PROPERTY SEIZURE IN CHINA

ROUNDTABLE

BEFORE THE

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PROPERTY SEIZURE IN CHINA

MONDAY, JUNE 21, 2004

CONGRESSIONAL-EXECUTIVE
COMMISSION ON CHINA,
Washington, DC.

The roundtable was convened, pursuant to notice, at 2 p.m., in room 2200 Rayburn House Office Building, John Foarde (staff director of the Commission) presiding.

Also present: David Dorman, deputy staff director; Christian Whiton, Office of Under Secretary of State for Global Affairs Paula Dobriansky; Carl Minzner, senior counsel; Keith Hand, senior counsel; and Susan Weld, general counsel.

Mr. FOARDE. Good afternoon, everyone. Welcome to this issues roundtable of the Congressional-Executive Commission on China. My name is John Foarde. I am the staff director, and work for Congressman Jim Leach, who is our Chairman.

We pride ourselves on trying to start on time and to finish on time, so we are going to get busy and not try the patience of our distinguished panelists.

Today's roundtable seeks to look at property seizures in China and we are looking into these because, over the past year, urban demolitions and rural land acquisitions have become the leading causes of social unrest in a great many places in the Peoples' Republic of China [PRC]. Since 1991, nearly 900,000 families have been relocated in Shanghai. Last year in Chengdu, 24,000 families were moved. The same story seems to be true across cities in China.

The rapid pace of development and the high value of land in China continues to fuel corruption and abuse in land deals. A recent government survey uncovered more than 150,000 irregular land transactions in the PRC. Reports of protests, sometimes violent, hit the news wires almost daily, and the numbers of petitions and administrative lawsuits related to property disputes has increased sharply in recent years. This trend is clearly causing alarm in the central government, which has issued a series of directives in an attempt to deal with the problem.

This afternoon, we want to examine the law and the politics of land seizure in urban and rural China and assess whether recent reforms are likely to address the problem, including the amendment of China's Constitution to explicitly protect private property rights.

To help us this afternoon, we have three distinguished panelists with great experience in looking at these issues. Jacques deLisle, Meg Davis, and Roy Prosterman are going to help us.

I will introduce each of them in more detail before they speak, but as we have over the past two and a half years, each of the panelists will have 10 minutes to make a presentation. I will remind them that they have two minutes left after about eight minutes.

When all three have spoken, then we will go to a question and answer session. We hope to be joined during the course of the afternoon by other staff members representing our Commissioners, but if not, just the five of us will try to ask intelligent questions of the panelists to illuminate these issues.

I would like to recognize, therefore, Jacques deLisle, professor of the University of Pennsylvania Law School. He is a professor at Penn and a member of the faculty of the Center for East Asian Studies. His recent writings have focused on legal reform and the law and politics of economic reform in contemporary China, the PRC's approach to sovereignty, and international law. His publications include "Chasing the God of Wealth While Evading the Goddess of Democracy: Development, Democracy and Law, in Reform-Era China." So, welcome, Professor deLisle.

STATEMENT OF JACQUES deLISLE, PROFESSOR, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL AND MEMBER, THE FACULTY OF THE CENTER FOR EAST ASIAN STUDIES, UNIVERSITY OF PENNSYLVANIA, PHILADELPHIA, PA

Mr. DELISLE. Thank you for the kind introduction and for the invitation to be here today.

This panel has a big topic, and I have been asked to address an especially broad swath of it, and therefore I will approach the subject more shallowly than my colleagues.

I want to set some of the background and context for the issues we are talking about today.

Any discussion of property rights in the People's Republic of China is in some ways an odd topic. After all, everywhere throughout the formal Constitution and legal code in China one sees reference to it still being a socialist, Marxist-Leninist system in one form or another, with property presumptively owned by some collectivity, and indeed, often the state.

In a technical, legal sense, of course, land in the urban areas remains state owned, and land in the countryside remains collectively owned. And, of course the Chinese policy is officially a system that operates under the dictatorship of the proletariat, with the Chinese rendering of proletariat literally meaning "propertyless classes." Yet, now, in recent years, we are talking about something of a property rights revolution, as its proponents would have it, although the revolution has not yet triumphed in practice.

The most recent striking development in this area, of course, is the constitutional amendments that were adopted at the National People's Congress session in March. Here, there is a good deal of new language that raises private property to a status previously not held. Some will tell you that the new provisions accord private property equal status with state property or socialist property. That is actually not true, but the gap in status is a lot smaller than it used to be. If time permitted, I would be happy to go through the amendments chapter and verse.

Failing that, I think it is fair to summarize the reforms as saying that private property has been raised from a grudgingly acknowledged sector to a fully accepted one in the Constitution, although one that is still somewhat inferior to various notions of collective property.

Many of the amendments address the right to private property. They also address the protection of the rights to private property by promising compensation for takings of private property by the state.

Such innovations are also linked to other constitutional amendments that are not specifically about property. One is that "the builders of socialism" are added to the preamble's list of the "good guys" in the official perspective. This addition is generally taken as a reference to the first of Jiang Zemin's "Three Represents"—a reference to the entrepreneurial classes, who own a disproportionate share of the new private property. This status for important private property holders and, in turn, their private property is further underscored by the "Three Represents" itself being put into the preamble.

The other areas of significant amendment to the Constitution this time are provisions dealing with "states of emergency," protections of human rights, and social security rights. The first largely builds on existing law governing martial law and expands it to deal with a wider range of crises, some of which, in particular contexts, might have implications for the protection of property rights.

The second, "human rights" amendment, for the first time, offers a general statement that the state respects and safeguards human rights. For some proponents of relatively radical reform in China, the protection of property rights is of a piece with the promised protection of human rights—whether this be based on a theory that the right to property is a human right or that secure rights to property are a precondition to the effective enjoyment of core human rights. The third amendment could be similarly interpreted as linked to matters of human rights, and certainly there are potentially positive implications for some types of property rights—a "new property" with Chinese characteristics—in the notion that the state shall establish a social security system to guarantee a minimum standard of living.

These constitutional reforms, which are still quite modest and quite general, were politically dicey. It was a long, hard road to get them into place. They had to reach their final form in the final moments before the NPC session and against the backdrop of the "three unmentionables," which is not a reference to Chinese lingerie, but is rather a reference to the political directive prohibiting discussion of revising official judgments on the June 4, 1989 Tiananmen Incident, constitutional reform, or political reform during the crucial months that were the run-up to the constitutional amendments.

There certainly were more radical proposals for constitutional reform on the table that were eschewed. There was discussion of "big" as opposed to "small" constitutional reforms. There were conferences in Beijing and Qingdao and other places that talked about a more thoroughgoing attempt to address rights more broadly, and structural reforms.

The irrepressible Cao Siyuan trotted out his latest book on constitutional reform and, interestingly, drew very tight connections among property rights, economic reform, political reform, and human rights. He sees those as very linked, and he is not alone in that view.

For the relatively modest reforms that were adopted, the argument was largely that they were justified on economic grounds. That is, the way the changes were officially presented was, roughly: you need stronger property rights, and you need clear property rights with stronger legal underpinnings, in order to have an effective market-oriented economy.

That was the main selling point for the constitutional reforms, and that, of course, is the general direction that China has been going for some time. On this view, property rights protection is a way to reassure, energize, and bring into full play the energies of the "builders of socialism" and others who do or might respond to market signals.

Greater official and legal acknowledgement of private property is also a way of dealing with the growing unrest over the expropriation of, if we cannot call them property rights, at least property interests, and in some cases, property rights. What has been going on in the countryside, what has been going on in the city, the expropriations or disregard for property rights and interests in rural and urban China, are matters that the chair has already noted. And the regime has at least partly recognized the dangers that the failure to protect such property rights or interests can pose.

The question is, if property rights recognition or protection has such compelling justification in terms of economics and political stability, why was it seemingly politically so hard to adopt as a matter of constitutional or legal principle? There are several answers to that. To suggest what some of them are, I want to give a brief overview of the arguments, pro and con, of how much reform or enhancement of property rights needs to be done in China.

One view says that the ambiguous, limited, vague, informal property rights that arguably have characterized reform-era China are just fine, thank you. After all, it is hard to argue with success. Look at the growth rates. Look at the sectoral transformation of China's economy. Look at the investment, domestic and foreign, that has flooded into the Chinese economy. It is a remarkable story of growth and development.

This economic transformation has happened despite some fairly weak elements in the property rights system. What exactly rural land-use rights holders had, especially in the early days of reform but even now, has been, at minimum, a little uncertain and a little insecure.

So, too, in the urban land-use sector, and so, too, with enterprises across the spectrum from state-owned behemoths to spontaneously arising private firms. There has been an ambiguity, a weakness, a vulnerability, and a paucity of enforcement mechanisms, at least by Western standards, to property rights in all these areas.

Yet, people have raised capital, people have invested, the economy has grown, and it has transformed with, indeed, some of the greatest growth occurring in sectors—such as IP-intensive indus-

tries or projects with complex financing—in which clear and strong property rights often are thought to be especially important.

This has happened despite legal lacunae, and despite an approach to relevant legal reforms that can perhaps best be described as backing and filling. Many of the features that we associate with market-based property rights and their protection grew up as practices before the legal underpinnings were put in place—in effect recognizing them retroactively— and that continues down to this day.

Some argue that China's economic success despite the absence of a robust legal regime for property rights does not show merely that what China has was "good enough"—that China "satisficed" on property rights. In some views, the informality or vagueness of property rights was a good, perhaps optimal, arrangement . It was functional and adaptive. The literature adopting this view is fairly vast, but many of the arguments boil down roughly to the following:

In the context of a half-reformed economy, which China has had through much of the reform period and still has today, where state or political actors can still step in and stop certain things from happening, there is an argument for letting the state and its various pieces be a residual interest holder and a residual risk holder in a way that would be unlikely to occur—or complicated and costly to sustain—under a regime of clear, formal property rights.

So, ambiguity and informality actually work better, given the context. They give such potentially growth-undermining and efficiency-impeding government or political actors a material share—or stake—in the development of new economic undertakings that in other systems might be better supported by clearer property rights, more formally enforced.

There is also an argument that, with such ambiguous or informal rights, it is possible to avoid additional, related perils to growth. One can avoid the tragedy of the anti-commons, which hit many post-Soviet economies—the problem of there being so many actors who held some piece of the claim to control an asset—be it land or something else—that they could block its use, transactions costs being so high that markets were unlikely to provide a cure for the trapping of assets in suboptimal uses, or simple non-use. The ambiguity and informality of property rights characteristic of the Chinese reform-era system may make it possible get around those problems, giving potential hold-outs fewer rights to block usage of assets, and giving a key potentially impeding set of actors—state or political entities—economic incentives to see assets used productively and efficiently.

There are also narrowly legal factors—ones that are not so purely economic in their focus—that enter into this argument for the functionality of vague or weak or informal property rights. First, things are changing so fast in China on the ground, and legislation is a slow process, and the number of lawyers and lawmakers are so few, and getting changes through the NPC is so hard, that optimal or effective legal change must be pursued in a flexible, pay-as-you-go, make-it-up-as-you-go-along way. Otherwise, legal rules will get badly out of sync with economic reality—by running too far ahead or lagging leadenly behind—and the attempt to write the

"right" clear and formal rules on property rights—or other matters—will end up retarding market-oriented development.

Second, property is a hard ideological nut to crack in China. At least for much of the reform era, it seemed likely to be much easier to do all the things one could do functionally with clear, formal legal property rights through some other means. There was thus much apparent wisdom in reformers' avoiding a path that required an unambiguous endorsement of private property or formal mechanisms for protecting private property rights.

Consider how, during the Jiang Zemin era, we saw the step-by-step hollowing out of what it meant for the state-owned sector to be the dominant sector of the economy. There was some clever and protracted ideological finagling here, and much reform was achieved and legitimated in this way. And still, tackling the question of private property and some forms of ownership reform remained hard even in the mid–2000s.

Think of the Russian disease, rapid, bare-knuckled privatization leading to the rise of the notorious oligarchs and, in turn, the controversial prosecution of media and oil kingpins. While such a path was hardly inevitable, it serves proponents of a Chinese-style approach well by illustrating that there can be a variety of problems with privatization where relatively clear rights are handed out early in a transition from a Soviet-style economy.

Third, adopting a clear, formal regime of legal property rights would require reaching decisions on how best to handle some of the tough questions with respect to which there appears to be little consensus in China today, much less in earlier phases of the reform era: How do you sequence providing a social safety net, establishing alienable-in-the-market property rights and other interrelated property-relevant reforms? There are social justice questions, and growth-vs.-equity questions that I think have not been worked out, and that an agenda of establishing clear legal rights in property and related fields would demand be answered.

Finally, I want to turn briefly to the other side of the argument—to the argument that says, basically, China does need to do more. China does need to have clearer and more formal property rights, and the urgency, the need to create these, is increasing.

Part of the argument is simply based on the assertion of a counter-factual. Yes, China has done spectacularly well economically during the reform era. But it would have done even better with clear, formal property rights. This is the old, classical argument for the functional value of property rights in a market-based economy.

But beyond that, there is a claim that China needs—and increasingly needs—clearer property rights because much of the argument for the virtues of ambiguous or informal property rights is an argument about what works in a transitional system, and an economic system cannot be in transition forever.

If you go through a transition far enough, you must eventually come out the other side, and you need laws and institutions appropriate for the post-transition economic order. This view is, in effect, the revenge of the classical view. The argument is that, as the economy gets more de-state-ified, the notion of the state's having an active and discretionary hand, holding a residual economic in-

terest, in relatively fully marketized economic sectors does not make the sense it might once have made, and becomes a threat to growth and further development.

In addition, the pressure for more unambiguous and formally protected property rights may be accelerating with globalization and China's accession to the WTO. On this view, there are growing pressures on China to play by world rules, and perhaps more importantly, there will be pressure on Beijing to unify and make uniform rules and practices across China, which now vary substantially between rural and urban areas, and across different regions of the country.

Further, there may be much force to the argument that, as China becomes a more sophisticated economy—which is a somewhat different point from China's becoming a post-transitional economy—it needs clearer and more formal property rights. The easy gains from simply getting State planning out of the way have been reaped. Growth and progress now depend on the development more sophisticated financing vehicles, more complex product and factor markets, and advanced technological sectors where the ability clearly to define, effectively to protect and freely to alienate property rights will be vital to realizing potential economic gains.

Much of this is a long way of saying that features that used to be plausibly praised as showing the virtue of ambiguous and informal property rights in China may now constitute the burden of complex and fragmented property rights. That is, changes in the conditions and context of China have made it necessary or at least desirable to make the contours of property rights crisper, to make it easier to bundle fragmented property rights, and thereby to encourage or at least permit them more easily and efficiently to migrate to their highest value uses through markets rather than through a mixture of markets and gatekeeping by state or other political actors.

On this side of the debate too, the arguments are not limited to economics, and do include legal-political considerations. The trajectory or momentum of legal change—and underlying policy changes—in China strongly favor more expansive, clearer and more formally protected property rights. There are, to be sure, considerable shortcomings, some of which I have noted and some of which will be addressed in detail by my colleagues on this panel. But compared to what?

Think of the baseline. You can tell a story of remarkable legal change from the General Principles of Civil Law in the 1980s, and legal reforms undertaken even before that, down through property laws and related laws that are being drafted now, including the general Property Law which is in draft form and about to be passed, innovations in mortgage law, laws recognizing private ownership of economic assets, and many other areas. If you want to look beyond the kinds of property I have mostly been talking about, think of shareholders' rights and private securities litigation and things of that ilk. These are areas of substantial and substantive legal change, and there is an agenda of significant further change going forward.

In addition, there is a plausible set of arguments that politically China may need clearer and more formal property rights—more

than one would otherwise think—because of peculiarities in the Chinese system. First, because so much is in flux politically and economically and, for that matter, legally, the system may need some fixed point, some pole star, and property is a good place to start, especially given reform-era China's long-standing core commitment to developing a market economy. With property rights in place, greater ambiguity and more extensive tinkering with other economic laws and policies, forms of government structure and regulation and so on may be more smoothly accommodated.

Second, the law, in many ways, including the assertion of legal rights to property interests asserted by individual owners, provides a substitute for pressures for political democracy. It creates a steam valve. It allows the regime to monitor, and sometimes to address on its own terms and in its own way, problems that otherwise could create greater pressure for political accountability.

Third, a political need to go unexpectedly far in making property rights clearer and more formal in China may arise from the lack of trust in the regime that we have seen develop over a variety of issues, particularly including property rights-focused complaints arising from the expropriation of property in the countryside and in the cities.

The final point I would make in this regard, brings us back full circle: formal commitments to greater protection for property rights have been put in constitutional form, not because we are on the eve of constitutional litigation in a meaningful sense in China, but rather because writing such commitments into the Constitution provides an important political lever.

Once the regime says it is alright, a member of civil society, an elite intellectual, a policymaker below the top levels can push for further change, at least around the edges.

Outsiders can play some role here. One thing the United States can do is help with such officially tolerated pushing, and property rights is a particularly good area to do so. A property rights reform agenda now is ideologically acceptable in China. Foreign advice or advocacy for it can be put in technocratic, technical, legal assistance terms, not potentially rankling political or ideological forms. A property rights agenda permits foreign advice and advocacy to draw upon the prestige and power that American and Western models have as successful models of property-rights-supported, market-oriented economic growth. Simply, the argument is: we have property rights and it has worked for us; it has worked for the world. Thus, U.S. policy and advice can push for property rights without pushing buttons as much as would be the case with, say, a straightforward political or human rights agenda.

If U.S. policy goes forward with such an agenda, I think it is important—as it would be with any agenda—to listen to allies within the PRC system who share the same basic reformist ends. I think it is important to emphasize implementation, enforcement, and monitoring mechanisms, for those currently lag behind the existing and impending property laws on the books.

Thank you.

Mr. FOARDE. Thank you very much, Professor. A lot of provocative ideas to take up in the question and answer session.

I would now like to recognize Meg Davis, researcher in the Asian Division of Human Rights Watch, who joins us from New York City. Meg earned her Ph.D. from the University of Pennsylvania in 1999, and she has taught and held post-doctoral fellowships at the University of Pennsylvania, Yale, and UCLA. At Human Rights Watch, she has written "Demolished: Forced Evictions and the Tenants' Rights Movement in China," and she is also the author of a forthcoming book, "Song and Silence: Ethnic Revival on the Borders of Southwest China."

Her articles and op-eds have appeared in Modern China, the Asian Wall Street Journal, and the South China Morning Post, and she is an old friend of ours at the Commission. Thank you very much for sharing your expertise this afternoon.

STATEMENT OF SARA (MEG) DAVIS, RESEARCHER, ASIA DIVISION, HUMAN RIGHTS WATCH AND VISTING SCHOLAR, COLUMBIA UNIVERSITY'S WEATHERHEAD EAST ASIAN INSTITUTE, NEW YORK, NY

Ms. DAVIS. Thank you very much. A special thanks both to the Commission for the invitation, and also to staff, including Keith Hand, for pulling this roundtable together and bringing us together.

My comments today draw on my recent report for Human Rights Watch, which is available in full on our website, *www.hrw.org*. The report details the growth in protests and lawsuits over forced evictions in urban areas in China in recent years, especially the past two years.

As we all know, China's rapid growth, especially for the 2008 Olympics in Beijing, also more recently in Shanghai, has really sparked a land grab in many urban areas. In fact, 10 years ago, many people welcomed having their homes knocked down and being moved to new apartments, because of the improvement in their lifestyles. But over the past 10 years, millions of people have been evicted around China. Quite a few have wound up homeless, and we are really beginning to see that this is not just a natural stage in the process of development, but that in some respects it may even be development out of control, development that the central state is not able to regulate to the degree that it may even wish to. The problems around forced evictions are beginning to point up weaknesses of the court system which could really threaten the long-term stability of the state.

So, I am going to talk a little bit about what happens to people who get evicted from their homes. What we are seeing, is especially problems with due process. People often have little to no notice of their eviction. They come home, in some more extreme cases, to find the character "chai," "demolish," written on the walls of their homes.

Others are approached in advance by developers. They are offered some form of meagre compensation for their homes. They begin to negotiate over this because they have no hope of actually stopping the development, so instead, they negotiate over the compensation. Some are actually are forcibly evicted before the negotiations are concluded.

Those who feel that their negotiations have reached a dead end can seek arbitration in local government offices that "manage" demolition and eviction. But what they encounter there are problems with corruption, which are endemic in the system. Local officials often have financial interests in the projects. Some of them run companies that actually do the demolition, others are investors in development projects or may be profiting from fees associated with the process of demolition and eviction.

