commune people's committees because officials at the commune level were not capable enough to complete such a task. He recommended that the provincial and municipal levels should be the lowest level of authority that is entitled to allocate land. Land plans should be made known publicly.

Like their partners in Hanoi, the business circle in HCMC emphasized the necessity of land information transparency. The representative of a construction, service and trading company in HCMC was of the opinion that land use plans were not consistent at commune, district and provincial levels. Moreover, it was not logical if the planned duration of a land lot was shorter than the length of land allocation or lease. All over the country, land planning activity is too stagnant. In many cases, although the land clearing activity had been completed, it was not easy to select a site for a project.

In order to overcome these problems, the Decree should:

- force competent authority to allow investors to access detailed plans and organize site visits;

- unify the plans of different levels by determining the general planning body, forcing provinces and cities to follow the general plan, forcing districts to follow the plans of provinces and cities, and establishing detailed plans for communes; and

- supplement provisions on compensation for enterprises when the plans are changed.

Pricing of land

Representatives of Hanoi firms shared the opinion that land was priced without using specific criteria or a specific basis. There is no pricing council or instrument to protect enterprises when they are in danger. There is no organization to protect them when their assets are priced. The recommendation is to appoint an organization for pricing land. Staff of this organization should be trained, certified and qualified.

Enterprises in Hanoi, Hai Phong and Dong Nai thought the 'k' co-efficiency was not exact as it was determined completely by the feelings of the evaluators. Under the Decree, 'k' represented the profitability of land and the status of infrastructure. Based on this definition, 'k' might vary from time to time within the same land lot. If firms did not agree with the value of 'k' that was applied, they could react by submitting petitions, but they were never considered on the correct side in such petitions. Tax authorities were always judged to be right. In order to determine the 'k' co-efficiency more exactly, it was recommended by a firm

in Dong Nai that the frame of land prices should be adjusted periodically (for example, annually).

Regarding compensation for landowners when the land is mobilized for projects, a floor tiles manufacturer in Dong Nai recommended that criteria for calculating the compensation price should be in accordance with the capabilities of enterprises. The Decree stipulates that the compensation price will be re-announced annually equivalent to the market price. But the point is that it has not been determined on which basis the market price will be decided upon, which process will be used and by whose authority it will be judged. He also recommended disregarding the fluctuation of land prices for long-term projects as they were the catalyst for the increase of land prices. The frame for land prices at the beginning of a project should be applied so that investors did not have to run after the inhabitants for years when they refused to receive compensation money until the new frame for land price was issued.

Concerning the compensation council, enterprises in Dong Nai recommended that the Decree should take into account cases where the compensation council has lengthened the duration of compensation and site clearing intentionally to rent-seek for their own benefit. Project approval councils should be established with the participation of various sectors to increase the accuracy of decisions on land allocation, compensation and site clearing.

Also, according to the business circle in Dong Nai, it was a big burden for investors if, in addition to compensating for land according to the general price frame, they were still required to compensate for all attached assets. It was advisable to separate these two issues.

In the opinion of the representative of a HCMC private enterprise, land was priced too low compared with the market price for mortgage transactions. Banks only applied the rent for agricultural land for pricing. .

Also regarding the pricing of land and mortgage of LUR, businesses in Hai Phong recommended pricing land through auctions in combination with publicizing land plans. This would help in accessing bank loans through the mortgaging of their LUR at more realistic prices. Provincial people's committees could also use the results of those auctions to formulate a general price frame for land in wider areas.

Site clearing

Many problems arose in site clearing procedures. According to the representative of a business support service company in Hanoi, in many cases, inhabitants had already received compensation money but still refused to sign the enterprise’s site clearing agreement, or refused to receive compensation money under the present price frame because they believed they could receive a higher level of compensation under the new Decree. They did not think that their land was simply agricultural land and therefore believed that they had the opportunity to apply for a conversion of their land type. As a result, site clearing for enterprises becomes suspended.

A firm in Hai Phong reflected a similar problem to that of Hanoi. Interest on bank loans was still imposed on enterprises even when they could not take up the land for their projects. Inhabitants wanted to be compensated under the new Decree. They even believed it to be a sure result when they requested high compensation because, in their opinion, enterprises would make a lot of profit on their land. Moreover, the input costs of enterprises also

increased as a result of the support they were required to give to the localities. Too many authorities were involved in site clearing, but none of them took on the main responsibility. Enterprises had to knock on many doors (Cadastral Department, Department of Construction, Planning Institute, Viet Nam Road Administration and Municipal People's Committees) but still failed to obtain land. Recommendations for settling these problems were as follows:

- The implementation of the Amended Land Law issued in 2003 should be stopped.
- Public media should support enterprises by disseminating the necessary explanations to the public so that they do not create difficulties for enterprises in the site clearing process.
- Compensation should only be applied to land allocated before planning.
- The compensation value should be determined based on the land tenures' contributions to the State.
- Land rent should be increased and regarded as a contribution by enterprises to the land lease.
- Intermediary organs specializing in site clearing should be established.

