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# ENTER THE DRAGON'S LAIR: THE NEW SOCIALISM AND PRIVATE PROPERTY OWNERSHIP IN THE PEOPLE'S REPUBLIC OF CHINA

MICHAEL T. STANCZYK\*

In making the transition from a socialist command economy to a market driven capitalist economy, the main focus is the privatization of property.<sup>1</sup> In order to foster a healthy, robust market system, secure private property rights are a necessity.<sup>2</sup> The People's Republic of China ("PRC") has recently passed an amendment to its constitution granting, for the first time, individuals the right to own property.<sup>3</sup>

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<sup>1</sup> See Janos Kornai, *What the Change of System from Socialism to Capitalism Does and Does Not Mean*, 14 J. ECON. PERSP. 27, 32 (2000) (stating that a successful transition to capitalism requires "providing constitutional protections for private property" and the promotion of privatization); see also Ákos Róna-Tas, *The First Shall Be Last? Entrepreneurship and Communist Cadres in the Transition from Socialism*, 100 AM. J. SOC. 40, 40 (1994) (explaining that the change from socialism to capitalism requires "profound change[s] in property relations").

<sup>2</sup> See Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 3 ("A well-functioning property rights system is vital for a market economy. Without a credible legal system that protects ownership rights and provides stable legal rules, people will be less inclined to invest in long-term projects when return on the investment might take many years. To sustain growth and prosperity, property rights require the protection of fair and stable laws. In a market economy, it is the task of the government to provide this security."); see also Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the "Takings" Law in China*, 29 HASTINGS INT'L & COMP. L. REV. 1, 6 (2005) ("For developing economies, the implication of the NIE [New Institutional Economics] theory is that the first step to economic growth is to establish a well-defined and enforceable property rights framework. During this process, developing economies must be fully aware that while formal rules on property rights are relatively easy to establish (chiefly through legal transplantation), informal norms that create indirect property rights protections are not.").

<sup>3</sup> This paper was written before the passage of the new property rights law and examines China's property system prior to its enactment. This paper will not provide an analysis of the new property rights law. It is too early to witness the full effect the law may have. This paper concerns itself with the conditions in China that necessitated the passage of the law and some problems in the China's property system that the law may possibly rectify in the future. See *China's New Revolution*, ECONOMIST, March 10, 2007, which describes how the new law was passed and that it is deemed a "great symbolic

Two different approaches to privatization exist. The first was exemplified after the fall of the Soviet Union, when the world witnessed the so-called “big bang” method of privatization, which utilizes “shock therapy” – rapidly transforming a nation from a socialist state to a privately owned, western style market economy.<sup>4</sup> When “shock therapy” is used the government enacts a switch of control over ownership to individuals and corporations in a very short time period. While this method quickly transfers a huge amount of wealth to private parties, showcased by the overwhelming amount of young billionaires in Russia at the present time, it carries with it many negative externalities. While the more prevalent model, this “shock therapy” method of privatization is fraught with difficulties.<sup>5</sup>

The second method of privatization, the one that China has engineered, has been deemed “socialism with Chinese

victory for economic reform and the rule of law.” *Id.* However, it is not as comprehensive in the grant of protections to individuals as hoped. The law that was passed is a watered down version of a full private property rights law that was contemplated earlier and is still needed in China. However, it is a start and the process of privatization will continue in the future. The passage of the property law “may have started a process . . . that will one day change [China] completely.” *Id.* Prior to the passage of the new law a draft property rights law was accepted with a planned enactment date of March 2006, but after certain Marxist ideologues voiced their concerns about how the proposed draft strayed too far from the socialist idealistic underpinnings of the nation, the draft law was rejected. It fueled many outside opinions and heated debates. See Joseph Kahn, *At a Secret Meeting, Chinese Analysts Clashed Over Reforms*, N.Y. TIMES, Apr. 6, 2006, at A14, stating:

Officials and scholars who had been convened last month to advise senior Chinese leaders disagreed sharply on how to advance economic and legal reforms, according to minutes of the private meeting that have been leaked on the Internet. They also expressed anxiety about what one official called “unprecedented controversy and dissent” among China’s elite . . . Last month, the party-controlled legislature postponed consideration of a broad property-rights measure that had been expected to become law.

While it is true that prior to the enactment of the new property rights law China allowed ownership of certain types of property in the past, such as improved structures (buildings), this note will concentrate mainly on real estate. *Id.*

<sup>4</sup> See Vladimir Popov, *Shock Therapy Versus Gradualism: The End of the Debate (Explaining the Magnitude of Transformational Recession)*, 42 COMP. ECON. STUD. 1, 2 (2000) (highlighting differences between radical and immediate changes favored by “shock therapy” as opposed to more cautious approach of “gradualism”); see also *Shock Therapy (Economics)*, [http://en.wikipedia.org/wiki/Shock\\_therapy\\_%28economics%29](http://en.wikipedia.org/wiki/Shock_therapy_%28economics%29) (last visited Apr. 6, 2007) (noting that shock therapy often implements changes so rapidly that the economy is unable to keep up).

<sup>5</sup> See Pamela Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL’Y 607, 612 (2005) [hereinafter Phan I] (discussing social and political unrest prevalent in the Soviet model of privatization); see also Janine R. Wedel, *The Harvard Boys Do Russia*, NATION, June 1, 1998, at 11 (citing issue with privatization of rampant inflation which can wipe out the savings of individual investors).

characteristics.”<sup>6</sup> This is a gradual, pragmatic approach to privatization.<sup>7</sup> It is still an ongoing process in China, started in 1978, which peaked when the PRC Constitution was amended to recognize formal private property ownership rights.<sup>8</sup> However, this does not mark the end of the privatization process. It will be just one step in the furthering of the continued pragmatic “socialism with Chinese characteristics.”<sup>9</sup>

China has been expanding economically to the bewilderment of many economists and legal scholars.<sup>10</sup> It has not followed any clear economic theories and has had little, if any, assistance from legal constructs in its furious expansion.<sup>11</sup> It is itself creating new economic and legal growth models which will be studied and

<sup>6</sup> See Edward Cody, *China's Premier Calls Democracy a Distant Goal*, WASH. POST, Feb. 28, 2007, at A13 (stating China's Premier, Jan Wen Jiabao, used term “socialism with Chinese characteristics” to describe China's future).

<sup>7</sup> See Robert H. McGuckin & Sean M. Dougherty, *Restructuring Chinese Enterprises: The Effects of Federalism and Privatization Initiatives on Business Performance*, THE CONF. BOARD, 7 (2002) (finding China's experiment with privatization to have occurred systematically over the past twenty years); see also Matthew D. Bersani, *Privatization and the Creation of Stock Companies in China*, 1993 COLUM. BUS. L. REV. 301, 304 (1993) (“The term ‘privatization’ means something very different in the Chinese context than in Eastern Europe, South America, or other places where privatization has occurred. Privatization in China does not involve a radical departure from past practices, inspired by political necessity. Rather, it is the continuation of a process begun 15 years ago, and is motivated largely by excessive capital accumulation by private individuals in the PRC, rather than by the state's dire economic needs. . . . In the PRC, however, the government retains a controlling interest in ‘privatized’ entities, so that privatization results not in the sale of state assets to private interests, but in the absorption of private funds by state-controlled enterprises.”).

<sup>8</sup> See McGuckin & Dougherty, *supra* note 7, at 8 (explaining that small businesses with less than eight employees were first to be privatized in the late 70's and early 80's); see also Joseph Kahn, *China Moves to Protect Property, But the Fine Print Has a Caveat*, N.Y. TIMES, Dec. 23, 2003, at A1 (describing People's Republic of China's move to amend their constitution to protect private property).

<sup>9</sup> Cody, *supra* note 6, at A13 (referring to China's Premier Jan Wen Jiabao's use of term “socialism with Chinese characteristics” to describe China's future).

<sup>10</sup> See David Barboza, *A Rapid Rebound: Chinese Stocks Set Record*, N.Y. TIMES, Mar. 22, 2007, at C12 (finding that Chinese market is booming and Chinese stock market grew more than any other market last year); see also Joseph Kahn, *India, China at Business Forum's Forefront: Growth in Asia is Expected to Dominate the World's Economic Focus in the 21<sup>st</sup> Century*, L.A. TIMES, Jan. 30, 2006, at C7 (mentioning China and India have taken center stage as world's fastest developing nations because they have the greatest economic growth).

<sup>11</sup> See Joseph Kahn, *China Enacts Law to Protect Property*, INT'L HERALD TRIB., Mar. 17, 2007, at 6 (noting that China enacted its first law to protect private property only after twenty-five years of unprecedented growth); see also *The World's Largest Economies*, ECONOMIST, Apr. 1, 2006 (“By 2020, China will narrowly outstrip the United States in GDP, according to the Economist Intelligence Unit, a sister organization of *The Economist*. The forecast uses purchasing-power parities (PPP), which strip out price differences between countries, rather than market exchange-rates to convert national GDPs into a common currency.”).

applied in the future.<sup>12</sup> This note will give a brief tour of the structure of the property system existing in China before the enactment of the amendment to the PRC constitution granting individuals the right to own property, and to shed some light on areas that need improvement going forward.

Part I of this note will examine the political and legal system of China in order to provide background information regarding how the new property law arose. Part II will provide an overview of the property system in China, look at the *de jure* and *de facto* ownership interests that have arisen, and how the property law was necessary to delineate and solidify these interests. Part III will delve into two of the main problems in China's property regime; first, the troubling registration system, and second, the corruption, land takings, and mistreatment of the working class. Part IV will examine the economic effects that the property rights law, once fully implemented, may have on the People's Republic of China.

## I. CHINA'S STRUCTURE OF GOVERNMENT AND LEGAL SYSTEM

The People's Republic of China utilizes a unitary form of government, in contrast to the federal system of the United States.<sup>13</sup> A unitary form of government has one central government directly controlling all lower levels of government.<sup>14</sup> As of late, however, the lower levels of government in the PRC have begun to operate as separate entities.<sup>15</sup> This occurred

<sup>12</sup> See Mitchell Silk & Richard Malish, Symposium, *Legal Implications of a Rising China: Are Chinese Companies Taking Over the World?*, 7 CHI. J. INT'L L. 105, 109 (2006) (noting that managers of multinational corporations are already reading about and trying to learn from China's growth); see also *The Tiger in Front*, ECONOMIST, Mar. 5, 2005 (positing that "India can learn much from China's [rapid economic growth]").

<sup>13</sup> See Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 413 (noting that control of China's government is located in the central government); see also Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT'L L. & FOREIGN AFF. 227, 235 (2004) ("Departments at the provincial, city, and county levels correspond to the ministries in Beijing and take direction from them.").

<sup>14</sup> See Duncan, *supra* note 13, at 413 (comparing China's government to a pyramid, with the central government passing down orders from the top); but see Wilhelm, *supra* note 13, at 235 (stating that central control of local decisions has become less pervasive in the past twenty years).

<sup>15</sup> See Wilhelm, *supra* note 13, at 235 (citing KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 249 (1995)) (finding that local governments are gaining control of how initiatives are carried out even if they are not determining what initiatives should be carried out).

because the central government set tax quotas that each lower level of government had to meet, and after this tax goal was met, any surplus tax revenue could be kept by the local governments and used in any manner it saw fit.<sup>16</sup> Thus, local leaders have essentially been granted an "autonomy" allowing discretion in determining their means of operation.<sup>17</sup> The central government in the PRC is concerned with only the ends, that a certain amount of revenue be collected, and not the means used to collect such revenue, which is left to the localities to determine.<sup>18</sup> Therefore, each individual locality exists as a separately run enterprise while encompassed under the command of the central state government. Local government officials act in a capacity akin to that of chief executive officers of large not-for-profit corporations in the United States.<sup>19</sup>

The highest court in the PRC is called the Supreme People's Court, under which all other courts are organized, however, each court is under the command of the local government in which it sits.<sup>20</sup> The presiding judges in the courts of the PRC are employed by the legislative "branch" of the government.<sup>21</sup> Therefore the concept of "judicial review" of legislation does not exist in the People's Republic of China.<sup>22</sup> The primary function of

<sup>16</sup> See Wilhelm, *supra* note 13, at 235-36 (citing KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 249 (1995)) (explaining that the local governments in China have gained power as a result of being allowed to share in tax revenues).

<sup>17</sup> See *id.* at 236 (citing KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 316 (1995)) ("Financial independence has led to a considerable measure of policy independence.").

<sup>18</sup> See *id.* at 236 (citing KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 218 (1995)) (including such choices as localities' own strategies for meeting the targets based on the priorities and concerns of local government).

<sup>19</sup> See Liu, *supra* note 2, at 7 (comparing officials' goals and means used in obtaining them).

<sup>20</sup> See Vernon Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 77 (2004) (finding local governments have control over the courts' "personnel and financial arrangements"); see also Wilhelm, *supra* note 13, at 236 (noting that judges are appointed by the local governments and the government exploits this power, placing demands on their appointees).

<sup>21</sup> Wilhelm, *supra* note 13, at 236 (discussing the court system); see Randall Peerenboom, *Globalization, Path Dependency, and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 195 (2001) (observing practice of appointing judges may influence their decision-making process).

<sup>22</sup> See PATRICK A. RANDOLPH JR. & LOU JIANBO, *CHINESE REAL ESTATE LAW* 32 (Kluwer Law Int'l 2000) ("Unlike the American Constitution, the Chinese Constitution is not a limit on the power of the state to govern, and the Chinese Supreme People's Court plays no role in restricting the reach of governmental purpose."); see also Wilhelm, *supra*

the courts in the PRC is to interpret legislation.<sup>23</sup> The National People's Congress is the sole holder of the power to review and, if necessary, to overturn legislation.<sup>24</sup> Indeed, the same body that is responsible for creating the laws is also charged with the responsibility of reviewing such laws in order to ensure that they are serving the proper purposes for which they were enacted.<sup>25</sup> Not surprisingly, the National People's Congress has never struck down any piece of legislation.<sup>26</sup>

The legislative body of the PRC, the National People's Congress, is in session for a mere two weeks every year.<sup>27</sup> Although the Congress holds such a short session, the main decision-making is performed during the rest of the year by the Standing Committee, which is composed of select members of the Congress.<sup>28</sup> In addition to the Standing Committee, the staff of each Congressperson works year round to draft new legislation.<sup>29</sup>

The members of Congress or their staff draft the majority of the legislation in the PRC, however, over the last few years legal practitioners have been incorporated into the drafting process.<sup>30</sup>

note 13, at 236 (writing that courts do not have the power to annul local legislation).