Some residents then try to take the developers to court in an effort to obtain fair compensation or to stop the development project. I and my Chinese research assistant, who asked to remain anonymous, so unfortunately I cannot give him full credit, reviewed dozens of laws around the country, provincial and metropolitan laws. We found that, overwhelmingly, these laws tend to favor developers. The courts are also often subject to Communist Party interference at every level, so even judges who may be tempted to find in favor of evicted residents and homeowners may find that they are encountering political pressure that prevents them from doing so.

In most provinces, you cannot get an injunction to stop the process of demolition during a pending court case, so you can actually win the case, but have already lost the home. Perhaps worst of all, lawyers face harassment, and even jail. The most famous case is a case in Shanghai, where some of the biggest protests have erupted in the past couple of years. This was the case of lawyer Zheng Enchong, who assisted a number of evicted residents and homeowners to file suits, and then got involved in filing a case alleging official corruption in Shanghai, and sent some faxes to an international human rights group about what he was doing. He received a three-year sentence for circulating "state secrets."

After the Zheng Enchong sentencing, a number of Chinese lawyers and residents told Human Rights Watch that lawyers were afraid to take cases that had to do with forced evictions, and certainly they were very nervous about talking to us, with good reason.

In some of the worst cases, we hear about what is called "*yeman chai qian,*" "savage or violent evictions," in which people wake up in the middle of the night to find bulldozers knocking over their homes or wrecking crews knocking down the walls of the house while they are still in the home. Many people have been injured, and some have even been killed, during the process of forced eviction.

It is this combined lack of redress, this kind of Orwellian lack of any route, that is driving people to the streets to protest in unprecedented numbers. In Tiananmen Square last year, there were sometimes almost daily protests. There have been some extreme protests, as I think most people on this roundtable know, suicide protests, people attempting, and sometimes succeeding, with self-immolations. Numbers of protesters have been jailed and sent to labor camps. For some of the Shanghai protestors, we have had credible reports of torture in detention.

Perhaps the one great success story here is the success of the Internet as an emerging political tool in these protests. We are beginning to see really great numbers of people posting stories about their individual experiences, exchanging information, seeking con-

sultation about the law in their areas. We have seen circulation of large numbers of open letters, petitions which thousands of people sign onto, people circulating news from different areas that previously did not circulate. Really, our report could not have been written without the emergence of the Internet as this kind of tool.

And Chinese news media have become increasingly critical, openly critical. The China Economic Times has run a scathing series of editorials about forced evictions, and the People's Daily has actually been critical about this issue. And we have seen senior legal scholars sending letters to the government requesting reform. So, we are really beginning to see mobilization at many different levels of society around this issue.

There has been quite a bit of government response, and I am sure we are going to talk later on about the degree to which this has been effective or not. I tend to come down on the glass-half-empty side, which probably will not surprise anyone here.

But there have been a series of State Council circulars, what Keith Hand has been calling the "this time we really, really mean it" circulars, mostly urging local governments to follow national law. We have seen, of course, the expanded constitutional language protecting property rights. But the problem is that the Constitution does not yet really have the force of law. It is not justiciable.

My favorite case in this regard, which I will close with, is the case of Liu Jincheng, a retired teacher in Hangzhou who decided to use the previous protections of property rights that were in the Constitution in order to challenge the local Hangzhou government regulations.

Of course, the Constitution also protects freedom of speech, free assembly, free association, and so forth.

Liu Jincheng got a white medical coat and painted "Protect the Constitution" on it in black paint, and marched to the local city government to protest, and was promptly detained for illegally demonstrating.

So, what we have seen is that the Constitution does not really provide the kind of protection that it needs to provide. We have this fundamental problem of a weak court system, which 10,000 State circulars is not going to address.

The Party is continuing to interfere at every level of the court system, and until there is a truly independent and strong court system, we are not going to see significant change, I would argue, on this issue. That is, I think, where the United States could probably also lend some assistance, in terms of technical assistance, programs that would push for a stronger court system. The government wants protestors to take their complaints to the court and not to the streets, but in order for the court to function as a pressure valve, it has to be a place where they can find justice.

Thank you.

Mr. FOARDE. Thank you very much, Meg. Also lots of thought-provoking concepts in your presentation.

We are gratified that we have been able, particularly on this panel, to draw panelists from a number of places other than the Washington, DC area, where we of course have a number of China experts.

I think the one who now has come the farthest, at least, in any of our roundtables so far is our next panelist, Professor Roy Prosterman, president of the Rural Development Institute and professor at the University of Washington School of Law. Professor Prosterman is a leading expert on land reform and has spent over 30 years conducting field research and consulting on land reform issues throughout the developing world. He and his colleagues at the Rural Development Institute have worked with China's central policymakers on rural land tenure issues since 1987 and have been the principal foreign advisors for a series of reforms under which millions of families have received secure 30-year land use rights.

So, welcome to Professor Roy Prosterman. Thank you for being with us.

STATEMENT OF ROY L. PROSTERMAN, PRESIDENT, RURAL DEVELOPMENT INSTITUTE; PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON SCHOOL OF LAW, SEATTLE, WA

Mr. PROSTERMAN. Thank you very much. Much of what I discuss will be against the background of some 1,000 field interviews that we have done directly over the past 17 years with Chinese farmers, outside of the presence of local cadre or officials, I might add, as well as two extensive sample surveys that we have done cooperatively with Renmin University on the implementation of farmers' 30-year land rights. Those who may want to look at a very detailed presentation of the findings from the later 2001 survey might want to look at the Columbia Journal of Asian Law, fall 2002 issue.

The question of takings and of security of farmers' land rights arises in the context of two particularly important background issues or facts. One is that 800 million Chinese still live in, and make their living in, the countryside from agriculture. It is still 60 to 65 percent an agricultural society. When one speaks of progress and development in China, one is speaking mostly of progress in development for the other 500 million, or a bit fewer than 500 million, who live in the urban areas.

That is reflected in the second fact, that the ratio of per capita incomes in the cities to the countryside, as of the end of 2003, was calculated as roughly 3.24 to 1, which is a reform-era high. Zhu Rongji referred to it frequently as his biggest headache. The current administration, if anything, sees it as an even bigger headache, source of instability, and a reflection of the fact that rural productivity is quite low.

In particular, the utilization of the fundamental rural resource, land, is quite low. If you compare it, for example, to Taiwan, Taiwan produces 8.5 times as much value added per acre as mainland China in its agriculture. South Korea produces 13 times as much value added per acre. Those are also very small-farm agricultures.

But one key difference, as also in Japan, is that Taiwan and South Korea benefited from U.S.-supported land reforms in the immediate post-war era, land reforms which gave full ownership, full security, full transactability to the great majority of the rural population. I would argue that the take-off in those societies began before they became export-oriented economies.

The development of the internal market was critical, and I think the Chinese leadership sees the development of the internal market

and the creation of greater rural prosperity and productivity to be absolutely critical. It is in that broader context that the land tenure issue, the land security issue, and, as a major part of that, the land takings issue, arise.

Takings of agricultural land clearly cause a whole bunch of problems for the central government and for the development process. It means in a direct sense that you lose land for agricultural production. It means more broadly that you undermine the security of farmers' land rights, both because what they get paid when the land is taken is generally a pittance and only a small fraction of the total amount recovered for the non-agricultural use, and also because takings are often accompanied by illegal readjustments of land. Readjustments are the key source of tenure insecurity. China was the first of the Communist societies to physically break up, to de-collectivize, the farmland. They did that from 1979 to 1983 very successfully. But what the vast majority of farmers received under de-collectivization was what we would call "at will" land rights. They could be booted off at almost any time by the local cadre in the name of readjustment, as it was called.

Readjustment was justified either on the basis of demographic change in the village, the idea being, "let us give absolute arithmetical equality to every person in the village," or in the name of land takings because one or a few households would lose land, often much or most of their land, and instead of compensating those families with cash or by other means, the cadre sought to spread the pain equally through the whole village by taking all the land back, redistributing it in new patterns that reflected that there was less land now in the village because some of it had been taken.

Of course, one of the effects of creating this kind of absolute equality was creating absolute insecurity, and if you are absolutely insecure on the land, as farmers began telling us when we first interviewed in 1987, they are not going to invest in the land.

So, for the vast bulk of the rural population for the last 20 years, they have been absolutely prevented from investing in irrigation, drainage, land terracing, tree planting, intensive soil improvement, land leveling, you name it, any improvement that has a multi-year return. The farmers do not make such investments because, they tell us, we do not know if we are going to be on these same pieces of land next year or not. So the process of ending readjustment looms as an absolutely critical one if farmers are to get security or to be able to invest in the land and be able to improve their incomes and their consumption.

All of this being closely tied to the process of takings, insofar as takings both directly lead to readjustment of land, and also because the local cadre will often use as an excuse for readjustment that there has been demographic change in the village, when actually the idea is to have 5 or 10 percent of the land stick to their fingers in the process of readjustment, hold that back, and then suddenly, 6 months later, transact that to some outsider for a very valuable consideration.

So takings are closely linked to undermining farmers' land security, undermining the value of farmers' land rights, undermining farmers' ability to invest in the land, cheating farmers out of the income received from takings leading to a good deal of instability,

as we have already heard in the discussion today, and also distorting land markets: to the extent that much land then is cheaper or below market value, subsidized investments in terms of the land factor distort markets and create incentives to invest in times and places where those investments should not exist.

And, finally, it induces corruption of local officials, because a lot of the resources that get paid for the transaction of land from agricultural to non-agricultural uses get taken, either in a directly corrupt way personally or indirectly to buy the new "village" VW or have a series of banquets at the village or township level.

Let me say then in these last minutes just a word about what efforts have been made. In a broader way, the Chinese have, since 1993, been trying to introduce so-called one-generation, or 30-year, land rights. The survey reproduced in the Columbia article, as you will see, indicates that by 2001 they had reached about 40 percent of farm households with secure, no readjustment, 30-year rights. But that meant they had not reached the other 60 percent, and that is the goal of the Rural Land Contracting Law which was adopted in 2002 and is beginning at this point to be implemented.

But related to that, a key part of the implementation of that law being the end of readjustment, is the related and parallel need to stop or restrict takings, three key elements in which are to limit takings to truly public purposes, to make the takings process more transparent, and to provide reasonable and adequate compensation. There have been some very late-breaking developments, but I will hold those until the question period.

[The prepared statement of Mr. Prosterman appears in the appendix.]

Mr. FOARDE. Perfect. You were remarkably disciplined, and therefore we will have the time to come back to those things.

I am going to let our panelists rest their voices for just a minute while I make an announcement or two.

In connection with today's roundtable, we are delighted to also be distributing a written statement for the record by Patrick A. Randolph, who is professor of law at the University of Missouri, Kansas City. Professor Randolph is an expert in property law and the co-director of the Center on Land Law and Policy at Beijing University in Beijing.

He is also the author of a book entitled "Chinese Real Estate Law," and he has been a panelist of ours in the last year on related questions. So, we are happy to have that statement. It is also available on our website.

[The prepared statement of Mr. Randolph appears in the appendix.]

Mr. FOARDE. This leads me to my second point. That is that the proceedings of today's roundtable, and all of our hearings and roundtables, are available on the CECC website at *www.cecc.gov*.

Let us go ahead then to the question and answer session. What we usually do is give each of the staff panel up here the chance to ask and hear the answer to a question for about 5 minutes, and we will do as many rounds as we have time for before we are all exhausted, or before 3:30 comes, whichever comes first.

I will kick things off by asking Meg Davis, I was really taken by your description of the lack of alternatives for residents whose homes have been taken and razed frequently as Orwellian, because

it seems that there really is no way out for these people. What do the residents that you have talked to or read interviews with really want in terms of process?

Ms. DAVIS. That is a really interesting question. I would say that quite a few of the people that we either spoke with or that we gathered through the web would have been happy if there had been some kind of redress in the legal system. They are used to encountering corrupt officials and so forth. That is part of daily life.

But I think there was a great deal of sense that there was some hope, with all the talk about rule of law and so forth, that there was going to actually be some kind of answer in the legal system. I think they are very disappointed that that did not happen.

Mr. FOARDE. So they are not adverse to going to court.

Ms. DAVIS. Well, I mean, the people that we speak with, you have to understand, are going to be an elite. Right? I mean, they are going to be people who, in some way or another, found someone who could get them in touch with an international human rights group.

These are the people who tend to be leaders in their communities, in certain respects, if they have the courage to contact us, knowing that that could send them to jail. So, these are people who probably have a little bit more sense about the legal system than maybe a lot of other people to whom it would not occur.

Mr. FOARDE. And what is the principal goal of going through a process? I mean, are they looking principally for just a fair shake or looking principally for remuneration, or what are we really talking about?

Ms. DAVIS. I think most people wind up looking for fair remuneration because that is the only thing they have any hope of getting. By the time they find out that the project is going forward, it is really too late for them to try and stop it, at least, certainly in the urban cases that we are familiar with. In rural areas, it may be different.

But they do not really have the sense that it is possible to stop a project or that they could have input at an earlier stage of the process. That does not even cross their mind. So I think they wind up focusing on remuneration because that is all there is, really.

Mr. FOARDE. So would you describe that as a legal problem, or a political problem, or both? I am interested in your perspective on that.

Ms. DAVIS. I do not think, in China, it is possible to separate the two, because there is no legal system without political interference.

Mr. FOARDE. Thank you. Very useful.

I am going to pass the microphone on to my friend and colleague, Dave Dorman, who is the deputy staff director of the Commission and works for Senator Chuck Hagel.

David.

Mr. DORMAN. Thank you, John.

First, I would like to thank each of you for coming today. I studied your written testimonies over the weekend and the topic of this roundtable strikes me as one of the most complex issues that this Commission has dealt with, so I very much appreciate you all taking the time to share your experience and knowledge with us.

I would like to use my five minutes with a quick question to each of you, and I think we can probably do that. I will start with Dr. Davis.

In looking at the excellent Human Rights Watch report on forced evictions over the weekend, I was struck by one of the chapters where it referred to the "tenants' rights movement." Social movements of this type are generally not something that we see referred to in China. Can you comment briefly on the extent to which this is actually a national movement as opposed to a fragmented series of events that have some relationship in terms of topic, but little relationship in terms of public awareness of what is going on elsewhere in the country? To what extent is news of the protests—rural protests, urban protests—linked nationally through the Internet or through the press?

Ms. DAVIS. Should I answer that?

Mr. DORMAN. Sure.

Ms. DAVIS. That is a great question. I am not a political scientist, I am an anthropologist, so I get a little more leeway using words like "movement" than some of my colleagues.

I chose, and we agreed on the word "movement," because it really did seem to be mobilizing across regions, which is, I think, a really salient thing about this in terms of Chinese political grassroots activities.

I think, really, with the Internet, with a slightly more liberalized news media, we are beginning to see what the state has wanted to prevent for a long time, which is people moving from one region to the next, organizing protests, people in one area knowing what kind of protests are happening in another area, people consulting national law centers to ask for assistance or advice. So, I think it is fair to call it a movement, although I agree, it is right on the borderline in certain respects.

Mr. DORMAN. Well, I am a political scientist, and I am always pleased to have another social scientist close because I am usually the only non-lawyer within 25 feet of the podium. [Laughter.] So, this is important.

Ms. DAVIS. It is not often that anthropologists and political scientists find ourselves on the same side. [Laughter]. It is a pleasure.

Mr. DORMAN. Professor deLisle, one of the really interesting things about working on the Commission is how often we receive comments from groups and individuals throughout the United States on what the Commission is doing: what we are doing right and what we are doing wrong. We take these comments very seriously.

And one of the things that I have noticed over the last couple of days are a few comments that suggest by focusing on the issue of property rights, we are, in fact, looking at a secondary issue. It is not directly linked to human rights. We should be looking, for instance, at freedom of association or freedom of speech. If either of these existed in China, property rights would not be a problem.

You mentioned in your opening statement that some have said there is a direct connection between human rights and property rights. Can you comment on that statement, and I apologize for the brief 30 or 35 seconds you have to answer.

Mr. DELISLE. I will try. I think they are linked in, possibly, three ways. One, of course, is in human rights discourse in the West. Certainly, we think of the Enlightenment tradition in which our own Constitution was written, and there is a pretty close connection. In the classic Lockean view, there is life, liberty, and the pursuit of property. We changed the last to "happiness" in our Declaration of Independence, but that did little to remove the sense that property is part of the classically liberal package of human rights.

Particularly where there is a government that, like China's, has historically put its people in a position of insecurity, property ownership and secure rights to property can offer an appealing defense against some forms of State intrusion and undermining of a wide range of rights.

You can find a lot of people in China who talk that way. The issue is one of people who feel vulnerable, in part because the kinds of interests that could be protected by property rights are at risk.

Second, as this in part suggests, the discussion has been explicitly linked in Chinese policy. Even in the official position on constitutional reform, property rights and human rights strikingly came together. That is, the private property rights provisions were added to the Constitution at the same time that the first general statement about human rights, as opposed to the list of specific rights that have been in there before, was added. They came in as a package.

Premier Wen Jiabao, after the March 2004 NPC session, gave speeches which mentioned both human and property rights. He did not link them terribly clearly, but certainly their connection is part of the story of constitutional reform in 2004.

Third, there are unofficial, more radical reformers within China who draw the link explicitly. Cao Siyuan, I think, is probably the most voluble on this subject, but his views are not unique. The argument from this perspective is that, until the government is restrained from taking people's property, it is not going to be restrained from disregarding other rights of citizens, and there is not going to be an adequate material or political basis on which people will be interested in and willing to push for political accountability. Such views illustrate that, in the political science world, everything old is new again. We are really back to a Barrington Moore-style argument on this: a property owning bourgeoisie becomes a basis for pressing for political accountability and democratic reforms or, if need be, revolution.

And if we look around at what is going on in China, we have seen people who are suffering violations of what they see as, in effect, their property rights become quite visible and vocal in making demands on the regime and challenging its behavior—both peasants coming into the city and protesting or burning local party or government headquarters, and city people who are being kicked out of their houses in areas slated for redevelopment complaining through protest marches or other demands for legal or political redress. We have also seen the urban rich do it, organizing homeowners' associations in gated communities or luxury condominia, and taking on developers—often with strong ties to local government—who renege on promises concerning amenities or open space.

The last of these is one of the more striking examples of, if not politically inspiring, then at least truly autonomously created and officially tolerated endeavors to assert rights.

Mr. DORMAN. Good. Thank you. I am out of time.

Mr. FOARDE. Out of time, but we will come back. Good.

Susan Roosevelt Weld is the general counsel of the Commission. Over to you, Susan, for questions.

Ms. WELD. Thanks a lot.

I wanted to ask you all this question. I have been reading of many ways in which these land transactions give rise to worsening problems of corruption. Could each of the three of you tell me: What are the opportunities for corruption in land development, urban renewal, and expropriation of lands in the rural areas? At what point does the problem of corruption arise most sharply? What are the things the Chinese government is doing to try to forestall or cure those problems?

Mr. PROSTERMAN. In terms of the corruption problem vis-a-vis rural land, it arises in terms of local officials trying to capture increased value of such land both for non-agricultural and agricultural purposes.

For non-agricultural purposes, as I have commented, they attempt to capture it in the takings process in which the best estimates are that only 5 to 10 percent of the cash paid for land for non-agricultural purposes ends up with the farmer/cultivator who loses the land. The other 90 to 95 percent ends up with the local cadre and township or higher levels.

So that is a big inducement if they can get away with such a taking. There also have been takings for agricultural purposes in terms of taking away farmers' land and allocating it to what the farmers call outside bosses.

There was a very strong central directive, number 18, that came out about 18 months ago prohibiting such actions and that was also incorporated as part of the Rural Land Contracting Law adopted in 2002 which became effective on March 1, 2003. We have, in our interviewing, actually seen what seems to be quite a substantial decline in those agricultural takings, those attempts to allocate to outside bosses.

In fact, we may have a chance to get into it later in the questioning, but we have actually seen several instances in which really strongly worded and thoughtfully implemented central directives have been quite effective in sharply limiting various kinds of corrupt activities by local cadre vis-a-vis land.

Ms. WELD. Thank you very much.

Mr. FOARDE. Please, go ahead.

Mr. DELISLE. I went on too long on the last answer, so I will try to be very brief in this one. Two things. One, I would second that last set of remarks. One of the best barometers of where corruption is creeping in is: What is the center is squawking most loudly about concerning what is going on or going badly at the local level? So, when the official media or official spokesman says, "We really mean it this time; we are determined to eradicate X" or "There are a very small number of cadres or citizens who were going off the track by doing Y"—those kind of statements mean that X and Y are matters that the regime considers to be significant problems.