An enterprise in HCMC stated another problem. From his point of view, it was not a good solution to entrust the responsibility of site clearance to district authorities because they did not have enough power to complete this task. Also, from the point of view of the business circle, but reflecting the side of enterprises when they are land losers rather than investors, businesses often have to suffer from more losses than inhabitants when their land is taken back. Therefore, the State should pay satisfactory compensation money to, and create favorable conditions for, enterprises to obtain new land to ensure their continuous operation.

A famous producer of seasoning in Dong Nai complained that the Decree did not stipulate the maximum duration for site clearing. He recommended supplementing a provision on maximum duration for site clearing for each type of project.

Land allocation

According to a firm in Dong Nai, the Decree should provide a stipulation on administrative sanctions for authorities when they did not comply with the time limits for land allocation and lease. In terms of land allocation procedures, the Decree did not address how to manage the project implementation by the lessees of land. Therefore, the Decree should publicly make known the ways in which it will manage these issues before their projects are put into operation.

Land recovery

Stipulations on land recovery did not mention cases where enterprises paid land rent annually but leased attached assets for longer payment periods. A Hanoi based enterprise wondered whether they had breached the law when they registered for a land lease business with an annual land rent payment method but then re-leased assets for payment periods for a couple of

years. They also wondered about the ways in which this problem could be settled. The recommendation here was to pay the land rent every couple of years instead of every year.

Firms in HCMC added more to the discussion. The Decree entitled provincial/municipal people's committees to take back land if it was not used for business, or was used for purposes other than that for which it was originally applied. However, big investment projects, for which the capital mobilization and implementation can take many years, cannot use the allocated land for its applied purpose straight away, within the first one or two years. The business development manager of a joint venture proposed that the line of business and the scale of the project should be taken into consideration in these cases. For such projects, investors should be allowed to implement short-term investments in the first two or three years, and then shift to longer-term investments. For example, instead of leaving the land unused, investors might turn it into a car parking place for rent.

Other issues

- *Issuance of certificates of LUR*: In Dong Nai, there was a question of what was the difference between granting and delivering LUR certificates.

- *Re-leasing land in industrial zones*: Also in Dong Nai, a company wondered whether it had to satisfy any requirements to re-lease its land in an industrial zone.

- *Settlement of disputes*: Hanoi business representatives recommended that the decentralization of land management should be at a limited level of authority. Disputes or conflicts should be settled at relevant levels, not always submitted to higher levels. The implementation of legal regulations, that are planned to be issued soon, should be postponed.

Dr. Pham Duy Nghia (Faculty of Law, Hanoi National University)

Rationale of the Study

Since 01 July 2004, when the Land Law was enacted and took effect, it has become urgent, if not even too late, to issue implementing regulations. Land represents a valuable asset that requires an effective utilization. In fact, how to ensure an appropriate and optimal allocation and utilization of land also poses a serious challenge to poor countries.

During the preparation of implementing regulations of this key legislation, extensive consultations with the business community are of special importance since it is businessmen who create employment opportunities and decide the efficiency of land utilization, at present and in the future.

Against that background, the joint research by HSB and Concetti deserves high commendation, particularly in gathering and representing business views in relation to the grant and lease of land to business users.

Methodologies

The research team has completed a study report of nearly 30 pages and accompanying appendixes that represent the results and findings of a thorough and well-conducted study following suitable methodologies. I highly appreciate the ways in which different views from the business community were gathered, seminars held, and SWOT was undertaken that were all aimed at identifying the weaknesses of the existing regulations on the grant and lease of land.

Recommendations are well-reasoned and are of a highly consultative value that should be taken into consideration even in the future preparation of implementing regulations.

Key findings

The Report focuses on assessing the current practices of granting and leasing land before and after the passage of the 2003 Land Law. Assessments and observations are made on the basis of relevant legal provisions, survey of practices and conclusions drawn in respect of each specific issues such as: (i) land grant and land lease procedures; (ii) compensation for site clearance; and (iii) authority of State agencies, particularly provincial DONREs, and local people's councils.

The Report also provides an in-depth analysis of the existing provisions in relation to other branches of law, particularly land use planning, investment promotion and protection, and safeguarding legitimate interests of land users from violations by a third party.