<sup>23</sup> Wilhelm, *supra* note 13, at 236 (discussing the political and legal context of China); see RANDOLPH & JIANBO, *supra* note 22, at 32 (noting that courts refer questions of interpretation back to the legislature).

<sup>24</sup> Wilhelm, *supra* note 13, at 236; see RANDOLPH & JIANBO, *supra* note 22, at 32 (describing that the legislature has the power to review and interpret its own legislation).

<sup>25</sup> See RANDOLPH & JIANBO, *supra* note 22, at 32 ("As a practical matter, the Supreme People's Court will refer any significant questions of interpretation back over to the government agency that established the policy in the first instance."); see also Daniel C. Turack, *The Projected Hong Kong Special Administrative Region Human Rights Record in the Post-British Era*, 31 AKRON L. REV. 77, 79-81 (writing that the National People's Congress can interpret its own laws).

<sup>26</sup> See Alsen, *supra* note 2, at 4 (observing that Standing Committee has not yet exercised its power to review legislation); see also Pu Zengyuan, *A Comparative Perspective on the United States and Chinese Constitutions*, 30 WM. & MARY L. REV. 867, 876 (1989) (reiterating there has been no instance of the Standing Committee reviewing legislation).

<sup>27</sup> See Wei Luo, *How to Find the Law of the People's Republic of China: A Research Guide and Selective Annotated Biography*, 88 L. LIBR. J. 402, 405 (1996) (describing the National People's Congress); see also Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China*, 9 U. MIAMI INT'L & COMP. L. REV. 225, 231 (2001) (explaining NPC's plenary session).

<sup>28</sup> See Wu Jianduan, *International Essay: A Milestone of Air Legislation in China—Some Thoughts on the Civil Aviation Law of the People's Republic of China*, 62 J. AIR L. & COM. 823, 825 (writing that one function of Standing Committee is to supplement and amend laws when NPC is not in session); see also Luo, *supra* note 27, at 405 (noting that Standing Committee may amend or enact legislation when NPC is not in session).

<sup>29</sup> Wilhelm, *supra* note 13, at 236 (describing China's legislative process); see Rosenberg, *supra* note 27, at 231 (explaining details of NPC's plenary session).

<sup>30</sup> See Michael C. Davis, *Constitutionalism in Hong Kong: Politics Versus Economics*,

This trend has led to the recruitment of legal scholars from many varied geographical communities and industries in the PRC.<sup>31</sup> Input from these different areas was sought as a result of pressure from large powerful interest groups representing the private sector whose interests no doubt differ from that of the PRC Communist Party.<sup>32</sup>

The Chinese Constitution is not seen as a high authority providing protection for individual rights.<sup>33</sup> It is viewed as a policy document serving as the vehicle of party rule.<sup>34</sup> It is a programmatic document, proscribing the ultimate goal of the nation: strength and prosperity.<sup>35</sup> It serves as a roadmap to guide the country towards further development socially, economically, and politically.<sup>36</sup> China has been through five constitutions, the current document having been instituted in 1982.<sup>37</sup>

18 U. PA. J. INT'L ECON. L. 157, 162 (1997) (noting that China was aware it needed to include Hong Kong as participants in drafting of Constitution); see also Guiguo Wang & Priscilla M F Leung, *One Country, Two Systems: Theory into Practice*, 7 PAC. RIM L. & POL'Y J. 279, 293 (1998) (explaining that "outside consultation was sought" in the drafting of Constitution).

<sup>31</sup> See Wilhelm, *supra* note 13, at 236 (describing how legal scholars have been drawn into the drafting process); see Davis, *supra* note 30, at 162 (listing 23 members from Hong Kong and 36 members from China on the drafting committee); see also Wang & Leung, *supra* note 30, at 293 (observing that the incorporation of outside legal advice has resulted in a compromise of legal systems).

<sup>32</sup> See Wilhelm, *supra* note 13, at 236 (explaining that these efforts were done in large part to satisfy significant interest groups outside the Communist Party); see Davis, *supra* note 30, at 162 (pointing to the large number of capitalists selected as outside consultants).

<sup>33</sup> See Alsen, *supra* note 2, at 4 (explaining Chinese Constitution is "more of a guideline than a practical source of law."); see also Hiroshi Oda, *An Examination of the Unity and Diversity Within the Socialist Legal Family: The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East Asian States*, 61 TUL. L. REV. 1339, 1352 (1987) (proffering Constitution was instrument of policy).

<sup>34</sup> See Alsen, *supra* note 2, at 4 (emphasizing that because the Constitution is instrument of policy, laws conflicting with party policy are amended); see also Oda, *supra* note 33, at 1352 (writing that "law was an instrument to realize Party policy").

<sup>35</sup> See David S. Bloch & Thomas TerBush, *Democracy in the Cities: A New Proposal for Chinese Reform*, 33 CAL. W. INT'L L.J. 171, 181 (2003) (stating that China's economic goal is to be "strong and prosperous"); S. David Cooper, *The Dot.Communist Revolution: Will the Internet Bring Democracy to China?*, 18 UCLA PAC. BASIN L.J. 98, 100 (quoting President Jiang Zemin's goal of a "strong and prosperous modernized country with a higher degree of democracy and civilization").

<sup>36</sup> See Alsen, *supra* note 2, at 4 (explaining goal of Chinese Constitution is to develop China socially and politically); see also Phan I, *supra* note 5, at 612 ("The 1982 Constitution has thus been labeled a 'programmatic Constitution,' because it defines a mission for the State and its citizens through which China may be transformed into a strong and prosperous, culturally advanced, democratic socialist nation.").

<sup>37</sup> See Alsen, *supra* note 2, at 4 (describing the history of PRC constitutions); Cymonie Rowe, Note & Comment, *Religious Freedom in the People's Republic of China*, 2 ILSA J. INT'L & COMP. L. 723, 728-31 (1996) (outlining historical development of China's



The Constitution is supreme in theory only, in practice it serves as little more than a rough guideline. Courts in ruling cannot rely upon the Constitution, and the separate provisions of the document have no power in their own right; rather each must be given life through the enactment of subsequent legislation by the Congress.<sup>38</sup> Articles 10 through 13 of Chapter 1 of the PRC Constitution cover property rights.<sup>39</sup> A plethora of laws are currently in existence to enforce these articles.<sup>40</sup> An important constitutional amendment, implemented in 1988, allowed for the existence of private businesses for the first time.<sup>41</sup> All of the different quasi-ownership interests that have arisen in China are currently protected by this amendment.<sup>42</sup>

The legal system in China is one of civil law.<sup>43</sup> The law in place in China at the present time is an amalgamation of different acts, the main one being the General Principles of Civil Law.<sup>44</sup> To

constitutions).

<sup>38</sup> See Alsen, *supra* note 2, at 4 (describing the Constitution as guideline requiring further enactment of legislation); see also Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 386-87 (2005) (explaining need for further provisions to give Constitution effect).

<sup>39</sup> See Alsen, *supra* note 2, at 5 (explaining legal rights and duties); see XIAN FA art. 10-14 (1982) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html>.

<sup>40</sup> See Blanchard, *supra* note 38, at 386-87 (providing examples of provisions enforcing property rights); Vincent W. Lau, *Post-1997 Hong Kong: Will Sufficient Educational Autonomy Remain to Safeguard Academic Freedom?*, 20 B.C. INT'L & COMP. L. REV. 187, 215 (1997) (speaking of laws intended to protect private property).

<sup>41</sup> See Alsen, *supra* note 2, at 12 (stating that the 1988 amendment acknowledged the existence of private business and granted it constitutional protection); see also XIAN FA art. 11, Amend. 1 (1982) (P.R.C.) ("Article 11 of the Constitution shall include a new paragraph which reads: 'The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.'").

<sup>42</sup> This refers to ownership interests existing before the passage of the new property rights law. It is unclear how these exist at the current moment. The passage of the law would not have taken away any rights in property, but may have strengthened certain rights already in existence. See Alsen, *supra* note 2, at 11-12 (pointing out that while Chapter 2 of the P.R.C Constitution contains a list of legal rights and duties of Chinese citizens, there are no property rights guarantees found anywhere except in Articles 10-13, which were amended in 1988); see also XIAN FA art. 10-13 (1982) (P.R.C.).

<sup>43</sup> See RANDOLPH & JIANBO, *supra* note 22, at 29 (noting that "the historical roots of this system can be traced to the early 20<sup>th</sup> century, when the Emperor of the Qing Dynasty designated Shen Jiaben to supervise the drawing of new forms of [civil, criminal and procedural codes]."); see also Patrick A. Randolph, Jr., *Commercial Leasing in China*, 15 UCLA PAC. BASIN. L. J. 86, 88 [hereinafter *Commercial Leasing*] (stating that it is widely accepted that concepts of civil law are the basis of Chinese business law).

<sup>44</sup> See RANDOLPH & JIANBO, *supra* note 22, at 30 (detailing different provisions of General Principles of Civil Law: the doctrine of equality, the doctrines of voluntariness, fairness, compensation of equal value, the doctrine of good faith, contracts, and civil acts;

fully implement this act, the Supreme People's Court, in 1988, issued an Interpretation of the General Principles of Civil Law, which is commonly referred to as the "200 Clauses."<sup>45</sup> While the Supreme People's Court cannot review the laws, their interpretations of the laws in China play a very crucial role.<sup>46</sup> It is their interpretations alone, and not any lower court decisions, that have precedence in the Chinese legal system.<sup>47</sup> Questions may be posed to the Supreme People's Court as a formal appeal from a lower court from one of the parties involved, or as a request for guidance from the lower courts themselves before they rule.<sup>48</sup>

## II. PRC PROPERTY SYSTEM PRIOR TO PROPERTY LAW

### A. Legal Background

Before the new amendment to the PRC Constitution allowing individuals the right to own property, property rights under Chinese Civil Law were divided into two kinds: Credit rights and rights in rem. Credit rights are those that include obligations owed to others arising from the existence of a contract.<sup>49</sup> Rights in rem are the equivalent of ownership under

*see also Commercial Leasing, supra* note 43, at 88 (noting that current civil law in China consists of several separate acts, and that among these, General Principles of Civil Law is considered to be the core of civil law).

<sup>45</sup> *See RANDOLPH & JIANBO, supra* note 22, at 31. This document totaled around 200 pages, hence the moniker.

<sup>46</sup> *See RANDOLPH & JIANBO, supra* note 22, at 32 (stating that "judicial interpretation of the Civil Law is primarily interpretation of governmental policy as embodied in the statutes"); *see also Commercial Leasing, supra* note 43, at 89 n.11 (commenting that some of the 200 Clauses are not only interpretations of the General Principles of Civil Law are not only interpretations, but additions to the law itself).

<sup>47</sup> *See RANDOLPH & JIANBO, supra* note 22, at 32 (stating that the decisions of lower courts have no precedential significance and only Supreme People's Court is entitled to issue binding judicial interpretations); *see also Commercial Leasing, supra* note 43, at 89 n.11 (noting that only Supreme People's Court is entitled to issue binding judicial documents).

<sup>48</sup> *See RANDOLPH & JIANBO, supra* note 22, at 32 (noting that these documents, which would be referred to as "opinions" in the American legal system, are labeled "responses" in the Chinese system); *see also* Mark C. Lewis, *Contract Law in the People's Republic of China—Rule or Tool: Can the PRC's Foreign Economic Contract Law Be Administered According to the Rule of Law?*, 30 VAND. J. TRANSNAT'L L. 495, at 514 (stating that Supreme People's Court has administrative jurisdiction over lower courts, original jurisdiction in designated cases, and appellate jurisdiction over higher and specialty courts).

<sup>49</sup> RANDOLPH & JIANBO, *supra* note 22, at 42 n.53. "Contract rights are identified as credit rights under Section 84 and 85 of the General Principles of Civil Law." Other types

civil law.<sup>50</sup> These rights in rem are the civil law equivalent of our common law theory of ownership interests.<sup>51</sup>

The state will protect an individual's "in rem" rights from all others in the world.<sup>52</sup> If the state interferes with the right, it must properly compensate the owner, similar to our concept of eminent domain.<sup>53</sup> An in rem right is mortgageable and the mortgage interest held on such a right is itself in turn another in rem right.<sup>54</sup>

Prior to the new property law no person or entity could "own" any property in the PRC. Article 71 of the Civil Code states that the Chinese concepts of property ownership refer to: Possession (zhanyou), use (shiyong), the right to benefit (shouyiquan), and the right to dispose (chufen).<sup>55</sup> This foreclosed actual ownership of the property itself. These interests are only a part of the bundle of rights of ownership found in our common law.<sup>56</sup>

of credit rights include unjust enrichment and debatably tort claims. *See generally* XIAN FA art. 85-86 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>50</sup> RANDOLPH & JIANBO, *supra* note 22, at 43. While the Chinese civil law does not refer to these as "rights in rem," Chinese scholars agree that that is what they substantially are under the "Property Ownership and Other Property Rights Related to Ownership" in Chapter 5 of the General Principles of Civil Law. XIAN FA art. 85-86 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>51</sup> *See* RANDOLPH & JIANBO, *supra* note 22, at 43 (stating that "there is a rough correspondence between the "in rem" concept and legal title, or ownership"); General Principles, *supra* note 50, Art. 73-83.