Second, I also worry about a slightly different problem. Although the one you point out is more important than the one I will mention, the one I mention is in danger of being overlooked because it is more obscure. That is, some of these laws create loopholes.

I would predict that if we do see more progress in making the new formal rules matter on some of these property rights issues-yes, we are a long ways from that happening in full, but we do see progress—there are some dangers to watch out for, creeping back in through the loopholes broadly reformist formal law retains.

For example, there is the category of "public interest" and the question of what constitutes a "public purpose" for a lawful taking of private property. In China, these can be very broad concepts. I think we can already see some of this risk in the urban areas where they talk about redevelopment districts. One example is the expansive master redevelopment plan for the Eastern District of Beijing, the business district to the east of Tiananmen. Another is the massive tearing down and rebuilding associated with the 2008 Olympics.

When challenged, the necessary acquisitions of land use rights are or can be defended as serving a public purpose, even if the same developer has benefited at the end through the same connection with the same people as would have occurred under a simple, old-style regime of declaring the displaced residents to be without property rights. Much the same dispossession—often at not much greater cost—thus can be done through a medium that is really unimpeachable, as a formal legal matter.

Ms. DAVIS. Just a few cases. One, is in many instances we are hearing that officials who are involved in sort of various stages of the development process are either owning companies, for example, the Demolition and Eviction Management Departments, which, according to national Chinese law, are not supposed to own demolition and eviction companies, the wrecking crews. Often, they do.

In Shanghai, I think something like half of the companies are owned by local officials. In other cases, they may be invested in the projects. In other cases, we get reports that they are getting paid off by developers. Then there is the great system of fees.

I saw this a lot when I was working in Xishuangbanna in Yunnan Province, where a hotel would be given permission to build, and you would see a half-built hotel for about three years because halfway through the process they then got assessed a new set of newly-imposed fees, which the developer decided to abandon the project rather than pay.

Mr. DELISLE. One last legal point. In the property rights amendments to the Constitution, there is talk of compensation. What was dropped, but had been proposed, was market-rate compensation, or full and adequate compensation. The language ultimately chosen clearly provides another way of driving down payments for taking of property and thus weakens protections of property rights.

Mr. FOARDE. Useful. Thank you.

Christian Whiton represents Under Secretary of State for Global Affairs Paula Dobriansky. Under Secretary Dobriansky sits on the Commission.

Over to you for questions, Christian.

Mr. WHITON. All right. Thank you, John.

Dr. deLisle, in regard to the theory you mentioned that moving ahead with legal reform might be viewed by the Chinese as a pressure valve for demands for political reform, which raises the specter that the international community, if they ratcheted up demands for that political reform for human rights, that you would actually have an end result of moving along legal reform.

Do you personally believe that is true? Are you seeing that at all on the ground?

Mr. DELISLE. I am sorry. I missed the last part of that.

Mr. WHITON. Well, in your own view, you are ticking off a list of theories. Do you view that one as accurate? Do you think that is a real possibility, that increasing demands for political reform would actually have the unintended result of moving ahead legal reforms?

Mr. DELISLE. I think the relationship between legal and political reform is neither one of pure complements nor pure substitutes. I think that, viewed from the regime's perspective, offering a certain modicum of legal rights is seen as preempting or postponing greater pressure for political change. This echoes the almost classical radical critique of rights-asserting litigation: legal rights are problematic because they do serve as a steam valve that relieves pressure for more radical political change.

That is, if people have means to bring their own individual claims, and they have a reasonable hope get some redress, to get some compensation, then they are not going to take it to the streets. Instead, they are going to take it the courts, or more likely, in China, to an administrative process. Or, still, more informally, they can be bought off one by one as they raise their complaints to local authorities, and the ones who cannot be bought off, and who might lead or fuel organized movements demanding more systemic change, will be quashed.

There is, on this view, some set of plausible political circumstances where legal rights, in effect, buy an undemocratic regime time, at the very least. Personally, I think that ultimately rights consciousness on the legal side, in most places and under most conditions, tends to play out ultimately in rights consciousness on the political side. So, in the long run, people who are used to asserting legal rights start to think, "Gee, I would like to have a role in shaping the rules under which I am asserting these rights." At the level of macropolitical theory, that tends to be my view. I think comparative history generally tends to bear that thesis out.

In the best of all possible worlds, authoritarian regimes' "defensively" offering legal rights, including property rights, creates a softer landing scenario than one where the regime provides no rights of either sort, and then we see a revolutionary explosion. I do not think China is terribly close to that latter scenario.

I think the eruptions and the pressures we are seeing now in China with respect to property are from people who are feeling wronged in a generalized way, and except for an elite, we do not have a clear articulation of that as a matter of rights consciousness in a legal sense. The gradual recognition of some legal rights to property or other interests by the regime promises to provide some

room for accommodating the emergence of a greater popular legal rights consciousness.

At least for now, the property protesters in China seem to have a sense they are being wronged, and whether that means political action or legal action in response is a matter with respect to which I think we tend to draw the categories as more firmly distinct from one another than the people who are living in that system do.

Mr. WHITON. All right. Thank you.

Dr. Davis, do you have an understanding or a view on the land displacement that specifically surrounds the 2008 Olympics in Beijing? Does that come into a special category? Are you seeing a lot more related to that, especially as it gets closer?

Ms. DAVIS. It is more of a quantitative than a qualitative difference, I would say. There is no question that there is just an explosion of development in Beijing that is either directly linked to the Olympics or is being linked to the Olympics for marketing purposes, especially high-end condominiums.

There is a whole satellite city being built in the north area of Beijing that is almost certainly going to involve forced eviction that is actually being designed by U.S. architectural firms.

So, especially, I think, this is something I think we should be concerned about, is the growing participation of U.S. firms in development in these urban areas, and the degree to which they are involved in developing policies that are going to minimize these kinds of abuses.

Mr. DELISLE. Of course, you have French architects who design collapsing buildings. [Laughter.]

Ms. DAVIS. Yes.

Mr. FOARDE. Let us go on. I would like to recognize the person that is responsible for helping us put together this roundtable this afternoon. Each of the roundtables that we have are really the product of a vision and a lot of hard work by one of our staff members, and in this case it is Keith Hand, who is senior counsel. Keith, go ahead.

Mr. HAND. Thanks, John. Thanks very much to all three of you for your time and statements today.

I have a question for Professor Prosterman. In looking into this rural land takings issue, it seems like there is a significant gap between the economic value of a 30-year land use right and the current legal standard for compensation of farmers when their land is requisitioned.

I am wondering, how Chinese policymakers justify it. Do they even try and justify this gap? Are there any new regulatory initiatives or measures on the horizon that you think may deal with this enormous compensation gap?

Mr. PROSTERMAN. There are new measures on the horizon. I might note that the present provisions of the Land Management Law and its regulations call for three categories of compensation to be paid when agricultural land is taken for non-agricultural purposes.

One is compensation for standing crops and fixtures. That goes to the farmer, but it is a very small amount. Second is a resettlement subsidy which goes to the farmer only if no other provision is made for resettlement or for some new source of livelihood.

Of course, if they carry out a readjustment, even though they have robbed Peter to pay Paul, they will argue that they have, in fact, made other provision and they will hold onto that cash.

The third, and usually largest, is the compensation for the loss of land, and the regulations under the 1998 Land Management Law affirmatively provide that that goes to the collective and does not go to the farmer.

So, one important need for legal reform is to change that provision at least to allow it to go to the farmer, better yet to say that it must go to the farmer.

What we have argued, is that since—without getting into the formula in detail—30-year land rights at the beginning of the term should be worth something like 75 percent to 95 percent of the value of full private ownership, or fee simple absolute, that the farmer should indeed get 75 percent to 95 percent of the compensation to be paid.

We have urged that that be the standard put into the law. They have now said that they are going to amend the Land Management Law, and a number of individual statements and directives have come out that suggest that this is the direction in which they are going to be going in amending it.

Mr. FOARDE. Does anybody else have a comment on that question? [No response]. Keith, go ahead with another one.

Mr. HAND. Sure. A number of you mentioned efforts the central government is undertaking to address problems both in the urban and rural areas. It would be interesting to get your sense for how serious the central government is about solving these problems.

Is this primarily an issue of local implementation, local corruption, and a desire to fuel economic development? Is there some other issue at the central level with their basic approach to these issues that we should be concerned about?

Ms. DAVIS. Well, I do not doubt the sincerity, actually. I think there is certainly, at least, a very strong faction at very senior levels that sees this as an urgent issue. But the question is, local officials, through the network of "*guanxi,*" of relationships and favors, is able to exert control over the legal process, just to keep flogging this horse. So, the problem is the degree to which people at the local level are really going to be responsive to the series of "we really mean it this time" circulars, and also to the degree to which the Party itself is willing to tackle that issue, because that really gets at the heart of party legitimacy.

These local officials who are able to wield this kind of unrestricted power, who are able to influence judges and jail lawyers, and all the rest of it, the Party really needs to tackle that, and they have not shown themselves able to yet, though maybe a crisis will force them to.

Mr. DELISLE. I think there is a lot of seriousness about it. I think, to be somewhat simple-minded about it, most of what the top leadership or the dominant group in the leadership, or perhaps more accurately the center of gravity within top leadership, is guided by, is really a twofold agenda.

One is to sustain economic development at a sustainable pace, which means to cool off, heat up, whatever the imperatives of the day seem to dictate, but to keep the GNP growing at the rate need-

ed to deliver on the promise of rising prosperity. And the second is to maintain social stability while doing so.

Unfortunately, of course, growth sometimes comes with huge, dislocating costs, and that is where we see some tradeoff between development and social order. I think property rights and some of the specific reforms concerning takings, compensation, and perhaps social security that we have been talking about are seen as a way of squaring that circle, permitting the freeing up of assets for alienation in markets for property, and paying people enough in compensation—or assuring that they have secure claims to sufficient wealth—that the regime does not face too many people coming and protesting for too radical agendas of political change. Now, the formula here, and the role of property rights and takings law, remain something that the central regime and local authorities have yet to work out. I agree that the Chinese Constitution is not something that anybody can invoke in a direct or formally legal way, but I think it has symbolic and programmatic importance, although we are a long ways away from judicial or other formal legal enforcement of its provisions.

If you look at the discussion of the particular constitutional amendments adopted last time out, almost everywhere you turn—although, interestingly, this is said less about property rights than the other amendments—there is a discussion that asserts, in effect, that constitutional change is step one; what is next needed is implementing legislation and other measures.

So, in that sense, the members of the leadership that approved formal legal reforms in property and related areas are serious. They have a sense they cannot afford not to do it. The question they have not faced yet is, can they afford to do it?

The cost of reining in local government, the cost of giving people these kinds of rights, the costs of having a court system with administrative review of government action that this will entail, what that will imply, the second order political effects—I do not think those issues have been fully grappled with yet.

Mr. FOARDE. I would like to recognize our friend and colleague, Carl Minzner, who is a senior counsel on the Commission staff as well, for some questions.

Carl.

Mr. MINZNER. Thank you very much.

I have a particular interest in rural issues, as well as migrant issues, and would like to direct this question toward Professor Prosterman. But to the extent that our other panelists can address it as well, I would be very interested in your opinions as well.

I would like Professor Prosterman to talk a little bit about exactly what the boundaries and extent of collective land ownership are in the countryside. Let me give you a specific example. I have been noticing an increase, particularly in Shaanxi Province, in the number of legal cases involving the rights of migrants, as well as women who have married out of the villages from which they come, but these migrants and these women still retain a rural residence identification with the village itself.

When land is seized and compensated, often these individuals are excluded from distribution of the compensation on the theory that many people in the village feel they are outsiders now, that

they do not belong to the village and the compensation does not belong to them.

I wonder, is there any clear identification as to, what does it exactly mean to have collective ownership of the land in the villages? When compensation comes, who should get compensated? Who should receive the money? If there is no clear answer to that, what are the trends that are taking place?

Mr. PROSTERMAN. Very complex legal issues. Their collective, of course, is somewhat ambiguous in itself because it could mean either the old production team level, which is essentially the natural village, the old brigade level, which is the administrative village, or the old commune level, which is the township, currently.

It is quite unclear, even in the minds of local officials, often, as to which of those levels is the collective owner. But usually the allocation of land shares takes place in terms of the population in the hamlet or natural village.

The unit is the household. Remember, it is a household responsibility system, so every person in the household gets a land share. Now, up until the recent legal reforms, it was typical in those provinces, the great majority of provinces which had readjustments, that when a daughter married out to another village, she would lose her land share in the next readjustment. The household would lose that portion of land. In the next readjustment in her husband's village, she would receive a land share.

Now, the new Rural Land Contracting Law has two important provisions on this issue. One, is Article 6, which for the first time explicitly recognizes that men and women have equal rights with respect to land in rural China. The second, is Article 30, which basically says that, when a woman marries out, if there is land—now, there is not supposed to be any readjustment, but there might be flexible or other land—that she can get land in her husband's village, and in case of divorce or death of the husband, she can choose between keeping that land or taking land in her maiden village, retaining that, because that is not any longer to be readjusted away. That land will stay with the household that originally received it in the maiden village.

The problem then is how this plays out in terms of takings. That is not provided for at this point in either the Rural Land Contracting Law or any other place in the law, insofar as I am aware. It is linked to the question of the adequacy of compensation and whether there is to be cash compensation, which of course should go, and go in its lion's share, to the farm household.

I would think that the best way of resolving that would be to allow the cash compensation to go to, first, the household which lost land, and then probably to allow the wife to make an election, if she wished, to participate in that. But then you would have a kind of double dipping question as to whether she could do that and also maintain her rights to a land share, if she had received one, without readjustment, which would be illegal, in her new village. But as one of a number of issues that will have to be decided, probably this one can be decided in regulations under the Rural Land Contracting Law.

Mr. FOARDE. Really interesting.

Let me pick up the questioning now. Jacques deLisle, you have brought up an issue that is of great interest to each of our Commissioners, and also to us on the Commission staff. That is the whole question of the pace of legal development and legal reform in China and the extent to which, if any, it is driven by Chinese's accession to the WTO and the commitments that it has made under WTO. Separately, you mentioned globalization and the WTO as factors. So I wonder if you would tease that out a little more and tell me if you think that the pace of legal developments with respect to property, and real property, have any relationship with WTO commitments and the changes that have been wrought by them.

Mr. DELISLE. I think they do, although, of course, they are much less dramatic than in things like the Foreign Trade Law, the new version of which takes effect July 1. Obviously, the WTO does not specifically demand changes in those areas, but the indirect links are there, I think, in a variety of ways.

First of all, I think the general "WTO mania" in China matters here. You cannot go into a bookstore without finding half the shelves crammed with "China and WTO." In fact, you do not even have to read Chinese to know this. You can see "WTO" on the spine of everything. SARS and WTO are the two English acronyms that recently have made it into the contemporary Chinese lexicon.

Mr. FOARDE. And "website" as well.

Mr. DELISLE. Right. "WTO" is all over the place. Actually, people are reading those books, unlike the selected works of whomever among the present or departed political leaders, which are gathering dust over in the corner.

So I think WTO accession has created this atmosphere of thinking about laws and thinking about how the outside world handles the regulation of economic activity. I think there is something to the argument that the WTO, despite all its professed neutrality on things other than trade law narrowly defined, assumes a heck of a lot.

It clearly demands that member states provide a degree of judicial review of government action, and it clearly assumes, as an underlying substrate, some form of property rights. So, I think there is that kind of link between property rights and China's WTO membership.

Beyond that, I think that the question of whether China provides a level playing field for foreign traders and investors is becoming a real issue. We are used to thinking of such issues in this country as an American complaint about how American companies are discriminated against, and certainly that is a perennial and sometimes a valid concern.

But there is a curious structure that has emerged in China's foreign trade and foreign investment law throughout much of the reform era that gave foreigners certain advantages to foreigners over Chinese actors. True, there were many informal factors that clearly benefited Chinese firms, but if you look at the formal regulatory structure and many practices, foreigners have been privileged: there were tax breaks, there was streamlined government approval of applications, and there was preferential access to key inputs. There were even clearer property rights for foreigners, certainly compared to those for private ownership in China.

With China's entry into the WTO, the aspects of the preexisting system that discriminated against foreigners are under pressure for change. Seeing their former advantages thus eroding, Chinese parties are now among those insisting that there must be a level playing field. They want the property rights and other protections that the previous system provided in greater abundance to foreigners. So, there is a Chinese domestic constituency, certainly outside the most traditional State ownership sector, that says we need to be "leveled up" to create a level playing field by providing us with clearer and stronger rights of ownership.

More simply and more conventionally, the foreign investors who are being asked into joint ventures with Chinese firms or who are coming in as competitors with Chinese firms are expecting, and are relatively successful-though not perfectly successful—at getting, some property rights protections. Especially in the joint-venture context, the "spillover" effects to the "domestic" Chinese economy are hard to contain in post-WTO-accession China. You cannot keep the "domestic" and "foreign" economies very separate any more.

Mr. FOARDE. So I just want to make sure that I understand. You think, in a lot of ways, the demand of Chinese, say the Chinese business class or property owning class, to have the same sorts of privileges that have existed up until now in, say, foreign joint venture enterprises, foreign invested enterprises, is part of what is driving this?

Mr. DELISLE. I think it is part of it. Foreigners demand property rights protection as the price of providing their capital, and that protection can be provided more or less formally. The trend is toward providing it more formally. Chinese counterparts to foreign firms and investors say, "We have to be able to compete on a level playing field." Chinese in positions of political power realize that they have a problem if the foreigners come and take huge swaths of the economy, especially if their ability to do so is enhanced by legal rules and policies that favor foreigners. It is a political problem; it may be an economic problem.

I do not have a theory about precisely how these factors and concerns determine policy, and I would be grateful for anybody out there in the political science or legal world who can tell me how the politics of this actually works in China. It is hard to tell what is pull and what is push, but there is a Chinese side to this story along the lines that you suggested.

Mr. FOARDE. Really interesting.

Anybody else have a comment? [No response]. No. All right. Let me ask Dave Dorman if he wants to pick up the questioning.

Mr. DORMAN. Professor Prosterman, just a comment and a question. I was recently in China and had the opportunity to speak at length with an official who was a senior official in a provincial-level reform and development office.

This official described his primary function as finding ways to compensate those whose land had been taken for bridges and roads and railways, and he was quite satisfied that in each case, month by month, he was able to either compensate these individuals and families through the funds available to his office, or go directly to the province and get what money was required to satisfy all parties. But what struck me in the conversation was, although he was

representing a reform and development function at a rather senior level, his responsibilities did not include addressing the issue of rural incomes, or increasing agricultural efficiency for farmers. Is there a disconnect between rural reform policy and the current status of the legal system?

Let me explain. I was looking at a statistic in your paper pointing out that perhaps 1 percent, understated, of arable land is disappearing each year in China. When you look at that number and think of how long this has been going on, you almost have to wonder whether the problem of land taking will be solved by other means before the legal system catches up.

But the question to you is, and I know you have been dealing extensively with the organizations involved in rural development, to what extent are policies in this regard focusing only on converting arable land to other uses as opposed to looking at the interests of farmers in terms of raising incomes or raising agricultural efficiency and productivity? Is there a disconnect in policy? What organization is responsible for ensuring that rural development is responsible and equitable?

Mr. PROSTERMAN. Well, two points, perhaps, worth making. One, is that I think, at the very highest level of the government, including the President, the Prime Minister, the State Council, that there probably is a pretty strong consensus that the key need is to improve rural incomes and narrow the gap between urban and rural incomes. They really see that as a terrible problem, both in terms of potential instability, potential super-rapid and "hard-landing" urbanization, and in terms of reflecting a lack of development of the internal economy of the 800 million who live in the countryside.

I think they realize that a nation of 1.3 billion cannot export its way to developed country status. They must develop the internal market. That means that the 800 million who live in the countryside, that market has to develop. The only way that can really develop is if their principal asset, land, can be fully utilized, which cannot happen as long as this horrendous process of readjustment or the associated process of unregulated takings continues.

The other point is that there have been two recent and important developments. One, is an urgent notice of the State Council issued at the end of April on what is called land market correction and tightening land management, which is essentially aimed at restricting takings. It is essentially a moratorium for this calendar year on most takings of agricultural land for non-agricultural purposes. Just issued on June 10 is an accompanying regulation which basically limits takings of agricultural land to a specific list of seven public interest needs.