The Report highlights the impractical provisions of the Draft Decree providing guidance on the implementation of the Land Law, in particular: (i) poorly regulated application documents for land grants or land leases that result in arbitrary treatment of the regulators in handling the applications; (ii) ill-defined conditions for land lease or land allocation; and (iii) lack of clarity in determining the co-operation between relevant authorities.

Value of recommendations

As the Decree providing guidance on the implementation of the Land Law has been promulgated, recommendations that are stated in the Report may serve as a warning of possible defects of a piece of legislation, the enforcement of which may not reduce social injustices but even worsen them. The true warning value of these recommendations mostly pertains to the imminent danger that private enterprises are facing if land policies are to be implemented. In this spirit, the Study represents an important and practical contribution to the enforcement of the Land Law and its implementing regulations.

Workshops on the Land Law that were held by the research team also helped to disseminate the study findings, gathering opinions and inputs from the business community and scholars in hope that these voices would have a sustaining effect in the planning and implementing of land policies.

Overall comments

Generally, the study jointly conducted by HSB and Concetti is, in my view, of significant practical value.

If conditions permit, I do hope the individuals and organizations concerned are able to revise and disseminate the research findings in the public interest.

Ha Noi, 2 November, 2004
Pham Duy Nghia

Nguyen Gia Hao (Director, Ha Minh Investment and Business Consulting Company)

First of all, thank you to the organizing committee of the Land Law Workshop (held at the Ha Noi Horison Hotel on 21 October, 2004) for the opportunity to attend and speak. Due to time constraints, I could not make a full presentation of my comments. At the request of Dr David Ray, Deputy Director of VNCI, I hereby submit my comments as follows:

Land represents an important issue that concerns every individual. A Vietnamese proverbs states: 'When a person is alive, he lives in his own house. When a person dies, he is buried in a separate grave', or 'Each inch of land has an equal value of a tael of gold'. A strong interest in this matter is also evidenced by the overwhelming number of participants at the workshop, a number that is much higher than the organizers' expectations. (Usually, the actual number of attendees accounts for only 50-60% of the total number of invitations sent. In this workshop, the attendance rate may be as high as 90%).

Although, oral presentations on the survey findings by speakers are not sufficiently coherent, the written report covers numerous land problems faced by businesses. In addition to comments that have been raised in the workshop, I would like to make the following supplementary comments.

Land represents a natural resource and a national property. The land itself cannot grow; its utilization is very dependent on human utilization so that the environment may be protected and ecology is preserved for sustainable development**.** In particular, productivity should be sustainably enhanced in line with further improvements to the people's living standards.

To businesses, land is seen as a production input that constitutes part of the goods value. In an effort to achieve market optimization, the success of a business depends greatly on its selected place of business. Consequently, modern marketing gives a special emphasis on location: location, location and location.

Therefore, the land alone (in economic terms, land is understood to consist also of other resources that are inherent on the land surface or beneath the land) has both value and usage**.** As a result, land meets two pre-conditions to be a commodity, and hence land should be treated by individuals and businesses in the same ways as other types of goods. In fact, despite the fact that the full ownership is yet to be legally recognized and the right to disposal is yet to be sufficient, the so-called 'LUR' has so far been transacted as other types of goods to secure against possible risks . Under the newly adopted Land Law, 'the right to use' may be transferred at market price and that is seen as an encouraging sign.

However, unlike other kinds of goods, land is becoming more and more scarce. The supply is limited while demand is proven unlimited in response to the growing needs for business expansion and residential housing etc. Land is also different from other goods in that it is impossible to be shifted.

From these fundamental starting points, it becomes obvious that the land in Vietnam is (i) both redundant and insufficient; (ii) being wasted; (iii) a source of superprofits and a fertile soil for widespread corruption due to ambiguous regulations and a lack of transparency; and (iv) the root cause of social instability that is ultimately damaging to the State.

(i) *Redundancy and insufficiency*: Such a redundancy may be evidenced by the fact that both the central Government and local authorities are rushing to establish too many Industrial Zones (IZs) and undertaking development projects that require huge sums for compensation, and site clearance and leveling. As a result, investment capital is being thinly stretched instead of being concentrated on manufacturing, and social products could not grow at the pace people expect. Furthermore, many businesses, notably State Owned Enterprises (SOEs) which were previously granted huge land areas, have subleased part of their unused land. In some localities, this activity has even become a main source of income for the lessees. In response to such a practice, the Ministry of Finance recently issued new regulations requesting current lessees to refund to the State budget the difference in income that is generated from their illegal lease of State land. This is seen as a first step toward a full recovery of the unused land. By 2002, the Hanoi municipal government was estimated to recover up to 240,000 m^2 of land that has been granted but has not been used for its proper purpose.