<sup>52</sup> *See* RANDOLPH & JIANBO, *supra* note 22, at 43 n.56. The applicable portions of the General Principles of Civil Law numbered 73, 74, and 75 correspond to state owned property, collectively owned property, and citizen's lawful property respectively and all contain similar language: the property is either sacred (state property) or protected from any "organization or individual" seizing, encroaching, destroying, dividing, retaining, etc. *Id.*

<sup>53</sup> *See* RANDOLPH & JIANBO, *supra* note 22, at 43 (citing the Urban Real Estate Administration Law, Section 19, and the state can only appropriate land for reasons grounded in "social public interest[s]"). *Cf.* *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (stating that "[i]t is . . . clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking.").

<sup>54</sup> *See* RANDOLPH & JIANBO, *supra* note 22, at 44 (quoting the 1995 Security Law); XIAN FA art. 94-97 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>55</sup> *See* Alsen, *supra* note 2, at 25 (stating that "property ownership is divided into four constituent 'powers and functions' (quanneng): Possession (zhanyou), use (shiyong), the right to benefit (shouyiquan), and disposition (chufen)"); *see also* XIAN FA art. 71 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>56</sup> *See* *Moore v. Regents of Univ. of Cal.*, 793 P.3d. 479 (Cal. 1990) (Mosk, J., dissenting) ("Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations.") (quoting *Union Oil Co. v. State Bd. of Equal* (Cal. 1963)).

Chinese legal theorists and scholars experimented with different combinations of these four allowable ownership interests and came up with some interesting mixtures.<sup>57</sup>

It was possible for an individual or corporation to own an interest in property, and also to obtain various *de jure* ownership rights in certain types of property.<sup>58</sup> These *de jure* property rights evolved as a social construct in a way that allowed China to function as a market economy without the concrete property rights that most economic and legal scholars deem a requisite to prosperous economic growth.<sup>59</sup> In reviewing the path that China has taken, we can see how different methods that look from all practical purposes like ownership have arisen. Various innovations such as long term interests, land use rights, and the collectives that have sprung up all over China give the most interesting insight as to how a society can start to move away from a completely socialist state while not granting solid property interests.<sup>60</sup>

### *B. Historical Background*

The Communist regime took power in China in 1949.<sup>61</sup> They

<sup>57</sup> See Alsen, *supra* note 2, at 25 (stating that Chinese legal theorists broke down ownership into four constituent parts so they could build new rights with novel combinations of the old parts); see also XIAN FA art. 71 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>58</sup> See Alsen, *supra* note 2, at 35 (explaining how individuals may “lawfully” own their own income and savings, and how enacting various economic reforms is allowing for more diverse forms of ownership); see also XIAN FA art. 71 (1982) (P.R.C.), available at <http://www.dffy.com/faguixiazai/msf/200603/20060320173214-10.htm> (last visited April 15, 2007).

<sup>59</sup> See Alsen, *supra* note 2, at 20-21 (surveying China’s development from a centrally-planned, state-run economy, which the Deng government realized was hampering economic prosperity, to the development of private ownership and property rights within the socialist construct).

<sup>60</sup> See, e.g., Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465, 471 (2004) (“Observers of China’s evolving property law regime, for example, have pointed out the enduring mystery of how China has managed to achieve impressive rates of economic growth over more than two decades without an institutionalized system of property rights.”).

<sup>61</sup> See Robin Munro, *Judicial Psychiatry in China and its Political Abuses*, 14 COLUM. J. ASIAN L. 1, 65 (2000) (highlighting that Communist Party assumed control in China in 1949); see also RANDOLPH & JIANBO, *supra* note 22, at 14 (“After a short transition period following the setting up of the People’s Republic of China in 1949, China established a complete Socialist political and economic system on the mainland . . . characterized by: (1) public ownership of the means of production, (2) highly centralized economic management and organization through plan, and (3) unified state control over income and expenditure of enterprises and institutions.”).

disbanded private ownership, abolished free markets and set up a centrally controlled economy.<sup>62</sup> The Communists believed that this would lead to the proletariat peoples of the country to join in and work towards the main goal: advancing the interests of the nation as a whole.<sup>63</sup> To the Communist Party's disappointment and dismay, the lack of accountability and incentives to operate efficiently foiled their plans.<sup>64</sup> China became riddled with loss and debt.<sup>65</sup>

China wanted to establish market transactions, and in 1998 it amended both the Constitution and the Land Administration Law in order to permit the transfer of 'land use rights' to private individuals.<sup>66</sup> This marked "the beginning of the institution of market systems" in China.<sup>67</sup> In sticking to their socialist guns,

<sup>62</sup> See RANDOLPH & JIANBO, *supra* note 22, at 9-10 (detailing communist takeover and process of state property appropriation, property owned by war criminals, traitors, bureaucratic capitalists and counterrevolutionaries was seized immediately, while state takeover of property owned by national bourgeoisie was more gradual and forgiving, sometimes paying former owner up to 20% of income collected for certain time period. Total ban on private ownership finally came about with adoption of 1982 Constitution in which state declared itself owner of all urban land); see also Christopher M. Vaughn, *Venture Capital in China: Developing a Regulatory Framework*, 16 COLUM. J. ASIAN L. 227, 232 (2002) (discussing Communist Regime's economic changes in China after taking power).

<sup>63</sup> See Minxin Pei, *A Smoke Screen: China Needs Better Leadership, Not Another Morality Campaign*, NEWSWEEK, International Edition, Mar. 20, 2006, available at <http://www.msnbc.msn.com/id/11788163/site/newsweek/> (stating Communist "party hoped that communist ideology would bind the masses to its will."); Zhu Suli, "Federalism" in *Contemporary China—A Reflection on the Allocation of Power between Central and Local Government*, 7 SING. J. INT'L & COMP. L. 1, 4-5 (2003) (explaining communist party's goal has been unified state and this can be seen by its policy of coordinating country as whole under planned economy).

<sup>64</sup> See Opinion, *Don't Disturb China's Pace of Reform*, L.A. TIMES, June 3, 1990, at 2 (positing difficulty in becoming incentive based economy from centralized economy that was riddled with corruption); see also Janiece Marshall, *Current Developments in the People's Republic of China: Has China Changed?*, 1 TRANSNAT'L LAW. 505, 508 (1988) (commenting that communist party "did not fulfill its dual promises of prosperity through economic modernization and security from barbarian invasion" because society was divided and the economy was stumbling).

<sup>65</sup> See Ann P. Vandavelde, *Realizing the Re-emergence of the Chinese Stock Market: Fact or Fiction?*, 30 VAND. J. TRANSNAT'L L. 579, 583-84 (1997) (highlighting that Communists' tight control had "stifled the country's economic development"); see also Marshall, *supra* note 65, at 508 (1988) (highlighting that in decades after communists took power, China had "faltering economy").

<sup>66</sup> Joyce Palomar, *Contributions Legal Scholars Can Make to Development Economics: Examples From China*, 45 WM. & MARY L. REV. 1011, 1026 (2004) [hereinafter Palomar I]; See Patrick A. Randolph, Jr. & Lou Jianbo, *Chinese Real Estate Mortgage Law*, 8 PAC. RIM L. & POL'Y J. 515, 516 n. 1 (1999) (citing Chinese Constitution which states "right to the use of land may be transferred in accordance with the law").

<sup>67</sup> Randolph & Jianbo, *supra* note 22, at 17 (positing that this was also end of cultural revolution); see *Chinese Real Estate Mortgage Law*, *supra* note 67, at 516 n. 1 (highlighting that China amended its constitution to establish market transactions as means of resource distribution).

the full ownership of the land remained in the hands of the State or an Agricultural Collective.<sup>68</sup> These land use rights were granted to individuals for long terms, generally thirty to seventy years.<sup>69</sup> These rights could be leased, sold, mortgaged, or otherwise transferred to other individuals.<sup>70</sup> These land use rights are analogous to the common law concept of a long term ground lease.<sup>71</sup> The concept is a product of ancient Roman civil law which allows "land ownership without the characteristic of accession."<sup>72</sup> An individual or entity, the grantee, is granted use of the land and if they make improvements in accordance to the granted use, the grantee becomes the owner of the building, but not the land on which the building sits.<sup>73</sup>

### C. Current and Past Privatization

The process of retaining the socialist state while creating a separate concurrent market economy is probably the most interesting feature of Chinese privatization and has been deemed

<sup>68</sup> See Palomar I, *supra* note 66, at 1026 (discussing that State or agricultural collective has full ownership of land); see also Bin Xue Sang, *Pudong: Another Special Economic Zone in China?—An Analysis of the Special Regulations and Policy for Shanghai's Pudong New Area*, 14 NW. J. INT'L L. & BUS. 130, 143 (1993) (noting State and agricultural collectives have exclusive ownership of land in China and right to use land is different from ownership).

<sup>69</sup> See Palomar I, *supra* note 66, at 1026, which comments that although state has full ownership of land, it may grant land use rights to private person for specific terms; see also Phan I, *supra* note 5, at 614-15, which describes these different interests. In the rural areas of China, land may be used for either farming or residential purposes and are limited to a term of thirty years. *Id.* In the urban areas of China, the government agency (the State Land Administration Bureau SLAB) can grant land use rights for no compensation that carry no time limits, but can be taken back by the State as it wishes. Land use rights in urban areas can also be granted as a type of leasehold interest for which the state must be compensated, but the State promises not to take back the land for a term of 70 years, unless "under special circumstances and in light of social and public interests." *Id.* After the 70 year term is up the land reverts back to the state. *Id.*

<sup>70</sup> See Palomar I, *supra* note 66, at 1026 (explaining ways land use rights can be transferred); *Chinese Real Estate Mortgage Law*, *supra* note 67, at 516 n. 2 (1999) (noting land use rights granted "may be transferred, leased, or mortgaged").

<sup>71</sup> See RANDOLPH & JIANBO, *supra* note 22, at 18 (while many western lawyers and business persons have considered this to be case, especially because most of land in Hong Kong is subject to ground leases from government, most scholars in China trace roots of land use right to Civil law, especially Germanic concept of *erbbaurecht*.); see generally Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT'L L. 809, 846 n. 267 (1994) (defining *erbbaurecht* as hereditary building right which is an "encumbrance upon real estate consisting of a transferable and an inheritable right to build or develop the land above or below the surface.").

<sup>72</sup> RANDOLPH & JIANBO, *supra* note 22, at 18-19.

<sup>73</sup> See *id.* at 19 (explaining that "[t]here are separate rights (rights *in rem*) in the ground and in the building."); see also *Commercial Leasing*, *supra* note 43, at 98 (1996) (discussing ability to have lease on building but no interest in ground).

its “pluralization” process.<sup>74</sup> It is the creation of a non-state sector separate of public ownership in addition to the retention of the state sector.<sup>75</sup> Under the 1988 amendments to the Chinese Constitution, the private sector is not merely supplementary to the socialist public economy, but rather was created to exist as a separate private economy.<sup>76</sup> The 1999 amendments to the Constitution solidified the power of the individual, private and non-state sectors of the socialist market economy.<sup>77</sup> This was done in “a series of ‘trial and error’ reforms.”<sup>78</sup> As a result of some of these reforms it is unclear as to what nature of property interest the individuals and corporations in the non-state sector hold, it would appear under a common law system that they would hold mere leasehold estates.<sup>79</sup> This uncertainty was one of the main reasons a property rights law was needed.

The Communist Party created the non-state sector because it believed that successful state privatization could not take place

<sup>74</sup> See Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 200-01 (2004) (stating “[o]n the one hand, while public ownership forms are preserved, incidents of public ownership, specifically power to possess, power to use, power of partial income and sometimes power to alienate, have been gradually decentralized from the central government to local governments, from government to business or non-business entities, and from entities to individuals. On the other hand, a nascent private sector has been created through the introduction of foreign investment and the recognition of ‘individual industrial and commercial households’ (*geti gongshang hu*), individual partnerships (*geren hehuo*) and private enterprises (*siying qiye*). The overwhelming majority of ambiguities of property rights exist within the decentralized sectors.”); see also Robert C. Art & Minkang Gu, *China Incorporated: The First Corporation Law of the People’s Republic of China*, 20 YALE J. INT’L L. 273, 282 (1995) (emphasizing China’s commitment to socialism demonstrated through its Corporation Law’s “purpose of ‘maintaining the social economic order and promoting the development of a socialist market economy.’”).

<sup>75</sup> See Lan Cao, *The Cat that Catches Mice: China’s Challenge to the Dominant Privatization Model*, 21 BROOK. J. INT’L L. 97, 102 (1995) [hereinafter Lan Cao I] (discussing how China differs from dominant prescription for privatization by retaining state sector while creating non-state sector); Darryll K. Jones, *The Neglected Role of International Altruistic Investment in the Chinese Transition Economy*, 36 GEO. WASH. INT’L L. REV. 71, 75 n.14 (2004) (clarifying Chinese privatization emphasizes retention of state sector but creation of non-state sector to supplement state sector).

<sup>76</sup> See Blanchard, *supra* note 38, at 384 (noting in 1988 China amended its constitution to “formally endor[s] the existence and development of the private sector as a supplement to the public economy.”); RANDOLPH & JIANBO, *supra* note 22, at 60 (emphasizing 1988 amendments “declared for the first time that the State allows the existence and development of a private economy within the limitation of law.”).

<sup>77</sup> See Blanchard, *supra* note 38, at 385 (describing that private sector was taken “from its supplementary status to become a ‘major component’ of the socialist market economy” in 1999); RANDOLPH & JIANBO, *supra* note 22, at 60 (explaining 1999 amendments increased official standing of private enterprise).

<sup>78</sup> See Huang, *supra* note 74, at 201 (stating “decentralization process was a series of ‘trial and error’ reforms aimed at improving the efficiency of various public assets”).