It is an approach that, in comparative law terms, you might call it a "list approach" to takings, a very, very strict, restricted approach where you cannot count on a judicial system to narrowly interpret the meaning of "public purpose" or "public interest" takings. These listed takings also must be approved by the State Council, so at least for this year they are going to have a very strict restriction on takings for non-agricultural purposes.

The next step, hopefully, will be to extend this moratorium beyond 2004, perhaps make it permanent in terms of using the expro-

priation power for any but a narrow list of clearly public purpose takings.

There have been other straws in the wind that very much suggest they are going in this direction, so that any commercial, or industrial, or residential development takings, any for-profit takings, would have to, beyond getting approval for the change in use of land, rely on direct negotiation and paying a market price to the user of the land, which is definitely the direction in which they should be going.

I think there is overwhelming central support, as far as we can see, for this overall approach to the problem. Now, there are undoubtedly pockets of resistance. There are constituencies both at the center, and certainly at the local level, that are doing their own thing, but I think they are being pretty sharply reigned in at this point.

Mr. FOARDE. Good. Thank you.

Susan Weld, more questions?

Ms. WELD. Thank you.

I wanted to ask about the role of banks and credit unions. One reads a lot about the urban situation where there is sort of a malignant combination between the banks, the officials who might not be very pure, and the developers. The people who just get rolled over are the holders, the residents of those land areas. Can you tell me how that can be improved? What are the ways that that might be alleviated in the cities? In the countryside, one way, I would suppose, to let the farmers get their bit of value out of the land would be allowing them to use the land as collateral for a mortgage. Is that something that is in the wings?

Mr. DELISLE. We are passing a hot potato around here. I will not purport to speak to the rural areas at all on that, because I probably know even less about that than about urban areas on the banking issue, and because there are two panelists who know a lot about the rural sector.

In the urban area, I think it is part of the generic problem with banks in general. I think there have been sincere, and in many ways Herculean, efforts to fix the banks.

But the policy loans are still there, and until you get banks out of an environment where they are being told to do two different things—policy loans and commercial loans— you are going to see a lot of very sloppy banking behavior, and I think that means the continuation of lending based in part on bankers' personalistic connections with developers for urban development, and that sort of thing. And, yes, there is a real estate bubble, by nearly everybody's reckoning.

Ms. WELD. So, there are rules for disclosure of those things, but they are just not being enforced? What is the situation on disclosure?

Mr. DELISLE. I do not know much about it. My impression is that the answer is, quite weak. Again, I do not have much to say about the specific narrow questions you are asking, but I think it is going to be very hard to fix the problem, absent dealing with the broader problems of transparency and hard budget constraints and such on the banks. I think that is partly just because there is not a culture of disclosure. The banks are not listing on the exchanges yet. A

couple of them are getting close, and that will help. So too will the expected formation of joint ventures with foreign banks.

Of course, when some of the big State banks do list on exchanges, enter into joint ventures, and particularly when they try to raise capital abroad, there will be all sorts of tighter restraints that will develop, and that may improve things. But I think what you have got now is banks in the curious position of juggling these portfolios in very different undertakings—policy lending, commercial lending and so on— and it is all under one roof.

There are categories of loans and investments that nobody expects ever to be profitable, and then there are banks' quests for opportunities that hold out promises of being profitable, and that leads to a risk of speculative loans. The collapse of the TICs was in part a problem of bad and speculative real estate lending. I think that is at least a small piece of what is going on here, but I do not know enough about the details of real estate finance to go any farther than that.

Mr. PROSTERMAN. On the rural situation, the rural credit union offices have mainly acted as a recipient of farmers' savings to be channeled to urban lending. It is very rare that you find a farmer who is able to get credit. They will say in interviews, only if you have really got good connections or a brother-in-law at the bank, or something like that. But the government is getting very close to allowing mortgage of land, that goes naturally with giving long-term, 30-year rights, which, as I say, have something like 75 to 95 percent of the value of full ownership, to allow their use as collateral. That almost got into the Rural Land Contracting Law. We think it very likely will get into the forthcoming Property Law. That should allow, hopefully, the beginning of a modern rural banking system.

Mr. FOARDE. Christian, would you like to pose another question?

Mr. WHITON. Sure. Just one last one.

Dr. Davis, I was struck that you said last year there were almost daily protests regarding property seizures, and these were in Tiananmen Square. Do you see anything happening with momentum? Has this fizzled out? Do you think they will be back? Do you see any events on the horizon that may spark this to become something larger?

Ms. DAVIS. At the moment, it is difficult to say because we had real significant crackdown around June 4, which is, of course, the fifteenth anniversary of the Tiananman Square massacre. Around that period, the whole square was shut down. Lots of people were jailed or put under house arrest. Internet activists, especially, were put under lockdown. Websites were shut down. So, there has really just been a kind of drying up in terms of information coming out of urban areas. Also, I think a lot of people have been laying low until that period passed.

So, now that that is behind us, we may, in the next month or so, begin to see some more protests emerging. I mean, I doubt they have really shut that down permanently, but it is not uncommon around major holidays or anniversaries of big protests.

Mr. FOARDE. Let me give the last questions of this afternoon to Keith Hand. Keith.

Mr. HAND. Thanks, John. Jacques, it is interesting that you mentioned all the WTO books in bookstores, because I always find bookstores to be a fascinating touchstone for what is on people's minds in China. I was recently in Beijing, Shanghai, and Chengdu, and the bookstores were full of books on urban demolitions, and also how farmers protect their rights, these sort of how-to books with form documents and very simple answers to some basic legal questions.

One last question about the problem with urban demolitions and the related legal framework. We see a lot of abuses in terms of procedure and people getting their homes knocked down before they have had a chance to raise an issue about why their land is being developed or about compensation. In a lot of the conversations I had, compensation does seem to be the very central issue.

Another problem that I sense relates to this compensation issue is that people's property rights themselves are a bit unclear. People do not own the land itself, of course. That is all owned by the state. They may have been allocated a place to live by their work unit at a subsidized rate. Or they may have been allowed to stay on land that they never paid use rights for. I think it was in the 1982 Constitution that declared that land all belonged to the state.

So it seems that these people are angry because they have been living on land for a long time and the compensation that they get is not enough to buy new housing in the central part of a city where housing prices have gone up very quickly. On the other hand, if they did not own their apartment, or their shack, or wherever they lived in the first place, what would they be entitled to even if all these process issues were worked out?

Ms. DAVIS. We may all have different answers to that one. Our touchstone on this tends to be international law. The International Covenant on Economic, Social, and Cultural Rights actually allows governments to exercise eminent domain. It allows forced evictions. But the problem is, forced evictions have to be conducted according to law and they have to have certain procedural protections which are supposed to include consultation with the people who are going to be affected. Whether they are residents or homeowners, Chinese law does not distinguish, as you know, between the two. It has to give people adequate notice of their eviction. It has to give them information on the proposed use of the land from which they are being evicted. Government officials are supposed to observe the eviction process to make sure there are no abuses.

There is supposed to be proper identification of the people doing the demolition and eviction, which of course is often not the case in China where you have wrecking crews of guys from the countryside come in to do it. And, most crucially, there has to be some kind of legal remedy available.

A lot of these protections are not existent in the letter of Chinese law, and most of them are absent in practice. I think these kinds of minimal protections would go a long way toward easing some of the problems.

Mr. DELISLE. I would second that, in general. In addition, I'd offer a couple of specific points. There are people who face displacement who do not clearly have whatever rights people might have living in those positions. There is a spectrum running from quasi-

squatters up to people who have as good a claim as one can possibly have in Chinese property law, but you are right, that claim is still not one of underlying ownership to the land itself.

There is also the compensation problem. Compensation to the displaced generally is offered at well below market rates, if by market you mean what this land is going to be worth if you were selling it—the right to occupy this space-in a fair and efficient market.

I am struck in looking at the Reform and Development Commission's, the national one's, statement of reform objectives for the current year. What is striking is how little it addresses these problems, despite talking about a lot of other property rights related issues.

I think that reflects either that the leadership has not been able to come to an agreement or that they are in denial. Seemingly everything else is in the official agenda. There is a statement about the need to address the compensation problem in the rural areas, to have such takings compensated at something closer to market rates.

There is a statement of recognition of the need for a more sophisticated, transparent, functional market system for property rights in the urban areas. This is seemingly a pro-developer item. There is a statement of the need to make land-related property rights alienable and to create markets. Even mortgage-backed securities are on the agenda.

There is discussion of the need for a social security system, of some floor for the material wellbeing of people that include the displaced, but is not tied to their rights to the particular apartment that they are losing. And there is a statement of the need for better State administration of State assets, to address the asset stripping problem. That is the agenda. Where is the piece of it that addresses the concern you raise?

Mr. PROSTERMAN. Perhaps, finally, one small step in the right direction that came out at the end of May. The Ministry of Land and Resources announced the creation of an Internet hotline for accepting complaints about, and reports on, illegal land takings, both rural and urban. So, that is the kind of incremental movement that we very much like to see.

Mr. FOARDE. It is certainly welcome.

We are out of time for this afternoon. So, it is my privilege, on behalf of all 23 members of the Congressional-Executive Commission on China, and particularly Chairman Jim Leach and Co-Chairman Senator Chuck Hagel, to thank, first, our three panelists, Meg Davis, Jacques deLisle, and Roy Prosterman, for coming from out of town, and some of you a very great distance, to share your expertise with us this afternoon. We appreciate it very much.

In addition, everyone who came to hear the testimony this afternoon, thank you for participating with us. You will see the proceedings of this roundtable in a few weeks up on our website, and the statements will be available as well.

Please sign up for our mailing list. That is the best way to find out about the next activity of the CECC.

For this afternoon, we will bring this one to a close. Thank you all.

[Whereupon, at 3:30 p.m. the issues roundtable was concluded.]

A P P E N D I X

PREPARED STATEMENT

PREPARED STATEMENT OF ROY L. PROSTERMAN[1]

JUNE 21, 2004

The Rural Development Institute has worked in China on issues relating to the decollectivization of agricultural land and farmers' security of tenure—including the important tenure-related issue of land takings for non-agricultural uses—since 1987. Over that time I have directly participated in village interviews of more than 1000 farm households in some 20 Chinese provinces and province-level municipalities (my RDI colleagues have participated in several hundred more household interviews), most of which have included questions as to land takings. I have also helped oversee and analyze two sample surveys, each of more than 1600 farm households in 17 provinces, carried out in cooperation with Renmin University (Beijing Peoples' University) in 1999 and 2001.[2] RDI has also carried out comparative fieldwork and policy advisory work on rural land-tenure issues in 39 other countries or settings since 1967, in many cases including land takings as a significant issue.

The present testimony is based upon that cumulative work, discussions with Chinese government officials, discussions with other scholars and specialists, and on an ongoing review of the available literature.[3]

WHY AGRICULTURAL LAND TAKINGS ARE PROBLEMATIC

Takings of agricultural land in China for non-agricultural purposes have been a major source of concern to the central government.[4] There are a number of reasons why such takings are, and should be, of major concern:

- *Loss of agricultural land for production.* It is difficult to estimate the amount of land being lost, especially to the extent that many takings may not be disclosed to the central authorities. Since China is attempting to feed approximately 20 percent of the world's population on around 9 percent of its arable land, any significant loss of such land is of concern. Perhaps in anticipation of policy and legislative reform on this issue, reports indicate that a substantial land grab has occurred over the past 12 months, with government reports suggesting a staggering total of 168,000 fraudulent land development cases in 2003, twice as many as reported for 2002.[5] Non-agricultural construction took 1,527,000 hectares of arable land in 2003, stated to be an increase of 17 percent from 2002.[6] These latter figures suggest a recent annual loss rate of roughly 1 percent [7] arable land per year to non-agricultural takings, but again, may be understated due to non-disclosure to the central government.

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[1] The witness is Professor of Law at the University of Washington, Seattle, and President of the Rural Development Institute, a non-profit organization of lawyers which works on land law and policy issues in transitional economies and traditional developing countries.

[2] The full results of the 1999 survey are described in Roy Prosterman, Brian Schwarzwalder & Ye Jianping, Implementation of 30-Year Land Rights Under China's 1998 Land Management Law: An Analysis and Recommendations Based on a 17 Province Survey, 9 University of Washington Pacific Rim Law & Policy Journal 3, 507–567 (2000). The full results of the 2001 survey are described in Brian Schwarzwalder, Roy Prosterman, Ye Jianping, Jeffrey Riedinger & Li Ping, An Update on China's Rural Land Tenure System Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey, 16 Columbia Journal of Asian Law 1, 141–225 (2003).

[3] Also submitted for the record is a longer RDI memorandum, to Files, from Brian Schwarzwalder, Roy Prosterman, and Li Ping, on "Land Takings in China: Policy Recommendations," dated June 5, 2003.

[4] See, e.g., Central Committee Document No. 1 of 2004, entitled "Opinions of the Chinese Communist Party Central Committee and State Council on a Number of Polices for Promoting Increase in Peasant Incomes" (one of the policies to be promoted is to reform the land expropriation process to protect farmer rights and provide increased compensation when land is taken for development), reported in "Text of Chinese Policy Document on Raising Farmers' Incomes," Xinhua News Agency, Feb. 18, 2004, available in LEXIS BBC Worldwide Monitoring. This was the first No. 1 Document since 1986 to focus on rural issues.

[5] See, e.g. Ching-Ching Ni, "Land Grabs Sow Pain, Poverty for Chinese Farmers: As the Economy Grows, Development Deals Are Often Corrupt and Victimize the Peasantry," Los Angeles Times, March 7, 2004. See also Elizabeth Rosenthal, "Factories Bump Rural Chinese; Farmers Left Unpaid for their Land," The New York Times, March 24, 2003.

[6] Ministry of Land and Resources Declaration or Chinese Land Resources in 2003, available at *www.mlr.gov.cn/query/gtzygk/2003.htm*

[7] See FAO Production Yearbook 2002, Table 1.

- *Undermine the security of farmers' land rights.* As we shall discuss subsequently, China's farmers, under the 1998 Land Management Law and the 2002 Rural Land Contracting Law, are now supposed to be in possession of their land under 30-year use rights, in general not subject to "readjustment" (take-back and reallocation) by local cadres. Yet takings for non-agricultural uses are often accompanied by illegal "readjustments" of all the remaining agricultural land in the village, spreading the pain of land loss (and tenure insecurity) among all the farmers. Underlining the loss sustained by land-losing farmers, farmers themselves typically receive only a tiny fraction of the compensation paid for the portion of land being converted for non-agricultural use. Thus land rights village-wide may be perceived as both worthless and insecure.
- *Undermine the value of farmer's land rights.* To the extent that farmers' land rights are perceived to be readjustable and short-term rather than genuinely secure for 30 years, agricultural land will develop far less market value, and be far less transactable—undermining major goals of the Rural Land Contracting Law.[8]
- *Undermine farmers' ability to invest.* An even broader and more immediate consequence of undermining farmers' tenure security is through reducing their ability and motivation to make mid- to long-term investments in the land, which are critical for the increase and diversification of production, the increase of farm incomes (which currently lag behind per-capita urban incomes in a ratio of 1:3.24), and the increase of rural consumption (which would permit enhanced reliance on the development of the internal market).[9]
- *"Cheats" farmers, creates instability.* Takings of farmland for non-agricultural purposes represents a significant source of rural discontent. Farmers usually receive grossly insufficient compensation for the lost land, and without either adequate rules or effective judicial redress, farmers have typically reacted through demonstrations, as was reported in Jinyun county of Zhejiang Province in November 2003,[10] or by traveling to Beijing to lodge complaints at various ministries.[11]
- *Distorts land markets.* To the extent that farmers are deprived of fair compensation for their land rights in part (sometimes in large part) to provide land to buyers or end users at a subsidized, less-than-market price, the result is also a cor-

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[8] Based on the values of agricultural land in comparable Asian settings, we have calculated that secure and marketable 30-year land rights in China should, as markets develop, achieve an average value of between US$3,750 and US$4,750 per hectare (roughly Rmb30,750 to 38,950 per hectare), suggesting a total value in the range of US$500–600bn (roughly RMB4.1–4.9tr) for China's 135m hectares of arable land. This value, realized through market transactions and, eventually, through mortgage of arable land rights (not yet permitted), represents capital that farmers can begin to apply to investments in agriculture, enterprise, education, and consumption. See generally Roy Prosterman and Brian Schwarzwalder, From death to life: giving value to China's rural land, China Economic Quarterly, Q1 2004, p. 20. See also, on the importance of bringing, as he calls it, "dead capital" to life, Hernando de Soto, The Mystery of Capital (2000).

[9] Successfully carrying through the implementation of farmers' 30-year land rights in China may be thought of in parallel with the three great post-war land reforms which were supported by the U.S. in Japan, Taiwan, and South Korea, each of which gave land ownership to what had generally been unmotivated tenant farmers with short-term land rights. In Taiwan, for example, in the decade following land reform, farmers increased their rice production by 60 percent and (aided by further investment and diversification) their average per capita income increased by 150 percent . Rural consumption grew greatly across a wide range of goods and services. See Chen Cheng, Land Reform in Taiwan 84–88 (1961). In interviews conducted with farm households throughout Taiwan in 2000, we found that Taiwan's small farmers were full participants in the island's vibrant consumer economy. Virtually all of the farm households we interviewed (most of whom were part-time, rather than full-time, farmers) possessed a wide range of consumer electronic goods—color TVs, VCRs or DVD players, stereos, cellular phones, washing machines, refrigerators—as well as owning automobiles (and often motorcycles). Most families also held private life insurance policies, had purchased stocks in Taiwan's stock market, had a computer, and had traveled off island on at least one occasion. The implications for a Chinese rural economy of more than 800 million potential consumers are clearly enormous.

[10] South China Morning Post, "Around 1,000 Villagers Clash With Police over Land Seizure," November 27, 2003. In the Jinyun case, farmers claimed that the local government had illegally requisitioned up to 260 hectares of farmland belonging to 6,000 farmers. Farmers were compensated through a one-time cash payment of RMB 20,000 (approximately US$2,500) for their land. At least one farmer from Jinyun traveled to Beijing to lodge an official complaint regarding the taking. The clash between villagers and officials in Jinyun was reported to have involved around 1,000 farmers surrounding the industrial park in which the land is located. When local authorities intervened, violence ensued, with dozens of people reportedly injured.

[11] Officials at both the State Council and the Chinese Academy of Social Sciences report that they receive detailed letters of complaint regarding land takings cases from farmers on a daily basis. Many of these letters indicate that farmers have already made extensive efforts to register their complaints with various agencies in Beijing, each of whom push them to other departments. See generally on taking-related rural instability, Thomas Bernstein, Instability in Rural China, in Is China Unstable? Assessing the Factors 96 (David Shambaugh, ed. 2000).

responding distortion of factor markets in the Chinese economy. Land as a factor of production is then undervalued—in the most extreme cases, considered as virtually a free input—with consequent distortions in investment decisions and the inappropriate allocation of capital, as well as accompanying and frequent underutilization of the land acquired. Indeed, the twin distortions of artificially cheap credit and cheap land have probably contributed greatly to the recent perceived overheating of the Chinese economy, with its accompanying fallout (such as potential inflationary pressures) for the world economy.[12]

- *Induces corruption of local officials.* Low compensation paid to farmers for land takings in combination with the lack of transparency in the land takings process creates an opportunity for local officials to pocket huge profit for their own, contributing to the widespread expansion of official corruption. Three provincial level officials were convicted in 1998–1999 for taking bribes or embezzling land granting fees in an amount up to $20 million in offering cheap land to developers,[13] and a large proportion of all corruption cases tried in recent years have involved illegal dealings with land granting fees.

THE LAW AND PRACTICE WITH RESPECT TO AGRICULTURAL LAND TAKINGS, INCLUDING PROJECTED REFORMS

Over 800 million of China's 1.3 billion people make their living primarily from agriculture.[14] China was the first Communist state to bring about the break-up of collective farms into individual family holdings (in 1979–83) but it did so under ground rules that left the great majority of individual farmers with very insecure rights as to any particular piece of land. Farmers' security on the land, and their ability to invest both "sweat equity" and financial resources in improving that land and its productivity have, however, been issues of increasing importance to the central leadership since at least 1993. These issues are now seen as being of crucial importance to China's overall economic development during the coming years and are key goals of the 1998 Land Management Law, the more recent (2002) Rural Land Contracting Law, and accompanying central-government pronouncements.[15]

An extensive sample-survey by RDI and Renmin University in mid-2001 indicated that about 40 percent of Chinese farm households—85 million out of 210 million households, projecting from a sample of over 1600 households—regarded themselves as having received secure 30 year rights by that time, and subsequent village research by RDI and Chinese counterparts also indicated that this figure had probably neither substantially increased nor substantially eroded by early 2004.[16] Indeed, by that time, perhaps as many as one out of two farm households that had received secure 30-year rights had made long-term investments to improve the land, investments that they would not make under the old regime of insecure land rights.[17]

However, the remaining 60 percent of farm households had not (and have not) yet received secure land rights, and are subject to what may be regarded as four analytically distinct sources of insecurity on the land:

(1) "Readjustments" of farmers' landholdings carried out by local (collective) cadres because of either population change in the village over time or population change within individual households over time.[18]

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[12] See, e.g., Keith Bradsher, "China's Squeeze on Credit Shows Signs of Success as Economy Slows," New York Times, June 12, 2004:

Instead of interest rate changes, China's economic policy makers this spring have relied on a brute-force approach of restricting loans and land-use authorizations for industries that they believe to be overheating, notably real estate, steel, cement, and aluminum. These methods have drawn scorn from many free-market-economists. (Emphasis added.)