Meanwhile, there is also a shortage of land. Thousands of new enterprises that were created under the Enterprise Law (i.e. after 1 January 2000) have an urgent need for land for production and business purposes. Even some profit-making SOEs that have an expansion plan also find it hard to access 'redundant' land areas, including those situated in abandoned IZs.

(ii) *Wasteful use of land*: As mentioned above, a significant area of agricultural land was recovered long in advance of finding sufficient number of potential domestic and foreign investors. However, due to difficulties in accessing land by businesses, and as a result of widely stretching investment capital, many IZs could not establish a complete infrastructure for production. This caused, and continues to cause, huge waste because of the loss of agricultural products that should have been harvested on the recovered land. In addition, some IZ developers who have injected significant but insufficient amounts of capital have to witness their properties left abandoned. These losses must also include the waste of living labor who have lost their cultivated land and been forced to migrate to urban areas, where they add to the increasingly high numbers of unemployed.

More dangerously, due to subjective misjudgments and careless planning, many projects that were erected in reclaimed land areas are proving to be economically ineffective; for example, factories were built far from the source of raw materials, fishing ports were constructed in places where the fish supply is in shortage, deep-sea water ports were built in localities where imports and exports were not available, and factories were created to manufacture products that are more expensive than the imports.

(iii) *Superprofits and corruption*: Due to a lack of transparency in the process from recovery to the grant of land, as well as because of different types of barriers that make it harder for enterprises and individuals to access land or residential houses, there is a huge gap between demand and supply that results in a significant difference between the compensation price and the selling price of LUR. Consequently, a superprofit may be generated in favor of those individuals who are entitled to make land or housing decisions. A variety of intermediaries also emerged in real estate development that caused a big loophole enabling widespread corruption and the inflation of land prices. As a result, production costs, including land rents or LUR values, were also on the rise and these are detrimental to the competitiveness of domestic manufacturers.

It is said that in Hanoi, apartments are sold off even before the apartment building is completed. The latter buyer has to pay a difference amounting to 20-30% of the initial price that was offered to the 'first' customer. Let's undertake a survey to determine what percentage of these 'first' customers have an actual need for residential housing. Enterprises also consider the land in IZs to be like a cake for which they can have a share. However, in obtaining a share of the cake, they have to follow too many formalities or even go through a maze of unwritten laws and hidden costs that tend to rise as the enterprises enter the final stages.

It should be noted that the superprofits from real estate development (i.e. land and houses) were not poured into the State budget to be reinvested in new and feasible projects to solve the social problems that the 'land losers' are faced with, but were misappropriated by private speculators and opportunists.

(iv) *Social instability*: Land-related problems are also partly blamed for recent social unrests. As discussed earlier, land is becoming a scare resource but is also used wastefully. Since land is a special commodity that generates superprofits, it is also a lucrative deal to be grabbed at any cost by a number of powerful officials and opportunists who have no actual needs for land or housing but were allowed to purchase LUR for speculative purposes. State agencies at all levels have proven incapable of resolving unemployment, or improving the living standards of land 'losers', many of whom have been left unemployed if not further impoverished, while others have promptly found their fortune on the soil the former has lost. It is inevitable that the dismays and disappointments of land losers are unavoidable and the poverty gap is widened. Such a reality is obviously contrary to the State objective of establishing a just and civilized society. If these economic disputes are not promptly or properly addressed by the State, and if these social problems are manipulated by reactionary elements, it is difficult to avoid social instability and other serious consequences. (Although, a survey of all types of social disputes is yet to be conducted, land-related disputes should, in my view, account for a large percentage).

In ensuring an effective implementation of the Land Law, and a better management of such a scarce and valuable natural resource, the following must be accomplished when allocating land to the right users to generate a greater wealth and useful services for a sustainable development:

The State must formulate a master plan for long-term and stable use, or at least indicate specific requirements for industrial expansion in each region so that the planned use of land must be longer than the duration of the land allocation. Under exceptional circumstances, enterprises are required, as a result of any changes in the master plan, to reallocate their facilities in other geographical areas. In this case, proper indemnification must be made in respect of the loss that is caused by such a reallocation and business interruption. This suggestion is made not with the view of raising the individual responsibilities of the planners, but instead of encouraging the affected land users to claim for compensation.

Allocation of land, and sales of LUR for residential land or houses, also requires a greater transparency and publicity. In doing so, a clearer bidding regulation is urgently needed. Some local authorities have issued their own rules to regulate the bidding of LUR. With the exception of purchasers of land for business and production purposes, the use of land allocated as a result of a bidding win for residential housing projects must be also subject to a public auction to make sure that people with actual needs could purchase houses and the State

could collect sufficient taxes. This is aimed at eliminating the [illegal] 'lobbying' practices that are widely reported in the sales of apartments, in which a considerable amount of difference and a superprofit from these estate transactions were not earned by the State as the legal owner but found their way into the pockets of some individuals or entities who were involved.