<sup>79</sup> See *id.*

without the existence of a non-state sector with market characteristics and forces.<sup>80</sup> In the non-state sector, the creation of new firms, rather than the privatization of state sector firms into the non-state sector, has been the driving force of China's success.<sup>81</sup> The non-state sector has also been far more profitable than the state sector.<sup>82</sup> This has not been a hard feat for the private sector to accomplish however, considering that the state sector has been very unprofitable over the last decade or so.<sup>83</sup>

It is interesting to note that China is not under any political pressure to privatize,<sup>84</sup> at least not any internal pressure from the masses, because the creation of the non-state sector has led to such success and in turn such a high degree of wealth among its citizens.<sup>85</sup> Currently, Chinese citizens have one of the highest

<sup>80</sup> See Lan Cao I, *supra* note 75, at 140 ("Private property without market forces may simply create private owners who perpetuate the patterns of inefficient and monopolistic behavior of their state predecessors."); see also Lan Cao, *Public Perspectives on Privatization: Chinese Privatization: Between Plan and Market*, 63 LAW & CONTEMP. PROB. 13, 22 (2000) [hereinafter Lan Cao II] ("Chinese reformers deferred state-sector privatization and focused on establishing the fundamentals of a market-oriented economy—in other words, a working market—in the newly created non-state sector.").

<sup>81</sup> See Lan Cao I, *supra* note 75, at 130 (describing China's skepticism of the privatization of the state sector and its success in creating non-state firms that have been responsible for its record growth).

<sup>82</sup> See Lan Cao I, *supra* note 75, at 131-32 (discussing growth of non-state sector in China and how new institutional structure has generated surplus capital); see also Pamela L. Polevoy, Note, *Privatization in Vietnam: The Next Step in Vietnam's Economic Transition From a Nonmarket to a Market Economy*, 23 BROOK J. INT'L L. 887, 894 (1998) (noting the emergence of process of gradual privatization of state firms which focuses on combating the problems of general inefficiency, low productivity and lack of profitability plaguing state firms).

<sup>83</sup> See Lan Cao I, *supra* note 75, at 116 ("State firms were seen as vestiges from the past and were associated with inefficiency and unprofitability."); see also Polevoy, *supra* note 82, at 896 (discussing transformation of PRC's economy and primary purpose of economic reform as being the need to mobilize China's vast resources).

<sup>84</sup> See Bersani, *supra* note 7, at 304 ("China . . . is not making a head-long dash away from communism; despite the 1989 student uprising in Tiananmen Square, the government is currently under no apparent pressure from the masses to undergo radical political change.").

<sup>85</sup> See Fareed Zakaria, *Does the Future Belong to China?*, NEWSWEEK, May 9, 2005, available at <http://www.fareedzakaria.com/articles/newsweek/050905.html> ("The results have been astonishing. China has grown around 9 percent a year for more than 25 years, the fastest growth rate for a major economy in recorded history. In that same period it has moved 300 million people out of poverty and quadrupled the average Chinese person's income. And all this has happened, so far, without catastrophic social upheavals. The Chinese leadership has to be given credit for this historic achievement."); see also Bersani, *supra* note 7, at 304 ("China's principal motivation for privatization is to address a very different problem: Its private citizens are, in the PRC government's view, collectively too rich. Private citizens in China harbor huge amounts of money in personal savings. As of the end of 1992, the private savings of PRC citizens totaled U.S. \$ 310 billion."); Lan Cao II, *supra* note 80, at 43 ("Over the years, the prosperity of the non-state sector allowed China's private citizens to save large amounts of money. With one of the highest annual savings rates in the world—approximately thirty percent—private surplus capital at one



savings rate in the world.<sup>86</sup> China believes that this wealth would do a great deal more good if funneled into productive enterprises, especially if reinvested into the privatization of the economy instead of stashed under worker's mattresses.<sup>87</sup> The Communist Party also views, in a slightly paranoid manner, masses controlling such a large sum of capital as a potential threat to political stability.<sup>88</sup>

#### *D. Agricultural Collectives and Town and Village Enterprises*

After the Chinese Constitution was amended in 1982, it declared all land in China to be owned by either the State or by an Agricultural Collective.<sup>89</sup> The land in cities was designated State land while the land in rural areas was mostly deemed that of an Agricultural Collective.<sup>90</sup> The State is still the final authority however, and can make decisions as to what land will remain in the hands of the Collectives and what land they will

point constituted approximately 1.3 trillion yuan or \$ 260 billion, although other sources put the amount at \$ 310 billion, with an estimated \$ 200 billion idle in the domestic banking system and another \$ 100 billion concealed outside the system, under mattresses, for example, by people distrustful of banks.”)

<sup>86</sup> See Lan Cao II, *supra* note 80, at 43-44 (noting how China's high savings rate coupled with bank interest rates that are low makes investing in securities an appealing option); see also Polevoy, *supra* note 82, at 896-97 (explaining how accumulation of private wealth in China has become a political threat making the investment in state enterprises a suitable mechanism for maintaining stability).

<sup>87</sup> See Lan Cao II, *supra* note 80, at 44-45. However the author notes that “[l]ike its other market-oriented measures, China's conversion of private savings into investment capital must be contained within the perimeters of market socialism. Thus, capital extracted from Chinese personal savings was converted initially into debt instruments that do not threaten socialist ownership and later into limited minority interests that do not threaten the state's role as majority shareholder of state enterprises, resulting in the wrong sort of regulation: political regulation to serve the state's desire to maintain control, rather than the necessary market regulation to transform state actors into market actors.” *Id.*

<sup>88</sup> See William I. Friedman, *One Country, Two Systems: The Inherent Conflict Between China's Communist Politics and Capitalistic Securities Market*, 27 BROOKLYN J. INT'L L. 477, 478 (2002) (“The government viewed the disparity in wealth between the state-owned sector and the private sector as politically threatening.”); see also Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823, 848-49 (1991) (noting how communist elites in Eastern Europe were against economic reforms that would cause them to lose power).

<sup>89</sup> XIAN FA art. 10 (1982) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html> (stating “rural” and “suburban” lands are owned by Agricultural Collectives); see RANDOLPH & JIANBO, *supra* note 22, at 59 (detailing system of Agricultural Collectives in China).

<sup>90</sup> XIAN FA art. 10 (1982) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html> (noting some land is owned by state “in accordance with the law”); see RANDOLPH & JIANBO, *supra* note 22, at 59 (detailing the system of Agricultural Collectives in China).

requisition for non agricultural public uses.<sup>91</sup> These Collectives are the modern day equivalent of communes prevalent in the 1960s throughout China.<sup>92</sup> The workers who farm the land are the owners of the Collectives.<sup>93</sup> Collectives can be formed for many different purposes, but the Agricultural Collectives are the most popular and the only entities that can own land.<sup>94</sup> The types of Agricultural Collective land can be classified in one of three ways: (1) land owned by Township Agricultural Collectives,<sup>95</sup> (2) land owned by village Agricultural Collectives,<sup>96</sup> and (3) land owned by an Agricultural Collective that does not consist of an entire village.<sup>97</sup> As a part of the pluralization process, and the fact that each locality operates separately and independently from the central government, these Agricultural Collectives became part of the private market economy.<sup>98</sup>

The primary objective of agricultural collectives is to cultivate

<sup>91</sup> XIAN FA art. 10 (1982) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html>; see RANDOLPH & JIANBO, *supra* note 22, at 59 n.1 (“[T]he State . . . can requisition land from Agricultural Collectives when [it] determines that . . . it needs the land for public non-agricultural purposes.”).

<sup>92</sup> See RANDOLPH & JIANBO, *supra* note 22, at 74 (“The concept of a Collective is a holdover from historical attempts at organization of the Chinese Society”); see also Huang, *supra* note 74, at 213 n.126 (characterizing the collective ownership of rural lands as “people’s commune[s]”).

<sup>93</sup> See RANDOLPH & JIANBO, *supra* note 22, at 74 (“Collectives are ‘owned’ by certain of their workers, but Collectives may have employees who are not owners.”); Huang, *supra* note 74, at 214 (stating “rural lands are collectively owned by members of a village and managed by the village committee”).

<sup>94</sup> See RANDOLPH & JIANBO, *supra* note 22, at 74-75, 81 (explaining how other collectives can be formed for industrial or public service purposes and while these collectives will not own the land they operate on, they can possess land use rights, and also discussing how Agricultural Collectives cannot change the use purpose of their arable land unless they get approval from the local people’s government at the county level).

<sup>95</sup> See RANDOLPH & JIANBO, *supra* note 22, at 76. Land owned in this manner is operated by the township (same as a town) government, or in some areas the land is operated and/or managed by township agricultural-industrial-commercial complexes, which were designed to manage business affairs to separate from government functions. *Id.* at 76 n.58.

<sup>96</sup> See *id.* at 76-78. Villages came to own the land and were operated and managed by village Agricultural Production Cooperatives or village committees. These entities were also created to separate the business affairs of the Collective from the functions of the government, in the case of the village committees, they were created by the residents, and the members of the committee are elected by the people. *Id.* at 77 nn. 59-60.

<sup>97</sup> See *id.* at 77. This land usually consists of subdivisions of larger villages. Sometimes it was difficult to account properly for separate teams that worked on a large village collective, so it was broken up for convenience. *Id.* at 77 n. 62.

<sup>98</sup> RANDOLPH & JIANBO, *supra* note 22, at 60 (detailing how “[t]he 1988 amendments to the Constitution, however, declared for the first time that the State allows the existence and development of a private economy within the limitation of the law.”); Huang, *supra* note 74, at 200-01 (discussing ambiguity that has arisen with regard to public and private sector property rights as a function of the pluralization process).

the land.<sup>99</sup> However, because agricultural reform led to surplus labor, many peasant workers had to find non-agricultural employment.<sup>100</sup> This mass of labor capital was utilized by collective industries operating in the light industrial and also heavy industrial, service, construction, and transportation sectors of the economy.<sup>101</sup> These entities have become known as Township and Village Enterprises.<sup>102</sup>

Township and Village Enterprises (“TVEs”) are an interesting way that China’s economy has developed. These entities developed for a variety of reasons.<sup>103</sup> Although TVEs are not privately owned, they operate entirely separate from the state sector, are collectively owned, and can be said to be an arm of local governments.<sup>104</sup> They are sometimes considered local governments exercising ownership rights and acting in an entrepreneurial manner.<sup>105</sup>

<sup>99</sup> See Alsen, *supra* note 2, at 33 (noting that Collectives own the land and often contract it out); see also Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT’L L. 153, 156 (2001) (describing rural land collectives as “agricultural collective organization[s]” whose purpose is to grow crops for profit).

<sup>100</sup> See Alsen, *supra* note 2, at 33 (“Since the agricultural reform has produced surplus labor, many peasants have been freed to pursue other occupations.”); see generally Lihu Chen & Yun Gu, *China’s Safeguard Measures Under the New WTO Framework*, 25 FORDHAM INT’L L. J. 1169, 1186 n.11 (2002) (noting that the purpose of collective enterprises was to “promote economic growth, absorb the surplus rural labor force, and discourage excessive urban migration” and that there was a surplus of over 92 million rural workers).

<sup>101</sup> Alsen, *supra* note 2, at 33 (“These rural industries, known as township and village enterprises (TVE) are active primarily in light industry but are also found in heavy industry as well as in the service, construction and transport sectors.”); see Chen & Gu, *supra* note 100, at 1186 n.11 (“Township enterprises cover manufacturing, construction, mining, transport and communications, commerce, service and other businesses.”).

<sup>102</sup> See Alsen, *supra* note 2, at 33 (noting that these rural collective industries are “known as township and village enterprises (TVE)”; Lan Cao I, *supra* note 81, at 103 (defining collective enterprises as township village enterprises (TVEs)).

<sup>103</sup> See Lan Cao I, *supra* note 75, at 136-37 (“TVEs came into being through a combination of factors: the success of agricultural reforms, the availability of surplus rural labor, savings from increased agricultural income, and increased consumer goods consumption due to the rise in income.”); Brett H. McDonnell, *Lessons From the Rise and (Possible) Fall of Chinese Township-Village Enterprises*, 45 WM. & MARY L. REV. 953, 965 (2004) (describing a combination of factors that gave strong incentives to develop TVEs: opening of product markets, success of agricultural reform, increased labor-savings, and greater efficiency in farming that left more people available for other work (surplus rural labor force)).

<sup>104</sup> See Lan Cao I, *supra* note 75, at 137 (stating that TVEs “are not privately owned enterprises in the traditional sense, they do operate outside the orbit of the state sector” but that they are often “intricately intertwined with local governments.”); see also Lan Cao II, *supra* note 80, at 31 (“Although TVEs are not private enterprises because they are deemed to be ‘collectively owned,’ they nonetheless operate in a market environment outside the state plan.”).

<sup>105</sup> See Lan Cao I, *supra* note 75, at 138 (“TVEs, in fact, appear to be decentralized

Regardless of how they are controlled, TVEs have an unprecedented track record of growth, perplexing many legal and economic writers.<sup>106</sup> They have been called "private firms in disguise."<sup>107</sup> They are highly competitive with one another because the markets they serve are not protected, as are some state enterprises.<sup>108</sup> They compete in both the domestic and international export markets.<sup>109</sup>

The interesting way that TVEs have developed, and the fact that they do not fit into any state, corporate, or any other form recognized by the government, leaves them in a very precarious position as far as legal ownership rights are concerned.<sup>110</sup> Almost no laws exist to protect TVEs.<sup>111</sup> Local governments can take their property right out from under them and, additionally, random fines and assessments are regularly imposed on them without warning.<sup>112</sup> The persons involved in these TVEs

local states acting in an entrepreneurial capacity."); Alsen, *supra* note 2, at 34 (noting that in many cases owners of TVEs are units of local government on different levels).

<sup>106</sup> See Lan Cao I, *supra* note 75, at 139 (discussing TVEs "uncontested record of economic growth" and that economists are trying to "make sense of this seemingly perplexing phenomenon"); Huang, *supra* note 75, at 196 (noting China's fast-growing township and village enterprises and the several theories scholars have on their economic growth); Lan Cao II, *supra* note 80, at 31 ("Among the emerging firms in the new, non-state sector, TVEs have demonstrated one of the most remarkable growth and output rates.").