[13] Shi Hechang, Investigation on State Land and Resources: Who Protects Our Lifeline? Earth [Dadi], Issue No. 20, 2000.

[14] See FAO Production Yearbook 2002, Table 3.

[15] The Rural Land Contracting Law became effective on March 1, 2003. The government's Central Rural Work Conference of January 2003 had identified implementation of the RLCL to be the highest priority for rural work in 2003. See "Chinese Leaders Hu Jintao, Wen Jiabao Address Central Rural Work Conference," Xinhua News Agency, Jan. 9, 2003. Although there has been some concern that the Central No. 1 Document of 2004 appeared to focus more on short-term "fixes" than underlying tenure security issues, the most recent developments seem to indicate that the latter remain of key importance. See "The State Council Issues an Urgent Notice Requiring Restoration of Production on Idle Land As Soon As Possible," People's Daily, March 31 2004 (a notice also dealing with measures for RLCL implementation).

[16] See China Economic Quarterly, supra note 5.

[17] See id., at pp.22, 24. See also Klaus Deininger & Songqin Jin, "The Impact of Property Rights on Households' Investment, Risk Coping, and Policy Preferences: Evidence from China," World Bank Working Paper No. 2931, 2002.

[18] In a "big" readjustment made for population reasons, all village land is taken back and redistributed in new patterns, to maintain absolute per capita equality of every person's land hold-

(2) Readjustments of farmers' landholdings carried out because some farm households have lost land to a taking, in which all the remaining agricultural land is taken back and redistributed to balance out (equalize) the loss among all village households.

(3) Readjustments carried out purportedly because of village population change, but actually as an excuse for the cadres to hold back some land from reallocation for future or planned non-agricultural use (disguised taking).

(4) Takings accompanied by low or no compensation to land-losing households (assuming there will continue to be no readjustments for the 40 percent of China's households who consider themselves to have secure land rights, this one further potential source of insecurity remains under the existing rules if takings occur that affect their specific land).

What are the present rules with respect to takings of agricultural land for non-agricultural purposes, and what changes may be in prospect or desirable?[19]

Under the existing rules and practices,[20] there are major issues as to low farmer compensation, and also as to the overly broad purposes of land takings and the non-transparent procedures which are followed. Under existing laws, farmers are entitled to compensation that amounts to only a small share of the market value of the land. Under the 1998 Land Management Law, compensation for arable land expropriations includes: (1) compensation for the loss of land; (2) compensation for young crops and fixtures; and (3) a resettlement subsidy.[21]

Standard compensation for the loss of land is set at 6 to 10 times the value of the average annual output of the arable land over the three years prior to expropriation. The collective, whose land has been expropriated, is required to report to its members (but often fails to do so) the compensation received for the expropriated land. Compensation standards for surface fixtures and young crops are stipulated by provinces, autonomous regions, and provincial level municipalities. Resettlement subsidies on average should amount to 4 to 6 times the average annual output value of the land for the three years preceding the expropriation. However, such resettlement subsidies may exceed that average, and are capped at a maximum of 15 times the average annual output value of the land for the previous three years.

If land compensation and resettlement subsidies set according to these standards are still insufficient to help the displaced farmers maintain their original living standard, the resettlement subsidy can be increased upon approval by the people's governments of the provinces, autonomous regions and municipalities. The total amount of land and resettlement compensation is capped at 30 times the average annual output value for the three prior years. However, use rights for the land that is taken may be auctioned or sold by the State for a value that is many times higher than this figure. In fact, by most estimates, the compensation paid to farmers represents only 5–10 percent of the ultimate sale price of the land; 25–30 percent of the land value is kept by the village level collective, with the remaining 60–70 percent of the sale price captured by the county and township governments.[22]

While the compensation formula is already extremely unfair and well below the market price of the land to be taken, especially where the land is to be used for industrial, commercial, or residential developments, farmers who lose land to state takings cannot even get a large part of the compensation calculated based on these standards. The existing takings regulations explicitly require that the portion of compensation which is for loss of land be retained with the collective entity.[23] Farmers are entitled only to compensation for standing crops and fixtures, and resettlement subsidies if neither the collective entity nor the state take responsibility for resettlement.[24]

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ing—this reflects both overall growth in village population since the last such readjustment, and individual changes in each household's population. In a "small" readjustment, only population gains and losses in individual households are considered, with the former gaining additional land at the expense of the latter.

[19] The following has been adapted, in part, from Roy Prosterman, "Rural China update," pp. 19–21 (CLSA Asia-Pacific Markets, Special report, May 2004).

[20] Principally embodied in the 1998 Land Management Law and its accompanying Regulations. See generally the RDI memorandum to Files also submitted for the record, supra note 2.

[21] 1998 Land Management Law art. 47; People's Republic Of China Land Management Law Regulations art. 26 (1998).

[22] Xiaolin Guo, Land Expropriation and Rural Conflicts in China, The China Quarterly (2001) at 422. See also RDI memorandum to Files, supra note 2, 11–12.

[23] Implementing Regulations of the Land Management Law (1998), art. 26.

[24] Id.Central government efforts to curtail rampant land development and speculation through bureaucratic and administrative changes had, at least as of early 2004, proven ineffective. In

Continued

Policy makers and legislators in Beijing recognize that action must be taken, and initial steps are underway. Constitutional amendments adopted by the NPC in March, 2004, added new language regarding compensation when property is taken.[25] Although this change is unlikely to have an immediate or direct impact on land takings cases, it sets the broad direction for future reforms.

Importantly, amendment of the 1998 Land Management Law, which has enabled local governments to acquire agricultural land at very low prices relative to its ultimate price, and retain the lion's share of resulting profits, has been added to the legislative agenda. Prior to amending the LML, however, the central government plans to issue a policy document related to land takings. Initial drafts of this policy have contemplated several fundamental changes to the current system of land development, including:

- Limitation of the state expropriation of land solely to public purpose takings, which will be defined in legislation (roads, public schools, etc.);
- For other, profit-making commercial, industrial, or residential development projects, allowing the collective landowner and farmer-users to directly negotiate land use right leasing transactions with prospective developers, without (in contrast to present practice) invoking the state's expropriatory power or involving the state in the development process;
- Increasing the compensation standard that is paid to farmers to more closely reflect the value of the land that is lost as a result of conversion to non-agricultural use;[26]
- Providing key procedural protections to farmers whose land will be developed, including prior notice, an opportunity to be heard, and a right to appeal.

In dealing with seemingly uncontrollable conversion nationwide of agricultural land for non-agricultural use, the central government recently took several drastic measures to administratively halt such conversion. On April 29, the State Council issued an urgent notice putting a moratorium on land conversions for the rest of the year.[27] It requires government at all levels with authority of approving land conversions suspend their review of applications for land conversions during the moratorium period except for the conversions for projects with "urgent needs." In clarifying such "urgent needs," the Ministry of Land and Resources and the State Commission on Development and Reforms issued an Implementing Measures of the State Council's Urgent Notice on Carrying Out Land Market Correction and Tightening Land Management on June 8, 2004. The Implementing Measures explicitly list seven categories of uses that fall within the definition of "urgent needs" and may be approved within the moratorium: (1) energy projects; (2) transportation projects; (3) water conservancy and agricultural projects; (4) major urban utilities; (5) healthcare facilities; (6) education facilities; and (7) national defense facilities.[28] These new developments clearly indicate the central government's grave concerns over rampant land takings, and appear to show its inclination in defining the scope of future land takings by listing public purposes in unambiguous terms.

Issuance of a longer term policy document, however, has been delayed, primarily because of objections raised by local governments, who consider the ability to offer low cost land to developers to be an important component of attracting investment

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late 2003, the central government announced that officials at the county and township levels of the Ministry of State Land and Natural Resources would be brought under the direct supervision of province-level ministerial offices. There have been repeated calls for strengthening land use planning efforts in order to make China's system for protecting arable land the world's strictest. Anecdotal evidence—such as driving around any peri-urban area in China—inevitably leads to the conclusion that land continues to be developed at a brisk pace.

[25] Article 10 of the Constitution reads in part, "the State may, for the necessity of public interest, requisition [zhengshou] or expropriate [zhengyong] land in accordance with law and pay compensation."

[26] Depending on the discount factor used for future streams of income, secure 30-year land use rights should, at the beginning of the period, have an economic value equivalent to about 75–95 percent of the value of full private ownership, underscoring the argument that the farmer-user should get the lion's share of all compensation paid. Moreover, strong arguments can be made that compensation should be based on the full 30-year term, not treating the term as a depreciating asset. This can be supported both on the likelihood that the rights will be extended for a further 30years upon expiration of the present term, as has been indicated by former President Jiang Zemin, and by the practice in Hong Kong when farmers' 50-year rights are acquired for non-agricultural purposes.

[27] The General Office of the State Council Issues an Urgent Notice: Carry Out Land Market Correction and Tighten Land management," People's Daily, April, 30, 2004.

[28] The Ministry of Land and Resources and the State Commission on Development and Reforms' Implementing Measures of the State Council's Urgent Notice on Carrying Out Land Market Correction and Tightening Land Management, Sec. 2, available at *www.mlr.gov.cn/project/querysta/multidocview.*

and maintaining economic growth. Beijing still appears to be reconciling the potential negative impact of making land development transactions more expensive and time-consuming on a permanent basis, against the increasing social and political costs of the current system, which severely disadvantages farmers, badly distorts land markets and, quite likely, contributes to unhealthy overheating in various sectors of the economy. The central government also seems determined to increase farmers' compensation for land as an early step in the reform process — but when and by how much remains to be seen.[29]

WHAT MORE NEEDS TO BE DONE?

A longer-term central directive on the aggravated issue of land takings does seem likely in the near future, and should be followed by a package of amendments to the 1998 Land Management Law. These should include measures to specifically define and limit, following the current moratorium, the "public purposes" for which the power of compulsory taking can be used; moving towards a regime where any proposed taking of agricultural land for a commercial or private use should be on a non-compulsory basis, at a price which is voluntarily agreed to through negotiation both by the collective owner of the land and by the farmers who are the long-term users (that is, a market price); with a much higher compensation standard for compulsory takings than at present; with the farmers to receive the bulk of the compensation paid in both compulsory takings and negotiated acquisitions (versus the 5–10 percent of compensation they are estimated to receive now); and with highly transparent and public procedures being used, instead of the opaque and non-participatory process that has been used until now.

Beyond issuance of a new policy document and amendment of the LML, there will be key measures of implementation required to bring any new restrictions on rural land takings into full effect. Three in particular should stand out:

- *Publicize the new rules.* This was vital to reaching 85 million farm households with 30-year land rights by 2001, and relied heavily on the repeated use of television (the great majority of farm households do have a television).
- *Set up a hot-line for complaints.* This has successfully been done for the province-wide implementation of tax-end-fee reform in Anhui.[30]
- *Include takings-reform in monitoring.* A national sample survey of farmers should be done within the next 12–18 months on the state of implementation of farmers' 30 year rights, and this should include specific questions on recent land takings in the village and farmers' knowledge of new rules (by then, hopefully, clearly in place) on takings reform.

A broader benefit is that, as the central government begins such implementation steps on land takings, it will be setting patterns that are generally relevant, and necessary, in effectively extending other important normative regimes, and the rule of law generally, in the Chinese countryside.

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[29] See "China Will Increase Land Takings Compensation Standard (Woguo Jiang Tigao Zhengdi Buchang Biaozhun)," Law-Star.com, citing the Ministry of State Land and Natural Resources, January 18, 2004.

[30] In parallel to the idea of hotline, the Ministry of Land and Resources recently issued a notice calling on all provincial level land administrations to establish an internet hotline for accepting complaints about and report on illegal land takings. See the Ministry of Land and Resources Notice on Effectively Strengthening Transparency of Government Information on Land Resources Through Internet, sec. 2, available at *www.mlr.gov.cn/project/querysta/multidocview.*

rdi memo

June 5, 2003

To: Files

From: Brian Schwarzwalder, Roy Prosterman, Li Ping

Re: Land Takings in China: Policy Recommendations

Although China's 1998 Land Management Law attempted to limit conversion of arable land to non-agricultural uses, rampant land takings continue to represent a major problem in rural areas. The problems resulting from China's current land takings regime not only threaten the shrinking arable land base in a country where approximately 2/3 of the population still relies on agriculture for some or all of its income – they also expose fundamental issues related to the allocation of the growing economic value of rural land among the farm households who possess rights to use the land, the collective landowner, and the state itself. The central government has recognized the growing importance of these issues, and has firmly placed land takings issues on the rural policy and legislative reform agenda.

To understand these problems, RDI's research team conducted two rounds of fieldwork with respect to the extent and nature of land takings in rural China, including one round conducted in Anhui in late 2002 and a second round conducted in Hainan and Guangxi in March of 2003.[1] In Anhui, we interviewed four groups of farmers in four villages of three county-level suburban districts of Fuyang Municipality, who reported that their land was taken for 14 non-agricultural projects. In Hainan and Guangxi, we interviewed 24 households in eight counties or cities, and 13 of these 24 households reported that land takings had occurred in their villages since HRS, with a total of 20 land taking incidents reported. Combining the results of the two rounds of fieldwork, we interviewed farmers in 17 villages in three provinces, who had experienced a total of 34 incidents of land takings.

Consistent with the central government's intentions to develop a policy and legal framework that will: (1) reduce and restrict land takings; (2) expand the role of markets in the land development process; and (3) introduce consistent and effective procedures which govern land takings and related disputes, this memo analyzes three key issues that are likely to be addressed in a forthcoming central government policy on land

[1] The issues concerning land takings were the focus of the fieldwork conducted in Anhui. The fieldwork conducted in Hainan and Guangxi involved a a broader spectrum of issues related to farmers' land tenure, but included detailed questions concerning land takings in all villages where farmers reported that at least one taking had occurred.

1411 Fourth Avenue • Suite 910 • Seattle, WA 98101
tel (206) 528-5880 • fax (206) 528-5881
rdi@rdiland.org

takings, (1) the definition of public purposes; (2) compensation-related issues; and (3) procedural issues.[2] In our analysis of each of these issues, both international comparative experience and Chinese approaches, including the results of recent RDI fieldwork in China, are discussed, and policy recommendations are offered.

1. The Definition of Public Purposes

Most countries limit the state's right to expropriate land to circumstances that serve public purposes.[3] The reasoning behind this restriction is that the state should not use its extraordinary eminent domain power to take land from some private individuals to benefit other private individuals; rather, the state should only take an individual's land if doing serves a broader public purpose and benefits society in general. Varying definitions of "public purpose" embody each society's balance of the rights of individual landholders against the public's land requirements.

International Comparative Examples

Generally speaking, compulsory acquisition statues define the circumstances under which the state may expropriate land in one of three ways: a general guideline announcing that the state can only take land for public purposes, a list of purposes which are defined as fulfilling public purposes or a combination of the two.[4]

General guidelines merely state that expropriation requires a public purpose, leaving considerable discretion to the executive power of the state and the judiciary's power of statutory interpretation.[5] Countries employing this approach include the United States, the Republic of the Philippines, Vietnam, and Hong Kong Special Administrative Region. The Constitutions of both the United States and the Philippines state that private property shall not be taken for public use without just compensation.[6] Vietnam also adopted this approach in its 1993 Land Law. Article 27 of the law states, "[W]here necessary, the State shall, for purposes of national defense, security, national or public interest, recover possession of land which is currently being used."[7] Similarly, the

[2] For the purpose of this memo which will focus on state takings and collective transaction of land use rights for non-agricultural purposes through negotiated conveyance, collective withdrawal of farmers' land use rights for the uses that will benefit the public is not covered in the memo.

[3] MICHAEL G. KITAY, LAND ACQUISITION IN DEVELOPING COUNTRIES at 40 (1985).

[4] *Id.*

[5] *Id.* Note that the terms contained in statutes may vary: "*Public* may become *social, general, common,* or *collective.* Similarly, *purpose* may be replaced by *need, necessity, interest, function, utility,* or *use.*" *Id.*

[6] UNITED STATES CONSTITUTION Art V; PHILIPPINES CONSTITUTION Art. III, sec. 9.

[7] Land Law of Vietnam, art. 27.

government of the Hong Kong Special Administrative Region (SAR) may acquire land for public purposes under the Hong Kong Land Resumption Ordinance[8]

List provisions, on the other hand, limit expropriation of land to purposes such as schools, roads and government buildings, which are explicitly identified as public purposes in legislation.[9] In general, list provisions leave much less discretion to the executive and judicial branches of government than general guidelines.[10] List provisions may be either exclusive or inclusive. Exclusive lists provide a comprehensive list of public purposes beyond which the executive may not expropriate land. Inclusive lists, however, are combined with general guidelines, and expropriation is allowed where the purpose either falls within the list or meets the general guidelines.

Brazil and Mexico provide examples of countries that combine inclusive lists with general guidelines. Brazil recognizes two purposes that justify expropriation. First, land can be expropriated if it is needed for "public utility," which is defined by a list to include national defense, public health, construction of public works, and achievement of state monopolies. Second, land can be expropriated if it serves a "social interest," which is a more general guideline.[11] Mexico's expropriation statute contains a detailed list of uses that meet the "public utility" standard, but also includes a final catchall provision that allows expropriation for "all other cases provided for by special laws." This provision allows legislative expansion of the definition of "public utility."[12]

A broad survey of both developed and developing countries indicates that the public purpose doctrine most often includes the following permissible uses:

- Transportation uses including roads, canals, highways, railroads, sidewalks, bridges, wharves, piers, and airports;
- Construction of public buildings including schools, libraries, hospitals, factories, churches, and public housing;
- Military purposes;
- Public utilities such as water, sewage, electricity, gas, irrigation and drainage works, dams, and reservoirs;
- Public parks, playgrounds, gardens, sports facilities, and cemeteries;
- Agrarian reform.[13]

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[8] Laws of Hong Kong Chapter 124, Hong Kong Land Resumption Ordinance (1997) hereinafter Hong Kong Land Resumption Ordinance.

[9] KITAY, *supra* note 3, at 40.

[10] *Id.* at 40-41.

[11] *Id.* at 41-42.

[12] *Id.* at 42.

[13] *Id.* 43-44. Expropriation of land for agrarian reform is generally permitted where the land has been insufficiently exploited or to expropriate the excessive portions of very large, privately owned plots. In

This partial list of activities indicates the importance of defining the scope of the public policy doctrine in order to limit and define the state's broad expropriation powers. Except where a country employs an exclusive list of circumstances under which expropriation is permissible, statutory expressions of the public purpose doctrine will always require further definition and clarification through statutory interpretation by the judiciary or further detailed clarification in administrative regulations. This is especially true in countries with expropriation statues that contain broad general guidelines. Without further clarification, such broad guidelines give government entities broad discretion to expropriate land without checks on their power, which results in land tenure insecurity and rapid loss of farmland base.

Chinese Approaches

China currently utilizes the general guideline approach to designating what serves the public interest for purposes of state expropriation.[14] The Constitution grants the state the authority to expropriate land, in the public interest, for its use.[15] The Land Management Law echoes the Constitution without providing any further details on what specific purposes serve the public interest: "The State may, in the public interest, lawfully requisition land owned by collectives."[16] The State Council adopted implementing regulations for this law, but these regulations do not provide further details on what qualifies as a permitted expropriation for the public interest; therefore, great discretion is left to state bodies to determine what serves the public interest.

China's existing legal framework governing land expropriation further requires that all conversions of land from agricultural to non-agricultural uses must use state owned land. Where the land to be used in such a conversion is currently owned by rural economic collectives, itmust first undergo a process through which the state becomes the owner..[17] In such cases, the intended land user must apply to the state for approval of the use and conversion of agricultural land into non-agricultural uses.[18]

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some countries, agrarian reform is dealt with under specific constitutional provisions separate from those relating to the general eminent domain power.