Two trends may be noticed in the procedures for allocation or sales of LUR to enterprises. On the one hand, there seem to be more cumbersome formalities to be completed and, on the other hand, enterprises are enabled to access land by much more simplified procedures. In my view, the problem does not entirely lie with paperwork or formalities but in how to ensure that the needy land is allocated to the right users without any interference of intermediaries or dishonest double dealers. Also, land should be put to effective use as soon as possible. Therefore, greater efforts must be given to furthering public administration reform, simplifying formalities**,** and strengthening post-checks by imposing strong sanctions. In this spirit, it may be a good idea to request that a security deposit be paid. If the land is not used by the time indicated, to generate more employment opportunities for the land loser, the deposit would be confiscated by the State and used for public purposes. At the same time, the allocated land would be recovered and granted to others at market prices, as may be prescribed by the Land Law.

Similarly, there must be more stringent sanctions in respect of IZ land that fails to be subleased to domestic or foreign investors. This would ensure that the relevant agencies would be more responsible for their evaluation and for the implementation of ineffective projects.

As mentioned above, due to its special importance, land cannot be handed over to a small number of incapable State agencies. From past experiences in the implementation of the Enterprise Law, the Land Law may also need an energetic and effective Task Force. In addition, all draft circulars or decrees, as well as the draft code, must involve extensive consultation with both regulators and land users, using the mass media and workshops.

Above are a number of comments I would like to make in addition to the oral comments I presented at the 21st October workshop. Thank you.

Hanoi, 28 October 2004
Nguyen Gia Hao

Dr Dang Duc Dam (Prime Minister's Research Commission)

Implementing Decrees of the 2003 Land Law and problems arising from enterprises' access to land resources for business purposes

Key legislation that is currently under review by the Government and which will provide further guidance on the implementation of the 2003 Land Law are the:

- Government Decree on the Implementation of the Land Law.
- Government Decree on Land Valuation and Price Framework for All Types of Land.
- Government Decree on Collection of Land Use Fee.
- Government Decree on Compensation, Support and Resettlement upon State Recovery of Land.

A variety of new policies and new solutions that are embodied in the 2003 Land Law are being institutionalized in the above draft decrees, and are expected to bring about significant impacts on actual land management and utilization. As the degrees are schedules to be enacted soon, this is the right time to obtain comments and recommendations from the public, business community and NGOs.

My discussion will focus on two issues that may be considered the 'hottest' in regard to enterprises accessing land for business purposes.

Distinguishing changes in land use purposes from the transfer of LUR

In principle, the State should only recover land for the purpose of national security or defense, or in the national or public interest, while users of land for economic development purposes must be allowed to mutually agree on transfers of land. Practices in recent years show that needy users can rarely access land for production and/or business that is already leased to domestic and foreign enterprises without the State recovering the land or completing the site clearance. This is particularly true in respect of land areas whose purpose of use has changed or vast land areas that are currently used by many entities or individuals.

Article 40 of the 2003 Land Law provides that: 'In respect of production or business projects that are in conformity with approved land use planning, investors may receive, transfer or hire LUR, and receive capital contributions in the form of LUR by other economic organizations, households or individuals, without any recovery of land'. This is a crucial provision that aims at facilitating and promoting the formation and development of the secondary real estate market. However, all transfers of LUR that take place at the same time and include a change of land use purpose must be subject to recovery, compensation for site clearance and re-lease to new users by the State. Under these circumstances, there should be no room for any mutual agreement between the current user and the potential user on the transfer of LUR.

Why? As the facts indicate, numerous problems have arisen from the lack of a clear distinction between transferring LUR and changing land use purposes. In many cases, these two processes have been combined into a single transaction only. The most popular and also most complicated transaction relates to the transfer of land from farmers to enterprises, together with a change of use from agricultural land to production/business sites. Such a dual change cannot ensure a clear distinction between the three key stakeholders of the State,

farmers and enterprises in term of rights and obligations, particularly those of a financial nature. Consequently, disputes seem to be inevitable; farmers feel they are mistreated since the compensation costs for recovery of the same piece of land are many times lower than the actual land price after the site clearance is completed[6]. In fact, the rising land prices do not result from land transfers but are attributed mainly to the change of land use purposes (i.e. from agricultural land to construction land) and the State has to collect a major share of this increase. That irony helps to explain the serious disputes over land prices in An Khanh Industrial Zone (Chuong My District, Ha Tay Province) as well as those reported in other localities. For example, recently the HCMC-based Phu My Hung Company became a 'hot spot' because it was accused of 'illegally subdividing land into smaller lots for the sale of thousands of house foundations' (*The Youth Newspaper*, 3 September 2004).