<sup>107</sup> Lan Cao I, *supra* note 75, at 139 (discussing economists characterization of TVEs as "privately-owned firms in disguise."); see Alsen, *supra* note 2, at 34 ("In many provinces, the 'collective industry' is simply a cover for private companies, that, for different reasons, prefer to be labeled as TVEs.").

<sup>108</sup> See Alsen, *supra* note 2, at 34 (stating that TVEs compete with one another and unlike other enterprises, the local governments normally refuse to aid the TVEs); see also Lan Cao II, *supra* note 80, at 31 (noting that TVEs "operate in a market environment outside of the state plan, are not subsidized by the state, and are subjected to hard budget constraints").

<sup>109</sup> See Alsen, *supra* note 2, at 34 ("The TVEs compete with each other both in the domestic and the export market."); see also Lan Cao I, *supra* note 75, at 136 ("With the growth of TVEs, production of consumer goods for both the export and domestic market developed, and indeed prospered at an unprecedented rate.").

<sup>110</sup> See Alsen, *supra* note 2, at 34 (noting that "[t]he company forms available in China today do not fit the very special collective enterprises" and as a result, "millions of small rural companies do not fit into any company form found in Chinese law"); Lan Cao I, *supra* note 75, at 138 ("TVEs are neither private nor state enterprises and cannot easily fit into the traditional and binary classification of state planning or free market.").

<sup>111</sup> See Alsen, *supra* note 2, at 34 ("Since these types of enterprises have developed spontaneously, almost no laws exist to regulate TVEs."); Lan Cao I, *supra* note 75, at 139 ("TVEs simply do not fit within the established rules which a traditional property rights regime is supposed to entail.").

<sup>112</sup> See Alsen, *supra* note 2, at 34 ("The unsure status of TVEs have left them vulnerable to intervention from local bureaucrats. In some areas, local governments change the ownership of the TVE or simply take away property from the companies. Furthermore, random levies and fines are frequently imposed upon the companies."); see also Lan Cao I, *supra* note 75, at 139 ("Because TVEs are collectives, the local community

desperately need the protection of the property rights law in order to protect their interests.

### III. PROBLEMS IN THE PRC PROPERTY SYSTEM IN NEED OF RESOLUTION

China amended its constitution and land administration law in 1988 to allow the transfer of "land use rights" to private parties.<sup>113</sup> China also enacted regulations to allow the conveyance of long term land use rights in order for development by businesses, further, they enacted new land registration rules, and set forth a new law for the administration of urban real estate.<sup>114</sup> Although these rights could be transferred to private entities, the right of ownership remained in the state or a derivative of the state (an Agricultural Collective for example).<sup>115</sup> The State Land Administration promulgated rules to provide for a uniform system of registering interests in land.<sup>116</sup> The transfer of these rights has lead to many problems in the past due to, in part: the lack of enforcement of the laws in place, the ambiguity of the laws, problems in the land registration system, and the

government, not a private owner, exercise ownership rights.").

<sup>113</sup> See Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. COMP. & INT'L L. 7 at 16 (2002) [hereinafter Palomar II] ("In 1988, as part of the government's goal of establishing market transactions, China amended its Constitution."); see also Phan I, *supra* note 5, at 615-16 ("The National People's Congress ('NPC') amended the Constitution in 1988 to read: 'the right to use land may be transferred according to law.' Soon thereafter, it revised Article 2 of the Land Management Law ('LML') to read: 'the right to use State owned or collectively owned land may be assigned pursuant to the law.'").

<sup>114</sup> See Palomar II, *supra* note 113, at 16 ("China enacted regulations allowing the conveyance of long-term land use rights to businesses for the purpose of development."); *Commercial Leasing*, *supra* note 43, at 91 (1996) (noting the enactment of special legislation such as the Law on Urban Real Estate Administration and the Regulations on the Granting and Transfer of Land Use Rights on State Owned Land for Valuable Consideration in Cities and Towns).

<sup>115</sup> See Palomar II, *supra* note 113, at 16 ("Though the State may transfer 'land use rights' to private persons and entities, the right of ownership of the land remains vested in either the State or an Agricultural Collective."); see also Harry Williams, *Property Rights and Legal Reform in Township and Village Enterprises in China*, 2 ASIAN-PAC. L. & POLY J. 8, 246 (2001) (explaining how under the Regulations, the township or village ran the enterprise and ownership rights "did not change when the enterprise entered into agreements such as a managerial contract responsibility system, leasing, or joint operations with enterprises of other types of ownership").

<sup>116</sup> See Palomar II, *supra* note 113, at 19 ("[T]he State Land Administration promulgated rules to provide for a uniform system of registering interests in land."); *Commercial Leasing*, *supra* note 43, at 93 (noting that the State Land Administration established a registry system).

political corruption so prevalent in China.<sup>117</sup>

*A. Problems with the Land Registry and Conveyance of Land Use Rights*

The registry of rights is used in many countries to establish conclusively the rights to each piece of land, as opposed to the American system of recording which serves merely to give notice. A right is not recognized until it is entered in the registry, even if legitimate.<sup>118</sup> The maintenance of such a registry can be very expensive and more than a local government can bear. This in turn can cause many more problems in local governments in China. Although it is a long way from being able to rely on its accuracy, China has adopted this system of land registry.

The registration of ownership interests is not a right but a duty in China, and failure to do so can lead to a hefty fine.<sup>119</sup> It acts as more than just a notice system; it is actually the formal creation of the interest in the property.<sup>120</sup> The registration takes preference over any contractual obligations.<sup>121</sup> Therefore, if a seller contracts with buyer 1 to sell a parcel and then sells the same parcel to buyer 2 who registers first, buyer 2 will be the proper owner (this is true for real property—movable property may be transferred by the delivery of such item).<sup>122</sup> This is

<sup>117</sup> See Palomar II, *supra* note 113, at 18-19 (discussing the problems and risks that have arisen in China's current real estate laws and title registration system, and noting that they are due in part to a lack of enforcement of current law and the ambiguity of the laws).

<sup>118</sup> See Palomar II, *supra* note 113, at 56 ("With a few exceptions, rights not reflected in the register are not to be recognized, even if legitimate."); see also *Commercial Leasing*, *supra* note 43, at 93 (noting that registration in China is more than a notice system; it is the formal creation of the interest).

<sup>119</sup> See RANDOLPH & JIANBO, *supra* note 22, at 159 ("Registration of ownership is not a right or a privilege in China; it is a duty. Failure to register ownership of a land use right or building can result in a fine."); see also *Commercial Leasing*, *supra* note 43, at 93 (stating that registration in China as more than notice system but the formal creation of the interest).

<sup>120</sup> See RANDOLPH & JIANBO, *supra* note 22, at 159. Section 3 of the 1998 Implementing Regulations of the Land Administration Law states, "[l]egally registered land ownership and land use [r]ights [sic] shall be protected by law and free from infringement." *Id.* at 159 n.2. Although he is talking about security interests, Todd Benson describes how failure to register can invalidate an entire transaction. Todd Benson, *Taking Security in China: Approaching U.S. Practices?*, 21 YALE J. INT'L L. 183, 199 (1996).

<sup>121</sup> See RANDOLPH & JIANBO, *supra* note 22, at 159-60 (stating that "the registration requirement is absolute" and explaining how it can even supersede contractual obligations).

<sup>122</sup> See *id.* Article 72 of the General Principles of Civil Law states that "the ownership

similar to the “first in time, first in right” concept in American law.<sup>123</sup> Such a system would work, if it were accurate. There was debate prior to the enactment of the 1994 Administration Act as to whether the state should provide additional protection to property interests obtained by entities besides only upholding the registration, however this was not incorporated into the Act.<sup>124</sup>

As it currently stands the registration system in the PRC requires that four main types of ownership interests be registered: “Agricultural Collective land ownership, land use rights on State-owned land,” land use rights on “Agricultural Collective-owned land, and building ownership.”<sup>125</sup> Other interests in property that must be registered are “mortgages, leaseholds on land use rights, presale contracts, and various others.”<sup>126</sup>

In the PRC at the moment up to seven different registries exist.<sup>127</sup> One of the main problems relates to the existence of separate registries for buildings and the land under and around the same building.<sup>128</sup> The requirement for two separate

of property obtained by contract or by other lawful means shall be transferred simultaneously with the property itself.” *Id.* at 160 n.4. But for the transfer of real estate interests, delivery is not enough. The parties must go through the registration process. *Id.*

<sup>123</sup> See *Sauget v. Villagomez*, 228 F.2d 374, 376 (9th Cir. 1955) (affirming lower court’s determination that appellee was “first in time and first in right” and therefore could not be ejected by appellant); *Bailey Mortgage Co. v. Gobble-Fite Lumber Co.*, 565 So. 2d 138, 143 (Ala. 1990) (stating “Alabama is a ‘title theory’ state, meaning that [they] adopt the general rule represented by the maxim ‘prior in tempore, potior in jure’ (first in time, superior in right)” and further explaining that “[t]he order of priority between persons claiming an interest in the same property . . . is fixed by the order in which they are filed for record.”).

<sup>124</sup> See *RANDOLPH & JIANBO*, *supra* note 22, at 160 (providing both sides of the debate and pointing out that it was never resolved because 1994 Administration Act is silent on this issue).

<sup>125</sup> *Id.* at 161 (explaining the current real estate registration system).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *Palomar I*, *supra* note 67, at 1039-40 (2004).

“[L]egal scholars identified conflicts within the property rights institution itself involving China’s dual land registry system—one system and location for land use rights registration and a separate system and location for building ownership and lease registration. A title risk exists if an owner registers ownership of a building, but fails to register simultaneously an ownership interest in the land use right to the land under and around the building. Legal scholars recommended that for efficiency, consistency, and accuracy in both registration of transfers and examination of title, these systems should be consolidated. The 1994 Law on Urban Real Estate Administration authorized provincial governments to consolidate the registration systems within their own jurisdictions. As a result, regulations were passed in Shanghai and Shenzhen to provide for one government agency, the Municipal Building and Land Bureau, to issue a uniform certificate for both interests. In 2003, Chinese legal scholars began drafting a set of registration

registries, one for buildings, and the other for the land under the buildings, came about as a result of the 1994 Law on Urban Real Estate Administration (Chapter 5).<sup>129</sup> While local governments are required to issue certificates for both buildings and the land underneath as well, only some localities, mostly large cities, have begun to do so.<sup>130</sup> Most smaller local governments have not begun to do so.

In order to register an interest in property certain steps must be complied with for all interests, with minor caveats depending on the type of interest being registered. Whenever an interest in property is affected, whether through creation, alteration or destruction, the owner of the interest must apply within a time period of 30 days from the incident.<sup>131</sup> The registry office checks the application, issues a receipt, then will examine the application in detail.<sup>132</sup> If all is in order the registry office will then issue a certificate of land use right or building ownership.<sup>133</sup>

The registries in urban areas can generally be relied upon, however the registries outside of these areas remain suspect due to "concerns about the accuracy, the completeness, or even the existence of registries outside of the larger city areas."<sup>134</sup> Access to registries should be allowed free to the public at all locations, but it remains to be seen whether this will be the case. It is not reasonable for an investor to purchase an interest in property from a seller when they cannot be certain the seller is actually the individual recorded in the registry. Additionally, the high fee for access to registry records has inhibited the use of the registry in some locales.<sup>135</sup> The risks inherent in planning, financing, and

regulations for Beijing that would accomplish the same. Legal scholars have recommended that further consolidation of the two registry systems throughout the country can reduce inconsistencies, confusion, time and expense in both registration and examination of rights to land and buildings."

*Id.* See also Benson, *supra* note 120, at 199 n.93 (1996) (citing David Dall Liu & Mark Reed, Taking and Enforcing Security in the People's Republic of China 5 (Jan. 1, 1994) (unpublished manuscript, on file with author)) (discussing how buildings and fixtures are normally mortgaged together with underlying land use rights, but each must be registered with different authorities).

<sup>129</sup> See RANDOLPH & JIANBO, *supra* note 22, at 163.

<sup>130</sup> See *id.* at 163 (explaining how Shanghai and Shenzhen now issue uniform certificates for both interests).

<sup>131</sup> See *id.* at 164.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* at 164-65.

<sup>134</sup> See *id.* at 165.

<sup>135</sup> See Palomar I, *supra* note 66, at 1038 (explaining how the fees charged coupled



developing new locations can just be too high in consideration of the fact that the developer cannot find the parcel in the registry.<sup>136</sup>

*B. Government Seizure of Land, Political Corruption and Treatment of the Poor*

The argument has been made that one of the major stimulants in China's furious rate of economic growth has been the rigid dichotomy between the secure property rights granted to investors and the paltry protections for individual's land property rights.<sup>137</sup> As local governments operate as separate fiscal entities, they compete with one another to offer protection to investors looking to acquire property for development.<sup>138</sup> In this respect these local governments have an incentive to take private individuals' land and give it to large investors or corporations. This has led to major social unrest due to the lack of protections for Chinese citizens.<sup>139</sup> It is imperative that the Chinese government weigh the benefit of giving land to investors against the detriment of taking the homes of its citizen work force. China has not been evenhanded in using its power to seize property for "public use."<sup>140</sup> It has also been complacent about the corruption prevalent in the government when it comes to getting major investment deals done.<sup>141</sup> This may pose a serious

with the risk involved has slowed use of registry).

<sup>136</sup> *Id.* In addition to the new property rights law, "[t]o reduce that risk, China's Ministry of Land and Resources adopted a new law, effective March 2003, declaring that registries must be open for public inquiry. Chapter Two of the new Property Code proposed by Chinese legal scholars would mandate further that registries must be open for inspection, registration fees must be 'moderate,' and all matters must be registered in a timely manner." *Id.* at 1038-39.

<sup>137</sup> See XIAOBO ZHANG, ASYMMETRIC PROPERTY RIGHTS IN CHINA'S ECONOMIC GROWTH 1 (2006), [http://aeaweb.org/annual\\_mtg\\_papers/2006/0108\\_1300\\_0204.pdf](http://aeaweb.org/annual_mtg_papers/2006/0108_1300_0204.pdf).