[14] Under previous law, expropriation of collectively owned land was permitted for purposes of "economic, cultural and national defense construction, and public welfare undertakings." 1986 PRC Land Management Law, art. 21, repealed by the 1998 PRC Land Management Law (*hereinafter* LML). The current law governing requisition of land does not list the reasons that land may be taken, but simply states, as discussed in the text below, that land may be taken in the public interest.

[15] CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 10(3). "The state may, in the public interest, requisition land for its use in accordance with the law."

[16] LML, art. 2.

[17] Id., art. 43. A narrow exception to this rule is for rural public facilities, farmers' residential houses and township and village enterprises, which may use collectively owned land. Id.

[18] Id., art 44.

Upon approval the state will exercise its eminent domain power through the county level government.[19] Under such a land taking framework, the state may take farmers' land not only for "public purposes", but also for all other purposes of a non-public nature.

The absence of a clear definition of what takings are in the "public interest" together with the state's monopoly over land takings, has resulted in a substantial number of land takings for profitdriven commercial purposes throughout China, including those areas where RDI recently completed fieldwork on the question of land takings. In the four villages we visited in Anhui, seven out of 14 incidents of land takings were for commercial purposes, ranging from real estate projects to gas stations. Of the 20 incidents of land takings reported in 13 villages of Hainan and Guangxi we visited, 11 were for commercial uses, including real estate projects, stone mining yards and industrial facilities.

Some of the reported takings were in fact "dual use" takings, involving both a commercial and a public component. For example, 10 mu of a village's land in Anhui was taken for an approved use for building a school in 1997. After the building was completed, the school leased part of the building out to vendors of various stores and collected a rent of more than RMB 100 per month for a 32 m^2 space.

Recommendations

The current legal framework governing land expropriation serves to blur the lines between expropriation of land for legitimate public purposes and conversion of land for commercial development. This lack of clarity is further exacerbated by the fact that the state exerts legally-sanctioned compulsory acquisition power in all cases,[20] regardless of the nature of the end use. Furthermore, the delegation of the state's compulsory acquisition power to the county government undercuts the LML's attempts to limit the loss of farmland through land use planning and approval mechanisms.

As discussed above, most countries with developed legal frameworks governing land taking limit the state's compulsory acquisition power to pure public uses; all other acquisitions of agricultural land, whether for agricultural or non-agricultural purposes, are accomplished through direct negotiation between the owners or users of the agricultural land and the party wishing to acquire ownership or use rights to the land.[21] These negotiations are purely voluntary, and do not involve the state or local government; if the farmland's present owner or user is not willing to give up agriculture

[19] Id., art 46.
[20] With exceptions listed in note 17 above.
[21] It should be noted that such negotiated acquisition of agricultural land by private parties remains subject to all relevant land use planning restrictions imposed on the land.

or does not accept the buyer's offer, the buyer has to look for other willing sellers or raise his offer.

The first step taken in the reform of China's land takings regime should be to effectively confine the state's eminent domain power to takings for specified "public interests". We recommend that the central government make a clear distinction, first in its policy directives and later in revised legal rules on land takings, between "public interests" subject to compulsory state expropriation, and all other forms of non-agricultural land use, which should occur through a process of voluntary negotiation between the affected land owners and users on the one hand, and the party wishing to acquire rights to the land on the other. Under such a regime, it will be of the utmost importance that the state continue its stringent rulemaking and enforcement with respect to ensuring compliance with government's land use planning and its objective of preventing farmland loss. However, once a particular non-public- interest use of agricultural land has been approved by the state agency in charge of review and approval, the subsequent land conveyance should be conducted through the market mechanism.[22]

It is important to emphasize that the state, as represented by the county-level land agency, should not be completely excluded from the voluntary negotiation process. Indeed, the state has an important role to play in protecting the rights of landowners and land use right holders in the negotiation process. It is in the state's interest to ensure that not only all land use planning requirements are met, but that adequate compensation has been paid by the party acquiring land use rights (see discussion in Section II, below).

Both China's practical experience with legislative enforcement, and its civil law tradition suggest that the best approach to defining "public interest" would be for policies and laws to specifically list the purposes for which land can be taken. While such a list can be nearly exhaustive, it is certain that some exceptions may arise.

[22] In fact, the Chinese government has initiated a pilot program in several provinces exploring a better approach to compensating farmers in land takings. One principal component of the program is to break up the state monopoly over conversion of agricultural land for non-public-interest uses, allowing land use rights to collective owned land to be granted or leased to a non-agricultural user or converted into shares of joint stock of such user. Under the program, the pilot villages are allowed to grant collectively owned land for an approved non-agricultural use for market price of the use rights to the land subject to a small land transaction tax collected by local land administration. *See* The Interim Measures of Use and Transfer of Collectively Owned Land Use Rights for Construction Purposes of Anhui province (2002). This represents a remarkable shift from managing land conversions in a planned economy way to developing market for rural land use rights for non-agricultural purposes. By eliminating local land agencies as a middleman in conveyance of rural land use rights for non-agricultural commercial purposes, the objective of compensating farmers for the land's full economic value could be one step closer if the collective entity is required to allocate most of the proceeds from such transactions to the affected households (see discussion in Section II, below) and appropriate procedural safeguards are instituted (see discussion in Section III, below). We recommend the central government continue this land takings reform.

Therefore, the list should be an inclusive list, rather than an exclusive one, with the important requirement that any taking for a purpose not specifically authorized by the list must be approved by the State Council. On the important issue of uses that will include both a not-for-profit public component and a for-profit component, it should be required, where the compulsory acquisition power is to be exercised, the principal use is for non-commercial public purposes.

The language of a policy document describing these principles could read as follows.

> The State may, in the public interest, lawfully take land owned by rural collectives. The only purposes for which the State may requisition such land are as follows:
>
> - Transportation uses including roads, canals, highways, railroads, sidewalks, bridges, wharves, piers, and airports;
> - Construction of public buildings including schools, libraries, hospitals, and housing for low-income families;
> - Military purposes;
> - Public utilities such as water, sewage, electricity, gas irrigation and drainage works, dams, and reservoirs;
> - Public parks, playgrounds, gardens, sports facilities, and cemeteries;
> - Major economic development projects critical to the national economy and approved by the State Council;
> - Other highly important public uses approved by the State Council.
>
> Where a proposed taking of collectively-owned land by the State will involve any profit-making element, the State must demonstrate that the principal use of the land following its requisition is for public, and not commercial use (see the related discussion on judicial appeal in Section III, below).
>
> Conversion of collectively-owned agricultural land to non-agricultural uses for a purpose other than those specifically listed above, or for a purpose listed above whose principal use is commercial, rather than public, may not involve compulsory acquisition of land rights by the State. In such cases, conversion may only occur through a voluntary, negotiated transaction approved by all affected landowners and land-using households.
>
> All conversions of land from agricultural to non-agricultural uses, whether through state public purpose takings or negotiated acquisition,

must comply with relevant land use planning rules set forth in the Land Management Law and related laws and regulations.

II. Compensation for Land Takings

With respect to China's current land takings system, two distinct compensation-related questions exist. The first is the determination of the amount of compensation to be paid by the state when land is taken. The second is how compensation for land rights should be allocated between the collective as the land's owner, and those households possessing 30-year rights to use the land under the Rural Land Contracting Law that came into effect on March 1, 2003. This question applies both to cases where land is taken by the state and cases where rights to agricultural land are acquired through voluntary acquisition for non-public purpose uses. These two important issues are discussed separately, below.

A. The Amount of Compensation

Comparative Experience

Most expropriation laws broadly define the level of compensation for expropriation as "fair market value" or "just compensation."[23] Different expropriation schemes, however, have developed divergent methods for determining the level of compensation that equals market value or meets the "just compensation" standard.

The underlying goal of the "just compensation" standard is to leave the owner or user of the expropriated land in the same economic circumstances as before the expropriation; the former owner should neither be enriched nor impoverished. Many countries utilize this standard. Amendment V to the United States Constitution requires "just compensation" for all takings of private property.[24] The Philippine Constitution similarly requires that "payment of just compensation must be made."[25] Brazil's Constitution also contains a "just compensation" clause.[26] A survey of developed and developing country practices reveals that countries employ a variety of methods to determine "just compensation."

In the United States, the principle for determining just compensation is the full market value of the land, which is defined as the amount a willing buyer would pay a

[23] KITAY *supra* note 3, at 50.

[24] U.S. CONST. amend. V.

[25] PHILIPPINES CONSTITUTION, art. III, sec. 9.

[26] BRAZIL CONSTITUTION (1967) art 153, para. 22 (Amendment 1).

willing seller.[27] In Brazil, the 1956 Expropriation Law sets out the following determinants of "just compensation": (1) the assessed value of the land for tax purposes; (2) acquisition costs of the property; (3) profits earned from the property; (4) location of the property; (5) state of preservation of the property; (6) insured value of the property; (7) market value over the past five years of comparable property; and (8) valuation or depreciation of remaining property if only a portion of the owner's land is taken.[28]

In the Hong Kong SAR, the compensation standard is the "open market value of the resumed properties at the date of resumption."[29] According to the Hong Kong Department of Lands, the open market value of resumed properties is based on "the market evidence of similar properties in similar locality around the date of resumption. The assessment involves comparing the resumed properties with the sale transactions of similar properties and making necessary adjustments for various factors such as location, environment, building condition ... (noting other factors where the building is on the land) ... date of transaction ... etc."[30]

Several countries use tax valuation as a guide for compensation. In Mexico, the landowner is entitled to the amount declared or accepted by the owner for tax purposes, subject to adjustment for changes in value since the previous tax valuation.[31] In Singapore, the declared tax value is the ceiling for compensation, while in Guatemala City the ceiling is the declared tax value plus 30%.[32] When land was expropriated in El Salvador for land reform purposes in 1980, the declared tax values in 1976 and 1977 were used to determine compensation.[33]

Many countries provide that the government must compensate not only landowners, but also lessees. For example, in Great Britain, all owners, lessees, and occupiers are entitled to compensation.[34] Compensation is determined either through agreement between the acquiring authority and all interested parties or through an assessment of compensation by the Lands Tribunal. If the parties cannot agree on appropriate compensation, the Lands Tribunal first determines the level of

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[27] *See Shoemaker v. United States*, 147 U.S. 282 (1893); *Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d. 641 (D.C. Cir. 1957).

[28] Expropriation Law (1956) (Brazil), supra note 3,.

[29] Hong Kong Land Resumption Ordinance, *supra* note 8, § 11(1997).

[30] Hong Kong Department of Lands, "Land Resumption in Urban Area" available online at http://www.info.gov.hk/landsd/public/land_res/land_re.htm

[31] KITAY, *supra* note 3.

[32] *Id.*

[33] Basic Law of Agrarian Reform (Decree 153) (1980) (El Salvador), art. 13.

[34] The only exception to this rule is a short term tenant with a term of one month or less. Compulsory Purchase Act, 1965, sec. 1 (England); Acquisition of Land Act 1081, sch. 1 (England).

compensation according to the following principles: (1) no allowance is made for the fact that the acquisition is compulsory; (2) the value of the land is the amount for which a willing seller would have sold the land on the open market; (3) the special suitability or adaptability of the land for any purpose shall not be taken into account if statutory approval would have been required for that purpose; (4) value added to the property by uses that are illegal, detrimental to the health of the occupants, or detrimental to public health shall be excluded; and (5) if there is no market for the land, the compensation may be the reasonable cost of reinstating the occupier.[35] Under certain circumstances, compensation based on the reduction of value of the owner's remaining unexpropriated land may also be granted.[36]

Separate from and in addition to this compensation, when a person is displaced from an agricultural unit in Great Britain, he or she is entitled to a farm loss payment, if: (1) he or she has a use right to agricultural land with at least three years remaining; (2) loses this use right through compulsory acquisition; and, (3) within three years begins to farm another agricultural unit within Great Britain.[37]

Canada explicitly requires compensation to be granted to lessees. The government determines the lessee's compensation based on: (1) the length of the lease and the remaining number of years on the lease; (2) any right or reasonable prospect of renewing the lease; and (3) any investment into the land made by the lessee.[38]

Chinese Approaches

In contrast to most market economy countries, where market values are used to determine the amount of compensation due to a landowner whose land is taken by the state, in China the amount of compensation is determined by statute. Current compensation standards can be found in the 1998 Land Management Law. Under the law, compensation for arable land expropriations includes: (1) compensation for the loss of land;(2) compensation for young crops and fixtures; and (3) a resettlement subsidy.[39]

Standard compensation for the loss of land is set at 6 to10 times the value of the average annual output of the arable land over the three years prior to expropriation. The collective, whose land has been expropriated, is required to report to its members the compensation received for the expropriated land. Compensation standards for surface fixtures and young crops are stipulated by provinces, autonomous regions, and provincial level municipalities. Resettlement subsidies on average should amount to 4

[35] Land Compensation Act, 1961, sec. 5 (England).

[36] KEITH DAVIES, LAW OF COMPULSORY PURCHASE AND COMPENSATION 136 (4th ed. 1984).

[37] Land Compensation Act, 1973, sec. 34 (England)

[38] Canadian Expropriation Act, art 26(5).

[39] Land Management Law, art. 47 and LML Regulations, art. 26.

to 6 times the average annual output value of the land for the three years preceding the expropriation. However, such resettlement subsidies may exceed that average, and are capped at a maximum of 15 times the average annual output value of the land for the previous three years. If land compensation and resettlement subsidies set according to these standards are still insufficient to help the displaced farmers maintain their original living standard, the resettlement subsidy can be increased upon approval by the people's governments of the provinces, autonomous regions and municipalities. However, the total amount of land and resettlement compensation is finally capped at 30 times the average annual output value for the three prior years.[40]

Judged against the basic principle adopted by most land takings systems -- that the land loser should be left neither better nor worse off as a result of the taking -- the existing statutory compensation standards set forth by the LML are clearly inadequate. The maximum land compensation standard of 10 times the value of annual average production from the three years prior to expropriation falls well short of the actual value of the 30-year land use rights established by the Rural Land Contracting Law.

The inadequacy of existing land compensation standards is made even more pronounced when judged in the context of the requirement that the state's expropriatory powers, and related compensation standards, also apply to cases where agricultural land is converted to non-public uses. In these cases, Chinese law authorizes the state to convey use rights to the expropriated land to a developer through a granting process in which the end user must apply for use rights to the land, and, upon the approval of the application, pay a granting fee to a local land agency acting as the representative of the state.[41] If the land is for an industrial use, such as manufacturing facilities and processing plants, the granting fee includes an application fee, which is split between central, provincial and local governments, and compensation to farmers determined by local land agencies based on the standards under the 1998 Land Management Law. If the land is intended to be used for non-industrial commercial purposes, such as real estate projects and facilities of the service sector, the granting fee is determined through an auction process[42] with the starting bid equal to or higher than the combination of the application fee and the standard compensation; any portion of revenues in excess of the application fee and the standard compensation is retained by local land agencies. This process creates both the opportunity and the incentive to profit from commercial land development by setting low standards for compensation to farmers while auctioning the right to acquire land use rights for commercial development to the highest bidder.

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[40] This paragraph describes how property expropriated by the state is to be compensated. When property is withdrawn by the collective landowner for the purposes that will benefit the general public, land use right holders are entitled to "appropriate compensation" under Article 65. The same "appropriate compensation" standard applies to withdrawal of land that is already state owned for public purposes under Article 58. Very little arable land would already be state owned and subject to this provision.

[41] The Interim Regulations on Allocation and Granting of Urban State-Owned Land Use Rights (1990), art. 8.

[42] The Urban Real Estate Law (1994), art. 12.

To understand local governments' land taking operation with respect to the nature and extent of their revenues from land takings and compensation to farmers, we also interviewed the city land administration of Fuyang Municipality of Anhui. As of November of 2002, the application fee was RMB 25,000 per mu, split between the central, provincial and municipal governments with 40% to the municipal government. If use rights to the expropriated land were granted through auction, all proceeds from the winning bid minus the application fee and compensation to farmers went to the city government, which was usually 40% of the bidding price.

According to the land administration official we interviewed in Fuyang of Anhui, as of November of 2002, the city standards of compensation for the land located in the city suburbs which would be used for an industrial purpose are as follows:

Land Compensation

First class arable land:	RMB 23,000/mu
Second class arable land:	RMB 20,500/mu
Vegetable land:	RMB 36,000/mu
Wasteland:	50% of the standard for one of the above categories that the wasteland is adjacent to

Compensation for Standing Crops

Vegetable land:	RMB 700-800/mu
Non-vegetable arable land	RMB 600-700/mu

Resettlement subsidies

Depending on whether the land taking incident would involve resettlement of the affected households and varying in amount depending on the structure of the house.

Farmers in Fuyang were strongly upset about this arrangement for sharing proceeds from land takings. In one village, farmers complained to us that the city government had sold their land for more than RMB 70,000 per mu, but they could only get RMB 23,000 per mu for land compensation. They said the municipal government had got a large chunk of the proceeds for losing nothing while they had to give up their land to get a small fraction of the proceeds.

Fieldwork done by other researchers also indicates local government's abuse of the system by "buying low and selling high". In a village of northeast Yunnan, 850 mu of land was expropriated by the state and use rights to the land were sold for RMB 150,000 per mu to an investor. The compensation fees ultimately paid to the collective amounted only to RMB 28,000 per mu, of which farmers received only 9,000 - 10,000 RMB per mu, roughly 6% of the price for which the land rights were sold.[43]

[43] Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, THE CHINA QUARTERLY (2001) at 422.

Recommendations

Under existing rules and procedures governing land takings in China, the state pays inadequate compensation whenever land is taken from farmers, and derives potentially huge profits when the taking involves a commercial use. As discussed in Section I, we recommend that policy and legislative reforms should end the state's ability to exert compulsory acquisition power in all but specific public purpose takings. Allowing direct negotiation between the collective land owner and affected farm households, on the one hand, and the commercial developer, on the other hand, will result in higher levels of land compensation than is currently provided by statute.

There are three possible approaches to increasing the amount of compensation that the state must pay when it expropriates land for public purposes. One would be to continue to have a statutorily-defined compensation standard, but to increase the level of compensation currently provided by the Land Management Law. A second would be to adopt a "fair market value" approach. The third, and recommended, approach would be to require compensation based on fair market value, but to include a statutory minimum level of compensation for all cases of takings. Under this approach, the fair market value standard would be applied in areas where it is possible to determine a market value for the land rights - most likely in suburban or more economically developed areas - while the minimum compensation standard would apply in areas where fair market value could not be easily determined.

With respect to the amount of compensation to be paid for takings by the state for public purposes, the forthcoming policy document could read as follows:

> When the state expropriates collectively-owned agricultural land for one of the permissible public purposes designated herein, it must provide compensation to the owners and land use right holders of all affected land. The standard for compensation shall be the fair market value of the affected land. Where the fair market value of the land cannot be determined, the minimum compensation for the land shall be thirty times the average annual value of agricultural production for the three years previous to the expropriation. Compensation for standing crops and resettlement shall be made in addition to this amount, and in accordance with the Land Management Law and other relevant laws and regulations.
>
> Where the owner of the land to be expropriated, or one or more farm households possessing use rights to the land to be expropriated, or both, dispute the amount of compensation that the executing state agency has determined, they may appeal to the higher level of the People's Government for administrative review of the determination, or make a direct filing of a complaint with the People's Court. If they appeal for the

administrative review and disagree with the decision, they may file an appeal with the People's Court.

B. The Allocation of Compensation

In comparison to private land ownership systems, the allocation of compensation for land takings is made somewhat more complicated in China by the fact that the land is owned by collectives but used by households, who are entitled to 30-year use rights under the RLCL. Rules governing the allocation of the three types of required compensation are, again, found in the 1998 Land Management Law. Under the LML, compensation for the loss of land is allocated to the collective landowner. Compensation for young crops and fixtures is paid to the households whose land has been affected by the takings. Resettlement subsidies are paid either to the collective or other entity responsible for the resettlement, or to those to be resettled directly, if no resettlement arrangements are necessary.[44]

Field research conducted by RDI and others has shown that the current rules and practices governing the allocation of compensation result in most of the compensation for land takings being captured by the township government and the collective, with little or no compensation provided directly to farmers whose land is lost. In effect, the classification of compensation provided by existing laws, combined with the lack of transparency in distribution of compensation (see discussion in Section III, below) leaves both discretion over and responsibility for allocation with the collective officials, providing the opportunity and the incentive to retain as much as possible while allocating as little as possible to farmers..