In addressing such a problem, the two following solutions are proposed:

(1) The State will first recover land, pay compensation for site clearance works and change the land use purpose before allocating or leasing the land sites to new users.

(2) In case where old users and new users may reach an agreement on the transfer of LUR, there must be a clear distinction between the two processes of the transfer of the LUR and the change of land use purpose. (From an academic perspective, these transactions should take place in two different markets. In particular, LUR transfers are expected to be carried out in the secondary market while changes of land use purposes must be confined to the primary market only).

The most contentious issue that relevant State agencies have to deal with is a severe shortage of funds for site clearance works. As a result, project owners are called on for financial assistance long before their expected involvement. Ironically, developers have to rent the same land area where they have just paid for site clearance costs!

On their part, enterprises' demands also sound reasonable in that the State acting as the lessor is obliged to make sure that the land is 'clean' and free from any disputes. Otherwise, the State should handle any problems that arise unexpectedly instead of 'abandoning' enterprises to deal with these problems on their own, as has been recently reported in some localities.

Compensation for site clearance

a) There are three (not two) poverty-stricken areas in Vietnam, namely:

- mountainous, remote and isolated areas;
- river islands; and
- people whose land is recovered by the State.

b) Comprehensive solutions are needed:

- Compensation at reasonable prices is only one side of the issue.

[6] According to figures released by the Hanoi Department of Land and Housing, in the newly developed Linh Dam Lake residential area, all related costs including site clearance compensation, infrastructure and payable taxes are well below VND 1 m/m2. However, after the investment is completed, over 20 hectares of land in this area have been subdivided into smaller lots of land to be sold at VND 12-17 m/m2. How could such superprofit, equivalent to 1 for 15, be generated? (Trade World, 4-10 May 2002, p. 3).

- More importantly, displaced people must be provided with better accommodation in the resettlement areas.
- Most importantly, resettlers (landless farmers, traders without a permanent place of business etc.) must be given employment opportunities. In practice, it has proven unworkable to require corporate land users to prioritize their employment from displaced households, since these potential employees could not meet the required qualifications.

For more detail, please see 'Employment concerns in urbanized areas', *Labour Newspaper*, 6 September, 2004.

Hanoi, October 2004
Dang Duc Dam

Bank for Industry and Development of Viet Nam (BIDV)

After studying the Land Law passed by the National Assembly on 26 November 2003 and a number of draft implementing decrees, and based on the experience of implementation of the Land Law from 1 July 2004, the BIDV would like to make some comments on obstacles and problems arising from the implementation of the Law from a banker's perspective.

Implementing regulations of the 2003 Land Law

Although the 2003 Land Law took effect from 1 July 2004, its implementing regulations are yet to be issued. Therefore from the business and banking perspectives, there is an urgent need to issue these implementing regulations as soon as possible.

Problems facing banks and enterprises in implementing the 2003 Land Law

Registration of mortgages over and guarantees by LUR

The required registration of secured transactions, when customers take out a mortgage with banks over their LUR, runs into serious difficulties since many local authorities fail or decline to perform such a statutory function. Therefore, the BIDV kindly requests further guidelines, or even the imposition of sanctions against those individuals or entities that intentionally harass banks and their customers in complying with the obligation to have their secured transactions registered.

Time limit for registration of mortgages over and guarantees by LUR

In accordance with Article 130, Clause 1, Paragraph b of the Land Law: 'Within five business days from the date on which the credit contracts are concluded, the mortgagor and/or the guaranteed party using LUR as collaterals must file an application for registration of their mortgage/guarantees'.

In fact, such a provision is extremely difficult to comply with and is hindering credit institutions in receiving LUR as collateral for their loans. Under the existing laws and regulations, credit institutions and customers may agree on taking collateral at any point of time as long as the principal remains unpaid, or until the parties may agree to add or replace collaterals. As a result, further guidance is needed to clear ways for an easier registration. Meanwhile, the Draft Decrees do have not any guidance on this matter. The time limit for registration of mortgages or guarantee contracts must be determined by the time when these contracts – not the credit contracts – are concluded (not including the time needed for notarization or authentication as required by the law).

Standard form for LUR mortgage or guarantee contracts

It is strongly requested not to issue a standard form for such a contract. Instead, implementing regulations should only provide for major terms and conditions of a contract so that credit institutions may draft and negotiate specific contracts. If anything is to be used it should be a pro-forma contract for reference purposes only, while the structure and specific clauses can be decided by the parties concerned.