<sup>138</sup> See *id.* ("[I]n the presence of mobile foreign direct investments and under the arrangement of fiscal decentralization, local governments compete vigorously to offer various protections on the property rights of investors").

<sup>139</sup> Li Shuguang, a dean at the China University of Politics and Law, stated that the rise in social instability indicated that the dominant issue for common people was no longer "poverty of material resources" but "poverty of rights and power." See Kahn, *supra* note 3, at A14. He implies that the leaders should address those concerns with political rather than economic measures. *Id.*

<sup>140</sup> See Maureen Fan, *China Looks to Protect Private Property*, WASH. POST, Mar. 9, 2007, at A16. Liu Xiaobo, a leading political activist, states "since land is in the hand of the government, a developer can bribe an official and make the official claim that the land is seized for public use." *Id.* Local Chinese governments have also engaged in relocation and demolition under the guise of "public project." Liu, *supra* note 2, at 8.

<sup>141</sup> See Joseph Kahn, *Chinese Corruption Inquiry Expands to Beijing Party Leaders*,

threat to China's long term growth prospects.

The first transfers of land use rights in China occurred in the Shenzhen Special Economic Zone.<sup>142</sup> This proved to be hugely successful. After the government saw the potential positive effect this could have on the nation the Congress passed legislation allowing "economic and technological zones" (ETDZs) to be created, these were a mechanism through which the government could have more flexibility in the granting of land use rights.<sup>143</sup> The number of these ETDZ zones exploded all over the map of the PRC at an alarming rate, most notably near the coast.<sup>144</sup> These ETDZs provided such an influx of capital, and local politicians were so eager to get the new investment, that numerous local governments even created some ETDZs without prior authorization.<sup>145</sup>

Land management in the PRC has become decentralized as a result of local governments operating, in essence, independently from the central government.<sup>146</sup> This decentralization of land use control led to the State sector's need for private investment to fill the economic gap left behind.<sup>147</sup> This has led to a breeding ground of competition between localities in the PRC, each

N.Y. TIMES, Oct. 26, 2006 (reporting on a wide anti-corruption inquiry targeting Beijing's party leaders and examining corrupt property deals and procurement practices); see also Liu, *supra* note 2, at 14 (stating bribes from land sale deals account for a major source of corruption, which is a widespread problem in China).

<sup>142</sup> See Alsen, *supra* note 2, at 2 (pointing out that the new Special Economic Zone was a system where rental of state land was first attempted); see also Phan I, *supra* note 5, at 616 (stating that the first land transfers had taken place in 1987 in the Shenzhen Special Economic Zone).

<sup>143</sup> See Phan I, *supra* note 5, at 616 (citing Mark T. Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and its Role in Development*, 7 PAC. RIM L. & POL'Y J. 611, 638 (1998)) (stating that the greater flexibility includes: the duration of grant terms, the streamlined procedures and conditions necessary for assignment of property interests, and also in some areas reduced grant fees).

<sup>144</sup> See *id.* (stating that ETDZs proliferated in the coastal provinces).

<sup>145</sup> See *id.* (stating that local government chose to forgo authorization in setting up ETDZs in order to attract foreign investors); see also ChinaDaily.com, *3,763 Economic Development Zones Canceled*, CHINA DAILY, Apr. 10, 2004 (reporting that China has quashed 3,763 economic zones in 2003 alone).

<sup>146</sup> See *id.* (citing Tingwei Zhang, *Decentralization, Localization, and the Emergence of Quasi-Participatory Decision-Making Structure in Urban Development in Shanghai*, 7 INT'L PLAN. STUD. 303, 305 (2002)) (stating effect of this was to "modernize" by decentralizing land management).

<sup>147</sup> See *id.* (stating that the public sector found it necessary to turn to non-public sectors in order to secure economic development); see also Howard W. French, *New Boomtowns Change Path of China's Growth*, N.Y. TIMES, July 28, 2004, at A1 (pointing out that provinces raise money for their own projects by selling rights to develop real estate).

competing with the other to attract private investment.<sup>148</sup> Whether a local government official is doing his job correctly or not is determined by the increase in the economic numbers of their locality.<sup>149</sup> Local government leaders are driven to attract investment to their own areas to grow the economic clout of their locality, which in turn leads to greater prestige and political power for themselves.<sup>150</sup>

As the current power structure exists with local leaders thirsting for investment, residential communities have had to bear the negative aspects of rapid economic growth: huge displacements of residential communities has become commonplace with an even larger number planned to be displaced in the future.<sup>151</sup> Paradoxically, the local planning officials state that the displacement of these residential communities is for the greater good, in that it will lead to an overall increase in the citizens of the PRC's quality of life.<sup>152</sup> Many PRC residents and scholars have seen through this façade and accused the government of ordering the land takings for the sole motive of profit.<sup>153</sup>

Indeed, many local governments have negotiated with real

<sup>148</sup> See Phan I, *supra* note 5, at 617 (stating that the cities and individual districts engage in fierce competition over investment); see also French, *supra* note 147, at A1 (pointing out that cities are locked in competition over ambitious decentralized development plans).

<sup>149</sup> See Liu, *supra* note 2, at 8 (stating that local officials have put their emphasis on generating economic growth in order to get reappointed or promoted); see also Phan I, *supra* note 5, at 618 (pointing out that local officials are judged by economic measures).

<sup>150</sup> See Liu, *supra* note 2, at 8 (stating that the appointments of local officials to key posts is decided by how well the local official implements orders from the top, which results in local officials placing sole emphasis on economic growth); see also Phan I, *supra* note 5, at 618 (pointing out that local officials have incentive to develop because of the increase of political influence that comes with the increase of economic power).

<sup>151</sup> See Phan I, *supra* note 5, at 618 (stating that Beijing has acknowledged that since 1991, 400,000 households have been relocated and officials expect to relocate another 6000 in anticipation of the construction of Olympics venues designed to hold the 2008 games); see also *Shanghai Residents Make Room for World Expo*, CHINA DAILY, Nov. 9, 2004, available at <http://www.china.org.cn/english/2004/Nov/111609.htm> (last visited Apr. 6, 2007) (reporting that Shanghai plans to move estimated 50,000 people in the largest relocation project in Shanghai history to make room for development).

<sup>152</sup> See Ma Lie, *Xi'an Plans to Better Protect Ancient Walled Centre*, CHINA DAILY, Nov. 3, 2004, available at [http://english.people.com.cn/200411/03/eng20041103\\_162597.html](http://english.people.com.cn/200411/03/eng20041103_162597.html) (last visited April 6, 2007) (reporting that Chinese official Lin Lize stated future development aims to make the city into international modern metropolis while protecting the ancient district); see also Phan I, *supra* note 5, at 618 (stating that local officials emphasize that living conditions will be greatly improved).

<sup>153</sup> See Phan I, *supra* note 5, at 618 (citing *China to Evict 170,000 Residents from Ancient City of Xian*, Agence France-Presse (Beijing), Nov. 3, 2004) (stating that residents accused government officials to profit from the sale of land).

estate developers and granted these developers “sweetheart” deals, which can be viewed as loose partnerships.<sup>154</sup> Because the local governments have the same incentives to take the residents’ land as the developers do, when a collective or individual will not deal with a real estate developer directly, the developer will employ the local government to take the land for a “public purpose.”<sup>155</sup> Officials exploit the lax nature of the property law allowing a taking for public purpose without even considering what the purpose is.<sup>156</sup> The existing law lets them define both what a public purpose is and also the amount of compensation necessary to perform the taking.<sup>157</sup> Therefore local governments have their interests aligned not with the residents of the community that they exist to serve, but rather with the profit hungry non-state sector.<sup>158</sup>

The government’s acquiescence, even promotion of developers’ goals, has led to many accounts of laws and regulations falling to the wayside. Developers “overturn zoning and building codes with skillful arguments and, quite often bribes, turning inner-city redevelopment into a process of ‘speculation, private deals

<sup>154</sup> See Fan, *supra* note 141, at A16 (pointing out that provinces sell rights to develop real estate); see also Phan I, *supra* note 5, at 619 (stating that the pairing of local government with business interest groups creates coalitions that are threats to residents).

<sup>155</sup> See Fan, *supra* note 141, at A16 (reporting a developer can bribe an official and make the official claim that the land is seized for public use); see also Phan I, *supra* note 5, at 619 (stating that developers can always rely on government to achieve their aims).

<sup>156</sup> See Wilhelm, *supra* note 13, at 227 (stating that local governments have virtually unlimited discretion to approve redevelopment projects and delegate eminent domain-like powers to redevelopers); see also French, *supra* note 147, at A1 (reporting that the unchecked development means there is little ability to actually consider needs, to prevent duplication, or to prevent waste).

<sup>157</sup> See Liu, *supra* note 2, at 2 (pointing out that “public purpose” takings have been widely misused and commercial developers have been reluctant to provide residents with compensation and relocation arrangements); see also Wilhelm *supra* note 13, at 229 (stating that the redevelopment does not need to satisfy any administrative or judicial test for “public interest” in order for the government to exercise this eminent domain power).

<sup>158</sup> See Liu, *supra* note 2, at 25 (noting that “Chinese scholars pointed out that ‘the government has inappropriately become both a player and referee at the same time’”) (quoting Zhang Hui, *Chaiqian Biancheng Raomin Gongcheng, Zhengfu Ying Zhuanxin Danghao “Caipan Yuan” [Demolition Infringed Upon Private Property Rights; Government Should Offer Protection]*, Beijing Wan Bao [Beijing Evening News], Apr. 2, 2004, available at [http://www.news.xinhuanet.com/newscenter/2004-04/02/content\\_1398552.htm](http://www.news.xinhuanet.com/newscenter/2004-04/02/content_1398552.htm)); see also Wilhelm, *supra* note 13, at 234 (“Local governments package, price, and sell LURs [land use rights] to benefit their own coffers, offering discounts to attract investors to their cities. They have a direct financial interest in encouraging urban redevelopment. At the same time, they are charged with protecting evictees during urban redevelopment by ensuring that evictees are compensated and not subjected to illegal harassment. Predictably, local governments have often shown more concern for developers than for evictees.”).

and corruption.”<sup>159</sup> Critics have stated that the most valuable business asset that can be had in China is *guanxi*, or “special friends” in the government.<sup>160</sup> The reality could be that the permeating corruption has just become the norm of doing business in China, or it could be that the norm of doing business in modern day China just appears as a maze of corruption to us outsiders.<sup>161</sup>

The due process requirement implicit in a taking performed by the government in the U.S. does not exist in the PRC, residents can receive notice mere days before their property is to be taken.<sup>162</sup> Additionally as there is no judicial review in the PRC, a collective or individual farmer who objects to a taking cannot obtain an injunction.<sup>163</sup> It is possible, however, to litigate the issue of the amount of compensation due to the collective or individual whose land was taken.<sup>164</sup> This serves as little relief, considering that the courts are subsidiary to and actually agents

<sup>159</sup> Phan I, *supra* note 5, at 622 (quoting Yan Zhang & Ke Fang, *Is History Repeating Itself? From Urban Renewal in the United States to Inner-City Redevelopment in China*, 23 J. PLANNING EDUC. & RESEARCH 286, 291 (2004)).

<sup>160</sup> See PATRICK A. RANDOLPH JR., THOUGHTS ON CHINESE REAL ESTATE LAW: INTEGRATING PRIVATE PROPERTY INTO A SOCIALIST GOVERNMENTAL STRUCTURE, AALS PROP. & ENVTL. L. CONF. 130 (2004), <http://aalsweb.aals.org/midyear2004/randolph.pdf>; see also Henry J. Graham, *Foreign Investment Laws of China and the United States: A Comparative Study*, 5 J. TRANSNAT'L L. & POL'Y 253, 254 (1996) (stating personal connections, called *guanxi*, are paramount and critical to business success).

<sup>161</sup> See RANDOLPH, *supra* note 160, at 131 (suggesting “the perception [to be] a problem for a people wishing to invite strangers to invest with them in their nation’s economic future”); see also Graham, *supra* note 160, at 269 (according to investment banker Marc Faber, local governments have increasing power to allocate resources forcing the small entrepreneur to buy off the local government leaders in order to set up a business and to resolve this issue, either the central government has to step in to control corruption or it must allow private companies to grow larger in order to be in a stronger position to deal with local government).

<sup>162</sup> See Sara Meg Davis & Lin Hai, *Demolished: Forced Evictions and the Tenants’ Rights Movement in China*, 16 HUM. RTS. WATCH NO. 4 (C), 12-13 (2004); see also Phan I, *supra* note 5, at 631 (stating that in urban areas local governments have to notify residents of the existence of eviction plan, while in rural areas somewhat greater protection exists and certain regulations exist that allow collectives and single farmers to object to the government takings, or the amount of the compensation and request a hearing within 10 days; however, this is merely seen as window dressing).

<sup>163</sup> See Phan I, *supra* note 5, at 639 (finding “the ability to seize and demolish the property [to] not become a point of contention . . . because demolition may proceed even before lawsuits have been decided”); see also Zhonghua Renmin Gongheguo Tudi Guanlifa Shishi Tiaoli [PRC Implementing Regulations] (issued by the State Council on Dec. 24, 1998, effective Jan. 1, 1999, superceding Jan. 4, 1991, version) art. 16, (Apr. 4, 2007), available at <http://www.law110.com/law/guowuyuan/2011.htm>. [hereinafter PRC Implementing Regulations].