One very typical approach employed by the collective or township government is to retain most or all of the land compensation and conduct a big readjustment of village landholdings, spreading the pain of the loss of village land among all households while capturing the benefit of the taking for itself. A second approach is to distribute the compensation equally among all village households, while conducting a big readjustment. While this second approach is certainly preferable to the first, in both cases the land tenure security of all village farmers is undercut by the conduct of a big readjustment, which is illegal under the Rural Land Contracting Law and all related policies.

In the fieldwork conducted in the three provinces of Anhui, Hainan and Guangxi, we asked all farmers in villages where land had been taken (a total of 34 cases of land takings in 17 separate villages) about the method of distribution of land compensation, the type of land readjustment, if any, following the distribution, and their attitude toward a particular way of distribution. In the 17 villages, we found a total of five different combinations of land compensation distribution and land readjustment in

[44] Land Management Law, art. 47 and LML Regulations, art. 26.

response to land takings: (1) compensation distributed to all households followed by a big readjustment; (2) compensation distributed to all households followed by no readjustment; (3) compensation to the affected households[45] followed by no readjustment;[46] (4) compensation retained with collective followed by no readjustment; and (5) compensation retained with collective followed by a big readjustment. A breakdown of the fieldwork results concerning these five different approaches can be seen in the following table:

Compensation distributed to all households followed by a big readjustment	7
Compensation retained with collective followed by a big readjustment	6
Compensation distributed to the affected households followed by no readjustment	12
Compensation distributed to all households followed by no readjustment	4
Compensation retained with collective followed by no readjustment	5
Total incidents of land takings occurred in the 17 villages	34

We also asked farmers in Anhui about their attitude toward distribution of land compensation and land readjustment. In the four group interviews conducted in Anhui, most farmers in Group 1 and most female farmers in Group 2 supported egalitarian distribution of land compensation followed by a big readjustment because it would maintain equality among all villagers. However, most farmers in Groups 3 and 4 and most male farmers in Group 2 expressed their support for making land compensation directly to the affected households either in lump sum or in annual payments in the form of "rent" or in lump sum and carrying out no readjustment. They thought this would avoid the difficult task of carrying out land readjustments and facilitate investment in non-agricultural development by affected households who received compensation.

Several interpretations of our fieldwork findings are worth noting. First, in all 34 incidents of land takings, we found no case of conducting a small readjustment in response to land takings, suggesting that allowing a small readjustment under the circumstance of land takings may not be a practical approach to the imbalance of household size and household landholdings as a result of land takings. Instead, any permission of land readjustment in response to land takings would result in a clearly illegal and highly disruptive big readjustment, severely undermining both the rule of law and the tenure security of all farmers in the village.

[45] In some incidents of this model, collective retained a certain percentage of land compensation, ranging from 10% to 30%, before it was distributed to the affected households.

[46] This includes 4 incidents in 2 villages of Anhui where the affected households received compensation in the form of annual "rent" rather than a lump sum payment and no land readjustment was conducted after the taking.

Second, a substantial number of villages adopted the approach of making land compensation to the affected households followed by no land readjustment. Indeed, some villages have begun to improve their past practice by replacing "land compensation to all followed by a big readjustment" with "land compensation to the affected households followed by no land readjustment". Taking these findings together, it appears likely the improved approach would be welcomed, or at least accepted in an increasing number of villages.

Third, making land compensation to only the affected households appears to be a major stabilizer of land contracting relationship in case of land takings; *in all 12 incidents of land takings where land compensation was made to the affected households, not a single case of land readjustment was reported following the land taking.* In contrast, where land compensation was either distributed to all households in the village or retained with the village collective, a village-wide big readjustment was most likely a response.

Recommendations

The RLCL explicitly prohibits big readjustment[47] and lists illegal land readjustment as one of the violations of farmers' land contracting rights.[48] The fieldwork findings clearly indicate that both collective retention of land compensation and egalitarian distribution of land compensation will have mixed results, often but not always (13 out of 22 cases) leading to a village-wide big readjustment a village-wide big readjustment that will, in turn, result in a serious negative impact on the rule of law and tenure security for all farmers in the village.

On the other hand, the fieldwork experience strongly indicates that distributing all or most of land compensation to the affected households not only directly compensates the affected households for what they have lost, but also helps to strengthen tenure security for all farmers (no readjustment in 12 out of 12 cases). Although the Implementing Regulation of the 1998 Land Management Law requires the state to allocate land compensation to the collective, it does not state how the collective should deal with such land compensation after the state delivers it to the collective. The forthcoming policy directive on land takings should fill this vacuum by explicitly requiring collective to distribute all or most of land compensation to the affected households.

At the same time, the collective's interest as landowner must also be recognized. The question remains as to what constitutes an equitable distribution of the compensation between the landowner and the land user. Two points are important to recognize. The first is that under the Rural Land Contracting Law, all farmers are

[47] RLCL, art 27.
[48] Id., art. 54.

entitled to possess 30-year land use rights that are free from land readjustments in all but the most extreme cases. Depending on the exact discount rate employed, secure 30-year land rights represent between 75-95% of the economic value of full private land ownership. Therefore, farm households who lose land as the result of either a state taking or a negotiated transaction for commercial development purposes, should be entitled to somewhere in the range of 75-95% of the total compensation paid. In cases of negotiated transactions for commercial development, it may also be appropriate to allow the state to collect a tax based on the proceeds of the transaction. However, such a tax should be capped at 5% of the negotiated transaction price.

We recommend an approach that would place a cap of 25% on compensation paid to the collective landowner. This would lead to the following allocations: for state takings for designated public purposes, the collective would be entitled to receive between 5-25% of the compensation, while the affected households would be entitled to receive between 75-95% of compensation. For negotiated transactions for commercial development purposes, the state would be entitled to 5% of the negotiated transaction price, while the collective would be entitled to 5-25% of the negotiated transaction price, and the affected households would be entitled to 70-90% of the negotiated transaction price.

The second important point is that farmers should be entitled to compensation based on the full length of the 30-year land use right term established by current law, regardless of which year during the 30-year term the state taking or negotiated transaction occurs. Several factors support this recommendation. First, although no definitive determination has been made in law as to whether the current 30-year land use right contracts will be extended for an additional 30-year term, the strong presumption, supported by statements by former President Jiang Zemin, is that land use right contracts will in fact be renewed upon expiration of the current use term. The second is that in the Hong Kong SAR, where agricultural land use rights in the New Territories are held under 50-year use rights, compensation for resumption of land by the Hong Kong government is based on the full 50-year use term, and not the number of years remaining on the lease.

As noted in our fieldwork findings, the collective's failure to distribute compensation to affected farm households is currently a serious problem. To guarantee that compensation is actually disbursed to farm households according to the proportions set forth above, some protections should be established. One such form of protection would be the use of an escrow agent in lieu of directly providing the compensation to the collective landowner. This would involve designating a government agency or state bank as the unit responsible for receiving the payment of required compensation from the state or the land developer, and for receiving all documentation from the collective landowner and affected land users. Upon completion of the transaction, the escrow agent would then be responsible for distributing the compensation directly to affected households, in the form of either a lump sum or annual payments.

Some policy designers and scholars have proposed to convert the proceeds into shares of joint stock of the transferee company and let the affected households receive an annual dividend from the company. This proposal would in fact put farmers in a position of sharing business risks with the company. Because it is almost impossible to assess the profitability of the company at the stage of land transaction and in the absence of a credit reporting system and effective auditing and accounting rules, such conversion could end up with a complete loss of the proceeds for farmers if the company failed to generate profits (or misstated the profits) or even went bankrupt a few years down the road. We recommend that the central government take a skeptical look at the reliability and sustainability of this approach.

We recommend that the forthcoming policy directive on land takings include following rules on allocation of compensation for land takings and proceeds from agreed-upon land transactions:

> In the event of state taking or state purchase of collectively owned land or collective transaction of use rights to collectively owned land for any non-agricultural use, no readjustment of land contracting and operation rights shall be conducted on any unaffected portion of the village's land. Compensation for standing crops and fixtures shall be allocated to the affected households. Compensation or proceeds for loss of land may be allocated between the collective landowner and the affected households in the village with a collective share not exceeding 25% of the total amount of compensation or proceeds for loss of land. Where resettlement of the affected households is needed, resettlement subsidies shall be allocated to the affected households. Compensation or proceeds from such conveyance of collectively owned arable land or wasteland that has not been contracted to individual households may be allocated between collective and all members of the village with a collective share not exceeding 25%.
>
> Upon agreement of the collective and the affected households, a designated state agency or state bank shall be selected as an escrow agent to handle distribution of compensation or proceeds for loss of land. All compensation and proceeds for loss of land to which the affected households have land contracting and operation rights shall be deposited into an escrow account in such a designated state agency or state bank with the affected households as recipients, by the state agency responsible for land taking or state purchase or the transferee of land use rights with witness of the escrow agent. The escrow agent shall act diligently and responsibly in distributing the compensation or proceeds for loss of land to the recipients based on the shares of allocation agreed by collective and the affected households in conformity with the above rule.

In case of state purchase of collectively owned land or collective transactions of land use rights for any non-agricultural purpose, the state may levy a property transaction tax of not exceeding 5% of the proceeds on the affected household recipients of the proceeds, or 5% on any payment if multiple payments are to be made..

III. Procedures

Most countries with reasonably developed legal systems have adopted procedural guidelines for expropriation which place important constraints on state power and protect the rights of landholders against illegal expropriation of land. Effective procedures include, at a minimum, notice of the decision to expropriate land, direct involvement of affected landholders in transparent proceedings, and an opportunity to appeal.

Comparative Examples

Notice of the Planned Taking

Most expropriation statues contain provisions governing notice to landowners regarding the state's desire to expropriate land. The specific timing and form of notice varies greatly by jurisdiction.

In Great Britain, the ministry, local government, or other authority seeking to acquire land must describe the land to be acquired by reference to a map, publish notice of the proposed acquisition in at least one local newspaper, and serve notice to all of the owners, lessees, and occupiers of land affected by the proposed acquisition order.[49]

In Hong Kong, notice must be published in the paper and a copy of the notice had to be served on the owner (lessee) or affixed in a conspicuous place on the land if the owner could not be found.[50]

In Peru, a judge must notify the property owner of the state's decision to expropriate his or her land within 24 hours of the time the final decision is made.[51] Delivered actual notice should be given to the landowner, but if he or she cannot be located, notice can by given through publication for three days in the provincial capital's newspaper. If the owner does not respond within three days of either the delivery of actual notice or the last publication date, the state's designation of the land to be expropriated and its decision on the compensation level is considered accepted.

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[49] Land Acquisition Act, 1981 (Eng.).

[50] Hong Kong Lands Resumption Ordinance, *supra* note 8, §4.

[51] KITAY, *supra* note 3, at 60.

The Civil code of Russia provides for a very long notice period: "[T]he owner of a land plot must be informed in writing not later than a year before the forthcoming withdrawal of the land plot by the agency which adopted the decision concerning the withdrawal."[52]

Landholder Participation in the Takings Process

Direct involvement of the land holder in the expropriation proceedings also takes a variety of forms. Some countries permit a high level of landholder participation by requiring the government to first attempt to acquire the land through negotiations with the landholder. For example, in Poland, the expropriating agency must negotiate with the land rights holder for a period of at least three months to attempt to acquire the property through contractual agreement.[53] Once the time limit for negotiations has expired, the expropriating agency may submit a recommendation for expropriation to the district level of government, which reviews and approves or rejects the request. Similarly, Indonesia requires that the government body wishing to acquire land first hold negotiations with the landholder before bringing expropriation proceedings.[54]

Other jurisdictions, that do not require negotiation as a first step, involve the landholder in other steps of the expropriation process, most frequently the determination of compensation. In Honduras, landowners have the right to appoint one expert to a three-person committee that determines valuation.[55] In Brazil, the final determination of the amount of compensation is judicial, but each party has the right to appoint an assistant to the court-appointed expert who prepares an advisory report concerning the land's value.[56]

In Peru, if the landowner disagrees with the valuation, after receiving notice, as described above, he or she must respond within three days and then has eight days to submit a counter-appraisal of the land's value.[57] The judge then appoints two experts to resolve the conflict. Generally, the judge will approve these experts' appraisal of the land's value.

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[52] Civil Code of Russian Federation, ch. 17, art. 279(3).

[53] Poland Law "On Land Use Management and Expropriation of Real Estate," art. 49.3.

[54] Land Expropriation Act of 1961; and Presidential Decree No. 55 of 1993, "Land Procurement for Implementation of Construction in the Interest of the Public."

[55] KITAY, *supra* note 3, at 61.

[56] *Id.*

[57] *Id.* at 60

In the United States, property owners are entitled to notice and a fair hearing into all contested issues of fact and law before property may be taken.[58] Consistent with these requirements, each state enacts statutes containing detailed procedures governing land takings.[59] In Washington state, for example, state law requires that any time an authorized agent of the state intends to acquire land through the process of compulsory acquisition, the office of the state attorney general must present a petition for appropriation to the superior court in the county where the land is located.[60] This petition must describe the property to be acquired, list all owners or other interested parties, describe the purposes for which the property will be acquired, and request a determination of compensation to be paid to all affected owners.[61]

At least ten days prior to the presentation of such a petition to acquire property, the state is required to provide a notice to each and every person listed as an owner or otherwise interested party.[62] This notice must include a description of the property to be acquired and the time and place where the petition will be presented to the county superior court.[63] The law contains detailed requirements as to what constitutes notice; where the affected landowner or other party is not a resident of the state, or cannot be found, the notice must be made in a newspaper where the land is located at least once a week for two successive weeks.[64] The notice must be signed by the attorney general and filed with the clerk of the county superior court.[65]

At the required hearing, the court may enter an order permitting acquisition of the property if it has satisfactory proof that (1) all interested parties have been served with the required notice and that (2) the property to be appropriated is really necessary for the public use of the state.[66] Within five days of this hearing, any of the affected parties has the right to appeal the determination that the purposes for which the property is to be acquired is really a public use of the state.[67] If the purposes for which the property is to be appropriated have been determined by the court as a legitimate public use, and all other procedural requirements have been met, the taking may go forward. However, any landowner or affected party retains the right to appeal the amount of compensation offered for his property.[68]

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[58] DAVID DANA & THOMAS MERRILL, PROPERTY: TAKINGS, 205 (2002), *citing* State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928).
[59] *Id.*
[60] Rev. Code Wash (ARCW) § 8.04.010 (2003).

[61] *Id.*
[62] Rev. Code Wash. (ARCW) § 8.04.020 (2003).
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Rev. Code Wash. (ARCW) § 8.04.070 (2003).
[67] *Id.*
[68] Rev. Code Wash. (ARCW) § 8.04.150 (2003).

The Right to Appeal

The right of appeal provides the landholder with an important check against arbitrary or illegal administrative decision-making. Appeal rights vary substantially by jurisdiction, and may focus on the decision to expropriate, the decision of what land to expropriate, and the decision of how much to compensate.[69]

An appeal of the decision to expropriate may address the question of whether the taking serves a truly public purpose. This appeal right is limited in many jurisdictions. In the United States, significant deference is paid to legislative declaration of public purpose, but challenges of the decision to expropriate are allowed where the expropriation appears to serve private interests more than public interests. Mexico also permits landowners to challenge the decision to expropriate on the grounds that it serves private purposes more than public purposes. Similarly, in Great Britain, a landowner has the right to appeal an acquisition order to the High Court on grounds that the ministry or local authority has exceeded its statutory powers in making or confirming an expropriation.

The decision of what land to expropriate is also reviewable in some jurisdictions.[70] For example, in El Salvador, the court has the authority to review two issues: first, whether all or a part of the property is necessary and second, whether the location chosen for the public facility should be such that other property owners share in the burden of having their land taken by the expropriation in question. In Mexico, if the landowner challenges the designation of his or her land for expropriation, the expropriating agency bears the burden of proving that the designated property is "suited and necessary." In Indonesia, however, the decision of what land to expropriate is held to be final and non-reviewable.

The level of compensation to be paid for expropriated land is widely held to be reviewable.[71] In the United States,. the most commonly litigated question related to land takings is whether the compensation offered by the government meets the "just compensation" standard set forth in the Constitution, and a rich body of judicial precedent has developed to define this standard.[72] In various jurisdictions, judicial review of the original compensation determination is permitted based on procedural issues, fraud or error, or general grounds. In the Hong Kong SAR, compensation is the only issue that can be appealed by a rights holder.[73]

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[69] KITAY, *supra* note 3, at 64.

[70] *Id.*

[71] *Id.*

[72] DANA ET AL., *supra* note 58, at 169.

[73] Hong Kong Land Resumption Ordinance, *supra* note 8, §8

Chinese Approaches

The 1998 Land Management Law sets out detailed procedures governing the taking of agricultural land by the state. However, the law includes no provision for meaningful participation by farmers at any stage of the takings process. For example, it is only after the state expropriation is approved, that the user, owner and general public are notified of the expropriation.[74] The announcement must include: (1) the serial number of the approval; (2) use, scope and area of the expropriated land; (3) compensation standard; (4) farmer resettlement plan; and (5) deadline for compensation. All of these are determined unilaterally before the public is to be informed.

Once announced, the collective owner and individual users of the land must file with the land administration agency of the local government for compensation.[75] After the plan for compensation is made, it is announced and the collective and farmers whose land is being expropriated can submit comments to the land administration bureau.[76] If there are any disputes about the compensation standard the government at the county level or higher must try to resolve them, but if no agreement can be reached, the people's government that approved the land expropriation unilaterally sets the compensation amount.[77] All compensation must be paid within three months of the date of the approval of the compensation and resettlement plan.

RDI's recent field research strongly indicates that the lack of farmer participation in the land takings process serves as both a source of frustration for farmers and an opportunity for abuses of power by the collective landowner. None of farmers in the 17 fieldwork villages where takings had occurred had been consulted by the collective regarding the purposes or compensation related to the 34 incidences of takings. In most cases, farmers were only summarily informed by township government or collective cadres what parcels of their land would be taken for a certain non-agricultural use and what amount of compensation would be paid to them.[78] This communication was made orally rather than in writing. Moreover, because the taking itself and the terms of compensation were unilaterally imposed on farmers, this oral announcement was in effect a mere ultimatum demanding that farmers get ready for the taking within a designated timeframe, rather than 'participation', in any sense, in the takings process.

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[74] Land Management Law, art. 46. After approval the expropriation is implemented by the local people's government at the county level or above.

[75] *Id.*

[76] *Id.* art. 48 and implementing regulations art. 25.

[77] PRC Land Management Law Implementing Regulations, art. 25.

[78] However, it appears that some improvement has been introduced in recent years in Fuyang of Anhui on the process of land takings. In a recent taking, a public notice issued by the city land administration was posted in the village office announcing the would-be taking and listing detailed compensation standards for the affected land.

In the cases where such an oral announcement was made, it typically included the categories of compensation and the level of each category. However, most farmers told us that they did not know exactly how much the government had actually paid for the land taking. Of the 17 villages we visited, only two villages in Anhui made this information accessible to villagers by posting in the village's office the government's taking notice containing information on compensation.

Such procedural insufficiency also provided an opportunity for local officials and collective cadres to maximize their financial interests through land takings. During interviews, most farmers complained that they had been kept in the dark as to how much compensation was made to the collective and what portion of such compensation was subject to distribution among villagers or the affected households. In one village of Hainan, farmers were told by the collective cadres the land compensation for a land taking for building a local market in 1998 was only RMB 600 per mu, which is unbelievably low. In another village of Hainan, 40 mu of land was taken in 1993 for a high tech project with a total compensation said to be RMB 100,000, but farmers believed, based on their information on compensation levels in adjacent villages, that the collective had in fact received much more than what was announced to them.

The types of abuses by collective officials that are enabled by a lack of procedural safeguards can be placed into three categories:

1. Withholding land compensation

During the interviews, we asked farmers whether they had received any compensation for the land that had been taken, and if yes, what kind and how much. In almost all villages, the interviewed farmers reported that the affected households had received compensation for standing crops. Except for one case where the affected farmers of a suburban village of Nanning, the capital of Guangxi Autonomous Region, received RMB 1,500 per mu for standing crops, the affected households in all other villages were compensated for standing crops in an amount of RMB 600-800 per mu.

Of the 17 villages we visited, five villages involving 11 incidents of land takings (out of 34 total in all villages) did not pass land compensation to the affected households nor distribute it among all households. In another village, the affected household was promised by the collective to get the same amount of land from the village's flexible land, but that promise had never been performed. When asked where the land compensation went, the farmers in these villages said it had gone to the collective.