Recommendations on effective implementation of the 2003 Land Law

LUR certificates

LUR certificates are a legal deed of title that empowers land users to exercise their statutory rights. The State and competent agencies that are mandated under the Law shall promptly issue LUR certificates to land users who meet all conditions as prescribed by the law. However, LUR certificates are issued at a snails-pace due to cumbersome administrative procedures. Although this has already been identified since the implementation of the 1993 Land Law, such a weakness is unlikely to be addressed despite the new and improved provisions of the 2003 Land Law. Many land users have to spend much time, energy and money to obtain their LUR certificate. This reality also slows the flow of land and property transactions, and hence adversely affects the operations of credit institutions.

Local people's committees, that are competent to issue LUR certificates, must publicize regulations, procedures, application documents and costs that are related to the issue of LUR certificates. Further elaboration of processes and responsible officials are also needed to monitor and identify individual responsibilities. All related information must be listed in the people's committee head office, so that land users may be aware of and strictly follow this information. However, the Ministry of Natural Resources and Environment (MONRE) must, in co-operation with ministries concerned, provide provincial committees with further guidance on the implementation of uniform and consistent rules.

Registration of real estate

Article 48.1 of the 2003 Land Law prescribes that: 'In cases where a property is attached to land, such a property must be stated in the LUR certificate; the owner of the property must register his/her ownership to the estate in accordance with real estate registration rules'. Under the existing regulations (i.e. Decree No.60/CP dated 5 July, 1993 on ownership and the right to use residential houses in urban areas), certificates of ownership may only be issued to residential houses in urban areas. Meanwhile, separate regulations governing the registration of real estate, or the issue of ownership registration certificates in respect of properties that are situated on land, are still absent. During the implementation of the Land Law and its implementing regulations, credit institutions often run into difficulties where it is unclear whether the ownership to mortgaged or guaranteed properties is required to be registered, or whether a registration of secured transactions, notarization or authentication is needed.

Therefore, the Ministry of Justice and the MONRE should provide for a list of properties that are subject to ownership registration and the issue of LUR certificates. They should ensure that procedures are in place and that there are competent officials available for such a registration. Any registration of real estate other than land must be undertaken in the Office of LUR Registrar that is affiliated to the provincial or district people's committees, to enable easy monitoring of any changes in LUR.

Benefits of credit institutions upon the State recovery of land that has been legally mortgaged or guaranteed

There may be a situation where the State recovers land that has been legally mortgaged or guaranteed with credit institutions. If the current land users are entitled to compensation for the recovered land and the attached properties, new regulations must be developed to secure the interests of credit institutions in respect of the sum compensated (i.e. substitute collateral).

This is to prevent possible avoidance of their obligations to the banks or misuse of the compensation by mortgagors or guaranteed party who have been compensated for the recovered land. If upon the maturity of a loan, the borrowers fail to fulfill their obligations, credit institutions will be put at risk because of the unavailability of the collateral.

In securing the legitimate interests of credit institutions, the State Bank of Vietnam and the MONRE must issue a joint regulation that promotes closer co-operation and sharing of information between LUR registrar offices and credit institutions. Under this scheme, for all registered mortgages or guarantees using LUR or the properties attached to land as collateral, if the mortgaged or guaranteed land is to be recovered, the registrar office will serve a prompt notice to the credit institutions. At the same time the office will divert the whole sum of compensation to the bank accounts of the mortgagors or guaranteed party that are opened at the credit institutions. After the customers and credit institutions reach a new agreement on another substitute security or another mode of repayment, such a sum will be repaid to the customers. The banks will then notify the registrar offices of such an effect.

Article 38 of the Land Law provides for circumstances where land may be recovered by the State including ineffective use of land or deliberate destruction of land by land users. However, in the absence of further interpretation of these terms, banks still accept mortgages or guarantees using LUR that are in danger of being recovered without any compensation (Article 43.1 of the 2003 Land Law). It is also unclear as to how to handle a case where, as a result of the customer's failure to repay their due debts, the banks have to dispose the collateral that is at the same time being recovered by a competent authority (subject to Clauses 3, 4 and 5 of Article 38 of the Land Law).

Under these circumstances, the banks have no choice but to observe land recovery decisions and waive their right to claim the debt repayment. They must consider these accidents as credit risks or take other measures to limit possible damages to the banks. It is therefore advisable for the State Bank and the MONRE to regulate this problem in such a way that gives banks top priority to continue the lease or to be allocated with the land at preferable prices, should they have a need to use the land for business and/or production purposes. This remedy is aimed at helping to reduce losses to the banks.