<sup>164</sup> See Phan I, *supra* note 5, at 639 (“Actual control over the property is effectively conceded to the government, and the ‘fight’ by default focuses heavily on determination of the compensation terms, ex post facto.”); PRC Implementing Regulations, *supra* note 163.

of the government that is taking the land in the first place.<sup>165</sup>

The interesting phenomenon with all this displacement is that it feeds a vicious cycle of poverty.<sup>166</sup> With the red hot real estate market and the rising prices of housing in China, the poor who have their property taken are inadequately compensated and therefore cannot afford to live in the areas they once did. They are forced to move farther and farther away from urban areas, because only the rich, politically elite and the new budding Chinese middle class can afford to live in the large expensive cities.<sup>167</sup> China is, in essence, subsidizing the rich at the expense of the poor.<sup>168</sup>

The present state of affairs in China shows that the relocation of the poor is not a temporary phase the nation is going through, nor is it now that uncommon, and has in fact become the norm in many areas of China.<sup>169</sup> Understandably, many displaced

<sup>165</sup> See Hung, *supra* note 20, at 77 (2004) (stating that local governments have control over the courts' "personnel and financial arrangements"); see also Wilhelm, *supra* note 13, at 234-35 ("Inability of the court system to offer solutions to evictees, both because the law gives them few grounds for action and because the courts lack independence from local governments. Most evictees turn to political and popular channels of protest, including petitioning government offices, staging protests, and complaining to the media.").

<sup>166</sup> See Junhua Lu, *Beijing's Old and Dilapidated Housing Renewal*, 14 CITIES 59, 68 (Daniel B. Abramson trans., 1996) (noting developers to have moved urban residents into suburban areas with compensation, rather than allowing them to live in their original inner-city neighborhoods by offering them subsidized pricing); see also Phan I, *supra* note 5, at 641 (specifying the "sole means through which the economically and politically disadvantaged can carve out a space for themselves" to be "the refusal to sell" their property).

<sup>167</sup> Phan I, *supra* note 5, at 641 (citing Junhua Lu, *Beijing's Old and Dilapidated Housing Renewal*, 14 CITIES 59, 68 (Daniel B. Abramson trans., 1996) (discussing how development companies have preferred to compensate urban residents and resettle them into suburban areas, rather than rehouse them at subsidized prices in their original inner-city neighborhoods).

<sup>168</sup> Phan I, *supra* note 5, at 641 (discussing how the Chinese government in effect subsidizes the rich at a price that does not factor in the social costs borne by the poor); see Joseph Kahn, *Pace and Scope of Protest in China Accelerated in '05*, N.Y. TIMES, Jan. 20, 2006, at A10 ("Peasants, migrant workers and former employees of bankrupt state-run factories in the cities—collectively the overwhelming majority of China's 1.3 billion people—tended to benefit far less from the prosperity than the budding urban middle class and the party elite.").

<sup>169</sup> See Wilhelm, *supra* note 13, at 230 ("The present *chai qian* conflicts are not merely temporary growing pains or a byproduct of the phasing out of the Maoist state-supplied housing system, but are becoming a prevalent aspect of China's real estate market."); see e.g., *Desperate Measures: China's Forced Relocations*, ECONOMIST 45, Oct. 11, 2003 (stating Shanghai plans to move an additional 400,000 households between 2004 and 2007); *Hundreds in Anti-Olympic Protest*, HERALD-SUN, Feb. 25, 2004 (stating Beijing Mayor Wang Qishan said 1.5 million people were relocated in the capital from 1991 to 2003); *Old District Rebuilding in Shanghai Benefits 2.5M Households*, BUS. DAILY UPDATE, Aug. 11, 2003 (stating that although no nationwide statistics have been made public Shanghai has reported relocating 2.5 million people from 850,000 households between 1990 and 2003).

Chinese residents are upset, not simply because their land was taken, nor because of the inadequate compensation, but because of the shameful process that the government uses to justify the taking. The process of *chai qian* or "demolition and relocation" was the leading cause of public dissatisfaction with the government in urban areas within the last couple of years.<sup>170</sup> Indeed, there has been a steady increase in the amount of instances of displaced citizens protesting and even in two extreme cases citizens lit themselves on fire in protest after the demolition of their homes by the government without adequate compensation.<sup>171</sup>

One illustration of unrest caused when peasant land is appropriated is when 100,000 residents were displaced in order to construct the Pubugou Dam in Hanyuan County, Sichuan Province.<sup>172</sup> Over 60,000 of these peasants protested by physically blocking dump trucks as they attempted to begin construction on the dam.<sup>173</sup> The next day thousands of students boycotted school and marched on the County government building.<sup>174</sup> The protests turned violent and bloodshed ensued.<sup>175</sup>

<sup>170</sup> See Wilhelm, *supra* note 13, at 229 (stating *chai qian* has emerged as the leading cause of public dissatisfaction with government in Chinese cities in 2003); see also Li Fuyong, *Dong Qian Fubai Yinfa Guan Zhu [Relocation and Demolition Corruption Attracts Attention]*, CHINA COM. TIMES, Sept. 19, 2003, available at <http://www.realestate.gov.cn/news.asp?recordno=25075&teamno=3&line=111> (stating *chai qian* complaints were No. 1 topic of petitions lodged in 2003 with State Letters and Visits Bureau, a non-judicial channel for airing grievances against government officials at all levels and in all departments of government and a total of 17,000 *chai qian* appeals were made to the office in the first eight months of 2003).

<sup>171</sup> See Liu, *supra* note 2, at 1. On Sept. 15, 2003, a man named Zhu Qingliang poured gasoline on himself and lit himself on fire in the middle of Tiananmen Square after his local government seized and destroyed his home. *Id.* Another man made a similar self emolition protest in Nanjing three weeks earlier after the government had forcefully evicted him and his family. *Id.*

<sup>172</sup> See Shi Jiangtao, *Peasants in Upstream Fight to Halt Dam Protests by Thousands of Farmers against the Damming of Dadu River are Not Expected to Turn the Tide*, S. CHINA MORNING POST, Jan. 4, 2005, at 10 ("Plans for the 186-metre high Pubugou dam . . . would see 68,000 sq km of land flooded in Hanyuan and two other neighboring countries, with up to 100,000 people displaced.")

<sup>173</sup> See Gady A. Epstein, *Proud of Protest, Silent on Politics Dissent: Farmer's Success Against a Dam Project Shows the Communist Party's Difficulty Keeping the Lid on*, BALTIMORE SUN, Feb. 13, 2005, at 1A ("The farmers were already resentful at how authorities had kept them in the dark about the dam's progress, angry that corrupt officials had siphoned off money for their relocation and distressed by the prospect of resettlement into poverty.")

<sup>174</sup> See Epstein, *supra* note 174, at 1A (describing how more than 1,000 middle school pupils marched on the Hanyuan County government building).

<sup>175</sup> See *id.* (describing how at one point a crowd was repelled with tear gas and at the dam site paramilitary police beat two septuagenarian protesters with batons and the crowd became furious and attacked the police).

The Communist Party officials sent in 6000 soldiers from the People's Armed Police to quell the uprising.<sup>176</sup> If that wasn't bad enough, the government even mandated a nationwide media blackout to make sure that the rest of its citizens never heard of the event.<sup>177</sup>

Another incident in Dongzhou erupted because of the construction of a new power plant.<sup>178</sup> Farmer's lands were seized and fisherman believed the new plant would pollute the water.<sup>179</sup> Four days after the incident, the official New China News Agency released the first Chinese account in a report stating that over 300 armed peasants "assaulted the police."<sup>180</sup> It also stated that the "police were forced to open fire in alarm."<sup>181</sup> That report was at odds with the stories told by villagers, who insisted that twenty or more people had been killed by automatic weapon fire and that at least forty were still missing.<sup>182</sup> The government barred reports in newspapers, banned place names and other relevant keywords from search engines such as Google.<sup>183</sup> As any

<sup>176</sup> See *Survey – India and China: Two Concepts of Liberty?*, ECONOMIST, Mar. 27, 2005, at S1 ("In China, goes the argument, the government or party no sooner issues an order than it is done. A mind-boggling scheme to dam the Yangzi river and generate electricity at the Three Gorges, involving the forcible resettlement of 1.3m people, the destruction of priceless cultural relics and the risk of silting, flooding and the nightmare of an earthquake? No problem.")

<sup>177</sup> See Jiangtao, *supra* note 172, at 10. Due to the sensitive nature of the incident, no official media covered the protests because mainland authorities feared the threat of instability. *Id.* See also Epstein, *supra* note 174, at 1A (stating that no mainland Chinese media outlets were allowed to report the story).

<sup>178</sup> See Howard W. French, *Beijing Casts Net of Silence Over Protest*, N.Y. TIMES, Dec. 14, 2005, at A3 (describing how the police violently suppressed a demonstration against the construction of power plant); see also Richard McGregor, *China Police Kill Village Protesters*, FIN. TIMES, Dec. 12, 2005, at 7 (explaining how protestors were demanding higher compensation for the loss of land that was to make way for the power plant).

<sup>179</sup> See Minnie Chan, *Villagers Reportedly Shot Dead During Land Dispute; Protestors Angry Over What They Claim is Unfair Compensation*, S. CHINA MORNING POST, Dec. 8, 2005, at 5. The villagers claimed that if construction went ahead, they would lose access to Baisha Lake, which they relied on for fish and power generation. *Id.* See also Jonathan Watts, *Chinese Militia Open Fire on Demonstrators Opposing Coal Plant*, GUARDIAN, Dec. 9, 2005, at 17. Villagers believed that the power plant would result in the deterioration of air and water quality. *Id.*

<sup>180</sup> French, *supra* note 178, at A3.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* (stating that the article itself said that only three villagers were killed and eight injured and even this was only stated two-thirds of the way into the article); see Mark Magnier, *China Detains Police Official*, L.A. TIMES, Dec. 12, 2005, at A3 ("Villagers reached by phone have said that 10 to 20 farmers were killed and several dozen were injured or missing.")

<sup>183</sup> See Chan, *supra* note 189, at 5 (mentioning an interview with one villager who stated that local officials had patrolled the village roads to stop reporters from visiting); see also French, *supra* note 180, at A3 ("Users who continued to search found their browsers freezing. By Tuesday, links to foreign news sources appeared but were



protest that happens in China, the full story will never be fully known. In fact, most Chinese do not even know that these protests even happened.<sup>184</sup>

China's constitution was amended in 2004 to encompass a similar theory of the Fifth Amendment of the US Constitution: that the state may take land "in the public interest" (*weile gonggong liyi*).<sup>185</sup> While the theory is similar, the application of it in China is light years from the American model of government eminent domain takings.<sup>186</sup> Unlike how the United States Constitution decrees that "just compensation" be paid to the takee, as measured by market value, the Chinese constitution does not define the level of compensation to be given.<sup>187</sup> This has led to many disputes and litigation over the level of compensation that should be paid.<sup>188</sup> The government does not use a market rate for compensation, but rather has appraisers, whose interests are further entwined with the developers and the government, deem the appropriate compensation amount.<sup>189</sup> In looking at the compensation amounts, in light of the fact that individuals do not own the actual land, but merely the right to use the land, the level of payout is usually pretty small.<sup>190</sup> The

invariably inoperative.").

<sup>184</sup> See Epstein, *supra* note 173, at 1A (stating that even the details as to how many people protested and how many were injured and killed might never be known); see also French, *supra* note 179, at A3 (stating that one week after the incident, an overwhelming majority of the Chinese public still know nothing of the event).

<sup>185</sup> See Liu, *supra* note 2, at 6-7 ("In 2004, a new clause was imbedded in Article 13 of China's Constitution. According to this new clause, private property may be expropriated or taken by the state, but the taking has to be for public use and with compensation."); see also Phan I, *supra* note 5, at 613 (stating that this provision was amended in 2004 to provide for compensation in the event of a taking).

<sup>186</sup> See Phan I, *supra* note 5, at 644 (arguing that the American model of takings is inapplicable to China in that the government structure of China does not utilize the system of checks and balances that the American government has subscribed to).

<sup>187</sup> See Liu, *supra* note 2, at 6-7 (describing how "[i]n 2004, a new clause was imbedded in Article 13 of China's Constitution. According to this new clause, private property may be expropriated or taken by the state, but the taking has to be for public use and with compensation."); see also Phan I, *supra* note 5, at 639 (comparing the Fifth Amendment to China's constitutional equivalent).

<sup>188</sup> See Liu, *supra* note 2, at 20 (explaining that "[t]he Demolition Bureau is the only entity that may arbitrate disputes between residents and developers with regard to compensation and resettlement."); see also Phan I, *supra* note 5, at 639 ("Absent benchmarks, litigation over compensation terms has become a chaotic endeavor.").

<sup>189</sup> See Liu, *supra* note 2, at 17 (stating these appraisers are anything but independent and certainly do not want to bite the hand that feeds them); see also Wilhelm, *supra* note 13, at 232 (stating that using market value is the only way to ensure application of an objective standard because that way, self-interested local governments would not have the power to set compensation levels).

<sup>190</sup> See Liu, *supra* note 2, at 26 ("However, when these buildings are demolished, the

other factor here is that in a socialist state, everything exists to benefit the nation as a whole, and therefore this renders the “public interest” test in China moot.<sup>191</sup> Arguably every potential investment in the country is in the “public interest.”

To summarize the prevailing sentiment in China at the moment: “The common people are furious.”<sup>192</sup> The scale of unrest in China at the moment is unbelievable for any country in peacetime.<sup>193</sup> In China right now and since the Communist takeover in 1949, the rule of the Communist party and the ideals that it embraces is paramount.<sup>194</sup> The policies of the government rule supreme and when a party policy conflicts with individuals’ rights, the party policy wins every time.<sup>195</sup> When policy is seen as

owners are only compensated under the reduced residential price, rather than the commercial business price.”); see also Phan I, *supra* note 5, at 640 (stating that another similarity to the U.S. compensation method, the land or land use rights in the land are valued at the time of the taking, so the value is pegged not at the potential value of the land, but the undeveloped value).

<sup>191</sup> See Alsen, *supra* note 2, at 8 (1996) (describing how ultimately, all the laws and legally-defined rights are subordinate to the overall goals of social and political development); see also Phan I, *supra* note 5, at 611 (“In a society such as China’s, built upon Marxist doctrine, the means of production must be controlled by the State in order for society as a whole to achieve the ideals of communism. The Marxist vision is that the communist party . . . will help lead the masses toward a socialist society in which private ownership of the means of production is abolished and the economically and politically dominant thus cease to oppress the working majority.”).