Collective cadres in most of these villages did not explain to farmers how land compensation retained with the collective would be used. There was one exception. In that village, the farmers were told that the "upper level" policy document did not allow land compensation of RMB 1.8 million to be distributed to farmers, so the money had to be deposited into the collective bank account. However, farmers said they had never

seen such document; even the collective cashier at the interview could not cite the document on which the collective decision on withholding the money was based.

2. Announcing a reduced amount of land compensation

As noted above, few villages publicized the government's land taking notice that included the amount of each category of compensation; in nearly all villages we visited, only an oral announcement of compensation was made at the time of land taking by collective cadres. Such oral announcement had given collective cadres a huge discretion over the amount of land compensation about which they wanted farmers to know. Our fieldwork found that the announced level of land compensation ranged from RMB 600 per mu to RMB 40,000 per mu, but for a majority of land takings, the announced land compensation was under RMB 12,000 per mu. Many farmer interviewees believed that there was a huge difference between what should be and what was announced with respect to land compensation.

In Fuyang Municipality of Anhui, although the government's standard for land compensation was RMB 20,500-36,000 per mu, farmers in three of the four villages we visited reported a much lower level of land compensation as announced by the collective. Moreover, in two villages of Fuyang, the collective instituted a compensation scheme in recent years in which the affected farmers were paid in the form of annual "rent" between 600 and 700 yuan per mu per year. The affected farmers were very upset about the arrangement because the collective did not specify how long they would be able to be paid in "rent"; they suspected the collective had disbursed only a small portion of the land compensation in "rent" to the affected households while keeping a large chunk for itself.

3. Overtly intercepting land compensation to farmers

During the March fieldwork in Hainan and Guangxi we found several incidents of land takings where township government and collective entities had blatantly deprived farmers' of compensation through a series of illegal deals. In one village of Hainan, 40 mu was taken for a high tech project in 1993. Although the villagers were told that the total compensation was more than RMB 100,000, less than RMB 60,000 was distributed among all farmers in the village, and the village leader pocketed the rest. Also in this village, a large tract of the village's land was taken in 1986 for building a mineral processing plant. No land compensation was made to the affected farmers or distributed among all villagers. When the plant went bankrupt a few years later, it abandoned the land. The village leader turned it into 44 house building lots of 120 m^2 each, and sold it at RMB 3,000 per lot. All proceeds went to the team leader and his relatives.

In another village in Guangxi, the township government took 17 mu of the village's land for a development zone between 1994 and 1995. The township promised to pay RMB 6,500 per mu for land compensation. However, no payment was made

because the township claimed that it did not have money. Eight years later, in 2002, when the land was developed into a housing project capable of subdivided into more than 100 building lots of 80 m² each, the township allocated 17 lots to the village as an alternative to the initially promised land compensation. By the time of the interview, about 70% of allocated building lots had been sold at RMB 6,500 per lot. Through this scheme, the township had probably made or would potentially make more than RMB 0.5 million for itself (83 X RMB 6,500 = RMB 539,500).

Recommendations

We recommend that the central government's forthcoming directive on land takings require that users of land to be expropriated, be given notice of the decision to take the land, notice of the time and place of any discussions concerning compensation and relocation plans, and an opportunity to attend and speak at such discussions. The directive should also require a written time schedule for the land expropriation or withdrawal, as well as a written compensation and resettlement plan that all parties, including the land user, must sign. Any party that does not agree with any part of the written plan should be given an opportunity to attach a written dissent that will be reviewed by the approval agency. Furthermore, the law should set a minimum time period between the date the expropriation notification is given and the date the land user must vacate the land. Comparative experience indicates that three months would be a reasonable minimum.

The policy document's language concerning procedural safeguards could read as follows:

> Farmers residing in the collective economic entity whose land will be taken have the right to be notified concerning any proposed taking of land by the state, and the right to participate in all aspects of the takings process. Upon application for the taking of land for an accepted public purpose, all households within the collective economic entity where the land is located shall be notified. The form of notification shall include a written notice, posted in a public location within the boundaries of the collective economic entity, and a meeting of the village assembly or village representatives in each of the villages whose land will be affected by the taking. Farmers shall be similarly notified of any subsequent meetings concerning material elements of the proposed taking, including site selection, approval of the taking by relevant authorities, designation of the compensation standard and allocation, including the portions of such compensation be allocated to farmers, to which farmers, and when, and the schedule for requisitioning the land, and shall have the right to participate in any such meetings. Farmers shall be notified within three months of any decision or determination made by relevant authorities with respect to any such materials elements of the taking, and shall have the right to submit a written dissent with 15 days of such notification,

which must be reviewed and answered by relevant authorities before the taking can proceed. Once the final approval for the taking has been granted by relevant authorities, in accordance with the procedures outlined above, the affected farmers shall be granted three months to vacate the land to be taken.

In the event of a state purchase of collectively owned land or a negotiated transaction of use rights to the collectively owned land for non-agricultural purposes, upon a show of interest is made by the party interested in any parcel or parcels of the village's land, a meeting of the village assembly or village representatives shall be convened to discuss whether to proceed with the transaction. Any decision on proceeding the transaction must have 2/3 votes by the village assembly or the village representatives, and be agreed upon by all the households to be affected by such transaction. Upon an offer to buy or transact -in made by the interested party, all affected households shall be notified to discuss the offer and counter offer, if any. One representative from each affected household, shall participate in all subsequent negotiations for the transaction.

Once the agreement on all terms of the transaction is reached, a contract embodying the transaction shall be signed and/or sealed by the interested party, the collective landowner and the representative and spouse, if any, of each affected household.

SUBMISSION FOR THE RECORD

PREPARED STATEMENT OF PATRICK RANDOLPH, ELMER E. PIERSON PROFESSOR OF REAL ESTATE LAW, UNIVERSITY OF MISSOURI, KANSAS CITY, SCHOOL OF LAW

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PROPERTY SEIZURES IN CHINA: POLITICS, LAW, AND PROTEST

THE URBAN RENEWAL ISSUE

News reports from China for more than a year have been full of stories of conflict over what is popularly referred to as "demolition," but what we call "urban renewal" here. To understand the issue, one must first know what "urbanism" is being "renewed."

During the 1980s, the Chinese filled their cities with apartment blocks to provide basic housing as part of the "iron rice bowl" promise. Everyone gets an apartment, be it ever so humble. These were generally six story walk-ups made of concrete, with terrible plumbing, service porches on the window side (for drying clothes) and enough space to house one person comfortably, although generally families of five to eight lived in them. Having constructed these monstrosities in great dirty rows, the Chinese proceeded to ignore them for two decades, letting them deteriorate with rust, dirt, and the detritus of many poor people trying to live together in not enough space. Painted in fading green, dusty rose, and beige, these buildings were the dominant visual element of Beijing, Guangzhou, Shanghai, Xian and other Chinese cities I visited in the early 1990s.

Ugly and cramped as they were, the little concrete cubicles provided a warm (often too warm) and dry home for millions of workers in state-owned industries and lower-level government bureaucrats. The Chinese had become accustomed to living in close quarters, and often the apartments housed extended families that adjusted to the conditions and lived out their lives on top of one another. Buried somewhere in the rows of apartment blocks were schools, clinics, and community facilities all developed by the factory or bureau that owned them. In the interstices, very primitive concrete block or brick buildings housed the shops that provided food and basic necessities, again, all very convenient to the clientele. Sometimes these complexes actually were located within the walls of the big factories. Workers could easily walk or bike to their place of employment, and commonly went home on the long noon break to take a nap. The Chinese shopped for fresh meat and produce in open markets along the street. Few had refrigerators. Virtually none had air conditioning. But everyone that one knew (except a few high party bosses) lived pretty much the same way. At Peking University, the University President might have had a few extra square meters in his place, but it was otherwise indistinguishable from the nearby concrete cubes where his employees resided. This was the culture of communism.

Although, in theory, this housing was provided as part of one's arrangement with the work unit to which one was assigned, in fact the system provided virtually perpetual occupancy. There was rent—but it was very small, and evictions for non-payment were virtually nonexistent. Laid off workers continued to be entitled to this housing (and also education and health care) from their former employer. When the family member who worked for the work unit died, other family members who still lived in the apartment were permitted to remain. When the state-owned industries failed, the State took over the housing and other social service responsibilities, and the housing remained.

Around 1997, Premier Zhu Rongji announced that the game was over. Everyone in China's cities would stop living in State provided housing and buy their own homes. He set a 2-year deadline, but in fact the transformation, such as it was, took a number of years longer. The basic transaction was a sale of the living units by the State or the work units to the occupants, usually for small prices, which could be paid in installments that were not a lot more than the original tiny rent. Of course, now the occupants were responsible for their own maintenance, but they were used to very little of that. Today it is estimated that 80 percent of China's legal urban residents live in their own homes. I suspect the percentage is quite a bit smaller, since many Chinese own three or four of these little cubicles and rent them out to younger people who did not have the chance to buy an apartment when conversion occurred. But many of the lower echelon workers just stayed put in the concrete boxes they'd always known.

Then came prosperity and with it the development of newer, nicer housing that workers could buy. Tens of thousands of new apartments structures rose up virtually overnight, often on surplus land within the urban area or suburbs, but on the fringe. Chinese had more money to spend, and they sopped up these larger (60–120 square meter) boxes, in elevator buildings with far more amenities, at least when new. The maintenance is still appalling by Western standards, but compared to what people had before—this is "uptown."

The new buildings often were developed on land that the developers bought from the State through the newly created program of "land use rights." The same system was used to build the new office complexes, shopping centers, business centers, and other structures that marked China's economic renaissance. Local governments profited from the sale of these land use rights, and used the money to fuel massive infrastructure development (the flocks and flocks of building cranes).

The process of providing better and better housing to Chinese consumers proceeds today unabated. Most are built on granted land use rights—so the residents in theory really have rights in the land itself, and not just occupancy claims in the buildings. The newest facilities can actually be pretty nice, and arguably the Chinese soon will be waking up to the fact that they're entitled to expect some real building maintenance from the state- owned maintenance companies paid out of owner's association assessments to care for these new places. Air conditioning is common, elevators work, and there is even underground parking. And, always keep in mind, we're talking lots and lots and lots of these buildings. There are a whole lot of urban Chinese seeking new housing.

But now many of the cities that were most proactive in bringing about this economic rebirth have discovered that there is precious little land now available for the creation of new land use rights. And they've spent the money they already earned as fast as they got it. How to meet their future growth plans? The answer lies right there in the heart of the city—in those locations that were once dirty factory areas but now are prime residential sites as the city, surrounded by all the high rise office buildings, gleaming roads and other mass transit facilities. And convenience to work, once taken for granted and undervalued, has become a highly desired commodity. As the Chinese buy more and more private cars, they have discovered that wonderful western invention—traffic gridlock. People who have acquired apartments in the suburbs have found that it takes an hour or more to get to work, and there's a huge demand for more convenient middle and high-end housing.

And there—right in the urban core—is all that land ripe for development. Even better, the land has never been the subject of granted land use rights, so the local land administrations can sell it to developers for a pretty penny.

Just one little problem—there are people living in these squalid little places. In fact there are lots and lots of people, still trusting in government to take care of them consistent with the promises made to them during their youth. These people present special problems to the Chinese. In America, we've seen redevelopment of our urban cores time and time again. But, because theoretically we have an open market that will provide alternative housing for people living in these kinds of situations, we just startup the bulldozers and start ripping away. We pay the owners of the old apartments and flophouses and slum brownstones that we demolish, but the residents—usually rental tenants—get little by way of relocation allowance except when Federal money is used. But China had a political issue with that approach—these were people who trusted in Communism, and Liberation was all about guaranteeing basic standards to poor citizens. So when urban renewal happens in China, the local laws usually required that some effort be made to provide alternative housing to those living in these places, regardless of how it was to come to be there, and pretty much regardless of what "ownership" they might have. The compensation responsibility is placed upon the developer, and it is in addition to whatever the developer paid for the land itself.

As the urban renewal push began in China we started to see people waking up one morning and discovering huge Chinese characters painted on their buildings indicating that demolition was imminent. This was the first thing that happened in the process, since it prevented anyone claiming relocation rights who moved into a building so decorated with warnings. Then the developers started to negotiate with the residents. But the residents, although their little apartments were hovels compared to many Chinese facilities, liked their little communities and especially valued their location. The developers offered replacement housing facilities instead of cash payments (permitted and even encouraged by the laws) but the tenants often concluded that the substitute housing, even when new, was too remote from their jobs, and in fact from the community that they'd always known, to be suitable. They knew that their location was valuable, and they wanted appropriate compensation, not some remote concrete box that required a complete change of life.

Note that there are parallels here to the relocation that occurred when the great dam was built in the Three Gorges on the Yangtze River. But those were peasants, with different rights and different expectations. Now we're talking relatively sophisticated urbanites, who have friends and relatives still more sophisticated. It was one thing to say that one had to be removed because of highways or other public works. But when the demolition characters appeared solely because some fat cat developer intended to make a huge profit building new private housing where old private housing stood, people expected to be paid well. The situation from the government perspective was not aided by the exposure of massive corruption in the granting of land use rights for these purposes. Even though the requisite handful of developers and land administration officials were cashiered and imprisoned for the most egregious corrupt practices, the Chinese populace in fact felt that the occupants of these places deserved better treatment. We started to see demonstrations, sit-ins, even newspaper and television reports, and the Beijing taxi drivers were outraged—passing on their views to all who would listen.

As I've been saying all along, with prosperity in China comes the expectation of protection from government for vested rights. And this in turn leads to participation in government. Since, in fact, there was little formal right to participate, the affected Chinese citizens and their friends resorted to the time-honored method of seeking redress from the power structure—harangue. Party officials and land administration leaders were contacted regularly and called to account for what were perceived to be abusive practices. The plot thickened when stories emerged about the emotional impact that destruction of these traditional urban communities had on the beloved older folks who had trusted in Communism their whole lives. There were some suicides that occurred while the bulldozers chugged toward the buildings, and other dramatic examples of how Chinese, like the rest of us, place an extraordinarily high value on the concept of "home."

I've seen U.S. newspaper pieces, fueled often by dissidents and "China knockers," who have suggested that this is one more example of how much more abusive China is to its citizens as compared to the West. In fact, anyone involved in urban renewal here knows that we regularly have beat up on our poorest citizens in the same circumstances through the last 50 years. Tenants in slum buildings slated for demolition get virtually no compensation and little if any relocation assistance. Even commercial tenants routinely sign leases that say that any lease rights end on condemnation, thus eliminating any compensation for claimed property takings, and leaving the whole condemnation award for the landlord.

In fact, if anything, China's greatest oversight as compared to the U.S. was the failure to recognize the claims of the landowners and non-resident owners of the apartments who had been renting to others. Oh yes, there were stories of inadequate payments and abusive evictions. But these were not, so far as I can tell, the dominant complaint. Most of the complaints have been about nothing more than money. And neither these abuses nor the underpayments were condoned by law. For several years, there have been a national statute and local regulations that clearly provided for adequate compensation for residents and an appeal process to resolve disputes. But neither the regulations nor the system provided for proper attention to the actual owners of the land use rights or the housing units (if they were not residents).

Recently, things have commenced to change dramatically. There has been a dizzying release of new statutes and regulations. The national administration has promoted an amendment to the Chinese Constitution containing a guaranteed protection of property rights lawfully obtained and a specific requirement for compensation when such rights are taken. I saw a New York Times report citing Chinese scholars who said that the Constitution in China is not binding in the same way that the U.S. Constitution controls government behavior. True, but beside the point. The really significant fact is that the Hu administration is the interest group that initiated these reforms, and therefore the government appears prepared to take them seriously.

There is one glaring omission in this whole structure, at least as compared to Western process. The Chinese system, so far as I can tell, provides no opportunity for notice or review by interested landowners of the question of whether a public purpose exists to justify taking away the private interests of some citizens and giving them to others. My Chinese scholar friends tell me that a "public purpose" requirement undoubtedly exists—apparently in some Supreme People's Court interpretation of the Constitution—and the demolition must be consistent with zoning decisions, where relevant. But most of the decisions to grant land use rights to developers occur outside of the public eye and immune from judicial review. Once the characters go up on the buildings, there is process and judicial review concerning

payment (although usually by the time the fight is settled, the residents are out—condemnation in China is "quick take").

Clearly there should be greater process to make sure that there is public justification to strike down the old buildings, and the justification probably should be something more than just making a housing developer rich. But because there is no real process, there are no standards here. Likely, in light of China's tradition of powerful government, any system that will be developed will favor the government. But the point is that legal due process rights often lead to the development of political process. The harangue tactics could start sooner, and citizens could openly negotiate with the government toward some standard as to when demolition is appropriate, and when not.

It is important to note that, from the standpoint of substantive legal standards, American law also is grossly tilted toward the government. In 1954, in Berman v. Parker (the famous "Poletown" case), the U.S. Supreme Court pretty much rubber-stamped the notion that condemnation, redevelopment and resale to private developers is a legitimate government response to the problem of decaying central cities. The progeny of that decision have been some pretty egregious tactics in many local areas as governments vie with their neighboring cities to develop business opportunities, shopping centers, and, on rare occasion, even housing. In a few recent cases, State courts, interpreting the U.S. Constitution, have started to put the brakes on the most extreme practices. The Illinois Supreme Court struck down a local eminent domain action designed to eliminate the property rights of a factory owner who had the bad luck to be located just where a booming NASCAR track sought to put up an additional parking lot. The factory was by all accounts neat, clean and making a nice little profit. It was not a decaying urban core. But it was in the way, and NASCAR had neither the time nor the inclination to negotiate an acquisition price with the owner. The local government was more than accommodating, and authorized a "quick take" of the factory site at a price determined by eminent domain proceedings. But the owner had the resources to fight back, and his lawyers ultimately prevailed, convincing the state's high court that the procedure violated both State and U.S. Constitutions. The case does not stand alone, but is part of a series of lashback decisions responding to abuses of the eminent domain process around the country. But the U.S. Supreme Court has yet to address the issue, and there are lots of states where the process continues unabated.

Even the Illinois court acknowledged that if the local government had gone through an administrative process by which it determined, by application of objective and reviewable standards, that there was a demonstrated public need for public intervention to resolve creeping urban blight, the public decision would have been entitled to great deference. But the local politicos here had dispensed with that process—perhaps because, on the facts—any such decision would have been a pure sham that would have received embarrassing treatment in the press and ultimately might not have survived even the gentle judicial review that the courts might have applied.

In talks in China, I have emphasized this developing authority in America, noting that the political upset over the "demolition" practices might be alleviated, if not eliminated, by greater process before the actual taking commences. If people are given warning and opportunity to object, the most egregious corrupt decisions simply don't happen. Corruption dries up in the light of day, and in the threat of public scrutiny.

Further, the Chinese need to educate their people better about what it is they are receiving compensation for. The Chinese practice of using replacement properties instead of money for relocation compensation strikes me as sound, so long as the new properties do not unduly destroy community or employment access. Further, the government needs to explain to its citizens that the right of occupancy for which they are being compensated is just that and no more. Most of these occupants of old residential blocks never paid for the land use rights (in many cases no one did), and the "location value" that goes with land value was never traded out by the state. Consequently, the State should not be required to pay for that value. Even the newest laws in China do not draw an adequate distinction between granted land use rights (where people pay for the right in the dirt itself) and allocated land use rights (where there is only a sort of revocable license for the dirt, but people own the buildings—an independent object of ownership in China.) Clarity of legal provisions and greater information to the people about these distinctions would help a lot.

Of course, it's fun to criticize and cluck our tongues at the struggle of traditionally all-powerful government officials to deal with the new political awareness of their citizens. And it's useful to provide constructive criticism. But all of this should not obscure the real point here—the very publicizing of these disputes, and the agoniz-

ing of public officials over how to resolve them, and the consequent exposure of corruption—all of this is new stuff in China. It's clearly the result of a new commitment to openness, at least with regard to private ownership rights. Further, we should not lose sight of the fact that we here in America have swept these very issues under our own public policy carpets for many years. When we needed revitalized cities and gentrification of the slums, we didn't stand too hard on Constitutional principle, and this in a society that has limited government as a basic principle. The Chinese deserve credit and support for moving their traditional all-powerful government structure toward a new property rights regime. The battle over demolition in China shows that a highly developed, multi-layered and overbearing bureaucracy does not disappear overnight. But, given the opportunity to progress, I think we'll see some real political process emerging here, at least in the larger cities. Further, the U.S. is hardly in the best position to cast stones.

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