Mortgages and/or guarantees of properties that are attached to the leased land

Under the 2003 Land Law, users of leased land may take over mortgages or guarantee properties that are situated in the leased land with credit institutions. There remain two issues that require further guidance:

- The value of properties that are situated on the leased land must be determined in association with the commercial advantages the location of the land may bring about. The value of properties that are situated on the land and are attached with the right to lease land may then be higher than the true value of these properties. It should be made clear that leased land has no mortgaging value, but the association of the properties' value to the leased land should be taken into account when handling the properties. Such a requirement is needed to avoid a scenario where properties are dealt with independently from the right to lease land.

- Problems may also arise from the handling of collateral that is attached to the leased land. In case where customers fail to repay due debts, credit institutions are faced with

numerous difficulties in disposing of collateral. Firstly, it is impossible to split properties that are attached to land to be sold to a third party or to be handed over to credit institutions. Secondly, credit institutions must be given access to, and be allowed to continue, their land lease as a means to reduce their credit losses.

The BIDV also hereby requests further guidance on the valuation of LUR in the following special conditions, when the:

- valuation is carried out for mortgage purposes;
- LUR belongs to economic organizations that have been leased land by the State before 1 July 2004 and have made full payment of the rents or advanced payments for a number of years;
- remaining duration of the lease is at least five years; and
- land in question is located in areas where statutory land prices are many times higher than the rents.

In our view, the banks must be allowed to take into account the commercial advantages of the land location for valuation purpose in respect of land that is leased before 1 July 2004.

Above are the comments the BIDV wishes to contribute to the Seminar ”Implementing the Newly Amended Land Law: a Business Perspective”.

Hanoi, 20 October 2004
BIDV

Nguyen Minh Phu (Director, TransPacific Service Company Ltd)

Although my recommendations may not be properly considered by law makers or regulators, I would still like to kindly request the MONRE, assigned to draft the Government Decree on the Implementation of the Land Law, to add a new chapter titled 'Procedures and Time Frame for Site Clearance'. At present, site clearance emerges as the most contentious and 'hottest' problem. To address such a concern, the supplemented chapter should be structured into two sections: land with resettlement elements and land without resettlement elements.

The Government is also requested to authorize the Ministry of Finance to issue circulars that provide further guidance on the financial aspects of land transactions with a focus on (i) increasing land use fees; and (ii) lowering compensation for site clearance in order to generate more revenue to the State budget and increase business investment in technology renovation.

The Government should ensure that compensation for site clearance into land rents follows a one-door policy from site clearance to payment of land rents. This approach may produce multiple benefits such as:

- better recognition of the actual production costs enterprises must incur;
- guarantees that the one-door administration for land users fulfills their financial obligations;
- protects corporate land users;
- demonstrates and reaffirms State sovereignty over land resources; and
- secures social quality among land users.

Single-price schemes must be carried out to compensate for site clearance purposes in respect of agricultural, forestry and aquacultural land in different geographical areas.

Responsibilities and time limits for handing over 'clean' land by the provincial DONRE (being Party A in the land use agreement) must be specified to ensure equality. Otherwise, public administration reform will yield no significant results.

The MONRE must issue a standard form of land lease agreement and require all previously concluded contracts to be re-entered, subject to the new form, instead of allowing provincial DONREs to draft their own contracts which means that enterprises sign contracts in an unequal manner.

For example, a decision to recover agricultural land for lease to an enterprise may not specify which agencies are responsible and within which time limit 'clean' land must be handed over to the lessee. In addition, it is always the provincial DONRE, acting as Party A, that is empowered under the land lease agreement to impose sanctions or penalties on business entities as Party B, while Party A is not bound to any counter-sanctions.

Further studies should also be conducted in respect of prices at which farming plantations' land, that has been allocated to individual users for 50 years to plant perennial trees, may be compensated, since the current prices are proven unreasonable. In particular, those land users who have made substantial investments in enriching the bare hills or unused land for perennial trees in remote areas tend to receive less compensation than those who made smaller investments in short-term crops in suburban areas.

Article 33 of the Decree that provides for duration of utilization of land that is allocated or leased by the State must be revised as follows: 'The duration shall be determined from the date on which the clearer site is handed over the land users' (instead of the date on which the land allocation/lease decision is made).

State agencies or SOEs must be required by the Government to strictly comply with their contracts to lease production sites, warehouses or workshops to privately owned enterprises without arbitrary or unilateral increase of rents or termination of the signed contracts until the lessees find new sites. Otherwise any bankruptcy of privately owned enterprises may worsen the already high unemployment in the country.

Hanoi, October, 2004
Nguyen Minh Phu
Director, TransPacific Service Company Ltd