<sup>192</sup> See Epstein, *supra* note 173, at 1A. This quote comes from a peasant activist who declined to be identified that the author interviewed. *Id.* He continued: “The government has never explained its policy, never held a meeting with the people to explain the government policy. Whatever they want to make the government policy and wherever they want to put the common people, they just do it. We cannot negotiate.” *Id.*

<sup>193</sup> See Joseph Kahn, *Pace and Scope of Protest in China Accelerated in '05*, N.Y. TIMES, Jan. 20, 2006, at 10 (“Unrest has worsened especially quickly in the last several years because the government has seized millions of acres of rural land, which peasants can farm but not own, to make way for factories and real estate developments. Compensation is very low and many peasants say they have no choice but to protest to win attention for their claims. In 2004, when the country had 74,000 recorded protest events, 3.76 million people were involved, the police said. They were no figures provided for the total number of protesters in 2005.”).

<sup>194</sup> See Alsen, *supra* note 2, at 7 (stating that “a communist constitution is a tool for Party rule. The way law is interpreted, implemented and modified is determined on the basis of the Party’s assessment of current conditions.”); see also Yujie Gu, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE L. REV. 173, 183-84 (1999) (explaining how “[t]he state’s policy is the soul of the law. Individual rights are defined by the law, as opposed to the law being shaped by natural rights.”).

<sup>195</sup> See Alsen, *supra* note 2, at 7 (“The supremacy of the Party means that the Constitution may be overruled, especially when there is a conflict between the actions of the top party leadership and the formal requirements and procedures prescribed by law.”); see also Gu, *supra* note 194, at 184 (“Party policies and regulations . . . have played a rather significant role in the rule of the Communist Party.”); Daphne Huang, *The Right To A Fair Trial in China*, 7 PAC. RIM L. & POL’Y J. 171, 186 (1998) (“In order for China to embrace individual rights, China must revise four thousand years of Confucianist and socialist values. Following Confucian and socialist tenets, China has historically placed

more important than law, what significance can any law have? It is imperative that the government increase the amount of protection afforded to the poor in rural areas aimed for development. A law giving them stronger property rights is only one of the first steps. Moving forward in the PRC, the corruption in the government needs to be cleaned up, the land seizure system needs to be subject to independent court review, government officials need to be evaluated on more factors than simply the amount of investment that they can bring into their areas, the concept of "public use" needs to be defined, and when a taking does occur for a proper reason, the individual needs to be paid the current market value of their property.

#### IV. ECONOMIC EFFECTS

##### A. Foreign Direct Investment (FDI)

The creation of the land use right in 1988 was the catalyst that sparked a huge surge in the real estate market in China.<sup>196</sup> Many land use rights were granted for the construction of hotels, shopping centers, office buildings and more.<sup>197</sup> Surprisingly, all of this construction and conversion took place without the prevalent use of mortgage financing.<sup>198</sup>

The lower transaction costs and greater sense of security that will accompany the implementation of the property rights law will serve to increase, not only domestic investment but also and

state first, the collective second, and the individual last."); Carrie Menkel-Meadow, *The Ethics 2000 Commission: The Adversary System and the Lawyer-Client Relationship*, 70 TENN. L. REV. 63, 70 (2002) ("The goal of deliberative democracy and democratic discourse is to allow for greater participation by individuals most affected by policy issues or conflict.").

<sup>196</sup> See RANDOLPH & JIANBO, *supra* note 22, at 19-20 (stating that creation of land use rights was responsible for making real estate industry become leading industry in China); see also Ngai Pindell, *Fear and Loathing: Combating Speculation in Local Communities*, 39 U. MICH. J.L. REFORM 543, 544 (2006) ("The rise and fall of housing markets is not a new phenomenon, but the effects of housing frenzies and slowdowns merit examination under local governments' power to regulate land use.").

<sup>197</sup> See RANDOLPH & JIANBO, *supra* note 22, at 19 ("New granted land rights were created for office buildings, luxury hotels and shopping centers.")

<sup>198</sup> See *id.* at 19-20. Most Chinese lenders were weary of security mortgages, and would not lend on such, preferring to lend on personal guarantees. Also, much of the investment capital creating such a boom came from equity financing from the "Asian Tigers": Taiwan and Hong Kong. *Id.* at 20.

most importantly, foreign investment.<sup>199</sup> When parties can be confident of their ownership rights in property, they can then depend on these rights when they use their property in private transactions.<sup>200</sup> Persons with registered title properly will be able to use their ownership interests as collateral for loans. After the implementation of the property rights law, lenders should be much more willing to accept interests in land as security for loans amounting up to the fair market value of the property interest. More secure land ownership rights will therefore lead to greater amounts of capital flow in the PRC.<sup>201</sup>

When people have easier access to this source of credit, they put it back into the economy, further stimulating economic growth. This will lead to an increase in the general welfare of China. So while it may seem that the purpose of a property rights law would be just to benefit the individuals receiving those rights, it really will allow them to use the value of their property in order to further the credit attainable to them through mortgaging, which will increase the credit that can be put back into the economy.<sup>202</sup> As long as the government cuts back some of

<sup>199</sup> See Michele Balfour & Cameron Crise, *A Privatization Test: The Czech Republic, Slovakia and Poland*, 17 *FORDHAM INT'L L.J.* 84, 87 (1993) ("A legal system that protects and enforces property rights will allow owners of property to 'have confidence that they will obtain returns from the use of property.'"); see also Huang, *supra* note 74, at 195-96 ("In such imperfect markets, the costs of impersonal market transactions are actually higher than transactions conducted through informal social networks. However, as the market grows and the transaction costs of market exchanges are lowered, the informal property regime will give way to a more efficient formal legal system of clearly delineated property rights that offers more security.").

<sup>200</sup> See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 *COLUM L. REV.* 257, 271-72 (2007) ("Real and personal property rights systems generally establish strong ownership rights in the first possessor of such goods."); see also Palomar I, *supra* note 67, at 1016 (stating several ways in which individuals use their ownership rights in property to help in their private transactions).

<sup>201</sup> See Zhu Keliang, et al., *The Rural Land Question In China: Analysis and Recommendations Based on a Seventeen-Province Survey*, 38 *N.Y.U. J. INT'L. L. & POL.* 761, 829 (2006) ("Chinese law specifically prohibits farmers from mortgaging their land rights."); see also Palomar I, *supra* note 66, at 1015-16 ("In the United States, for example, seventy percent of the credit extended to new businesses stems from mortgaging real property titles as collateral for loans.").

<sup>202</sup> See Palomar I, *supra* note 66, at 1018 ("Secure property rights, on the other hand, encourage holders to invest in their property because of their certainty that the property will not be usurped. From a strictly economic standpoint, therefore, the true purpose of property rights is not to benefit the individuals or entities holding those rights, but to give them the incentive to increase the value of their assets by investing, innovating, or combining them advantageously with other resources, something which would have beneficial results for society."); see also Elizabeth L. Warren-Mikes, *December Madness: The Seventh Circuit's Creation of Dual Use in Illinois High School Association v. GTE Vantage*, 93 *NW. U. L. REV.* 1009, 1019 (1999) (quoting that "the property right function of trademarks allows companies to securely invest in their products in an attempt to build

the old socialist doctrine, and does not restrict property ownership rights or exercise its taking power to the detriment of the public, and assuming the land registration system does not create havoc, the new property law will lead to a huge mortgage market, and in turn to greater wealth and prosperity for the entire country of China.<sup>203</sup>

It is true, to a certain extent, that the mortgage market has been growing in China for some time now. To accomplish this without formal property rights, the use of "usufruct" came into existence.<sup>204</sup> An individual right for a definite term to possess, manage, use, transfer, and receive income from a parcel of land can be used as collateral in the same manner that an ownership right can be.<sup>205</sup> However, the fair market value of a usufruct interest is much lower than the fair market value of the full bundle of property rights in a parcel of land.<sup>206</sup>

good will" showing that securing one's property rights, such as in trademarks, will encourage one to invest in their property because they have some degree of certainty that their property will not be usurped).

<sup>203</sup> See Palomar I, *supra* note 66, at 1022 ("Individuals finance their purchases with twenty- or thirty-year home mortgage loans. At this time, the Bank of China finances all these residential mortgage loans with state money. If, instead of holding all this debt for twenty or thirty years, the Bank of China could sell packages of thousands of its residential mortgage loans into the world's securities markets and, thus, make private capital available for residential mortgage lending, this process could generate trillions in state resources for the funding of other projects."); see also Graeme Johnston, *Reform Plans Face Uncertainty*, FIN. TIMES, Apr. 4, 2006 ("The importance of these issues for foreign investors cannot be understated. If property and other legal rights are not protected by an effective and trusted legal process, there are implications not only for economic growth but also for the development of a healthy and contented society."); Kahn, *supra* note 3, at A14 (quoting Zhang Weiyong, deputy dean of Guanghua School of Management at Beijing University and director of several major Chinese companies as stating "areas of China that had grown the fastest, [were the ones that] opened up the most to foreign investment and given the widest berth to the private sector had higher living standards and narrower wealth gaps than areas that clung to socialist controls").

<sup>204</sup> Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1, 9 (1995) ("A usufruct is a civil code equivalent to a right to use and enjoy the property of another."); Michael R. Newhouse, *Recognizing and Preserving Native American Treaty Usufructs in the Supreme Court: The Mille Lacs Case*, 21 PUB. LAND & RESOURCES L. REV. 169, 193 (2000) (stating that some people view some usufructs as themselves property rights).

<sup>205</sup> See Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 363-64 (2006) (stating that owners of property may take any actions with respect to their property including using property as collateral); see also Palomar I, *supra* note 66, at 1024 ("A private right for a definite term to possess, use, manage, receive income from, and transfer interests in a parcel of land has market value for purposes of credit, foreign commercial investment, and securitizing mortgage loans, so long as those rights are clear, enforceable, and inalienable, even if the sovereign or the State retains the fee title.").

<sup>206</sup> See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1367 (1993) (stating that perpetual private land rights are generally superior to usufructs); see also Palomar I, *supra* note 66, at 1023-24 ("[L]oans will not be available even to titled

While the effect of secure land rights may seem like a great benefit to the Chinese people, if these property protections are deemed reliable enough to foreign investors, it will attract huge amounts of foreign capital.<sup>207</sup> In fact this has already begun in China, and with the solidifying effect of the new property rights law, it will only further stimulate foreign investment. These foreign investors will bring new capital into the economy and provide additional employment and tax revenue. This will allow the working class people of China — a massive amount of “human capital”— to have access to new employment opportunities in corporations that set up new offices and manufacturing plants in the PRC.<sup>208</sup>

### CONCLUSION

Although the National People's Congress enacted a property rights law to solidify interests in land, there is much more that needs to be done in order for the people of China and the country as a whole to benefit from it. The law that was recently passed is a start in the right direction but it will not instigate the full property rights revolution necessary to stabilize the fast rate of development in China.<sup>209</sup> The groups most in need of a full property rights law, the peasants, will be little helped by the recently passed law, as it serves to mainly protect the investor's recently appropriated land.<sup>210</sup>

landowners if location, size, and value of the parcels involved are inadequate to interest lenders.”).

<sup>207</sup> See Palomar I, *supra* note 66, at 1024 (stating that secure land rights or private right for definite term to possess, use, manage, receive income from, and transfer interests in parcels in land can stir foreign investment); see also Bin Xue Sang, *Pudong: Another Special Economic Zone in China?— An Analysis of the Special Regulations and Policy for Shanghai's Pudong New Area*, 14 NW. J. INT'L L. & BUS. 130, 143-44 (1993) (“[A]lthough China is a socialist country and as such does not recognize private land ownership, land use rights will no longer be a problem for foreign investors who contemplate doing business in China.”).

<sup>208</sup> See *Valedictory: A Long Goodbye*, ECONOMIST, Apr. 1, 2006 (“The huge expansion of the global labour force represented by the liberalisation of China and India has held down the incomes of the unskilled in all countries; the spread of information technology has had the same effect. The politics of that inequality is finding expression in the rise of economic nationalism in Europe and America.”); see also Mark Landler and Keith Bradsher, *Airbus, China and Quid Pro Quo; The Giant of Aviation Markets Seems Just the Place to Put a Factory*, N.Y. TIMES, Mar. 15, 2006, at C1 (stating that Airbus is looking to build assembly lines in China, and that could lead to many employment opportunities for Chinese people).

<sup>209</sup> See *China's next revolution*, ECONOMIST, Mar. 10, 2007, at 9.

<sup>210</sup> *Id.* (stating that “[m]uch good land has already been grabbed, and the new law

The PRC government must ensure that property rights of both domestic and foreign businesses and private individuals are strong enough to withstand China's bullish economic rush into the free market economy. The new property rights law must protect the land use rights that parties currently possess, it must give further restrictions on the governments taking power, it must clear up the registration system, and allow for mortgages and free transferability. In order to fully implement the law, the government needs more transparency, more integrity from local officials, and more centralization. China's economic reforms need to take a back seat for once and allow for their political and legal reforms to catch up.

Deng Xiaoping's goal of "socialism with Chinese characteristics" was for government ownership to dwindle and foreign investment to rise in order to create a stable market economic system.<sup>211</sup> China is headed in the right direction, government ownership is dwindling and foreign investment is rising. The Chinese market economy is booming. However, it seems that most members of the lower class in China would agree that this new "socialism with Chinese characteristics" feels a lot more like capitalism, albeit corrupted, than anything resembling socialism, no matter what the Communist Party members in Beijing have to say about it. Call it what you will, the benefits of economic expansion are numerous and China's growth rate cannot be discounted. But can the frenetic pace be sustained without more legal reform?

will merely protect the grabber's gains.").

<sup>211</sup> See *China: The White Peril*, ECONOMIST, Apr. 1, 2006. Deng Xiaoping argued, "the [Communist] party's survival depended on economic growth." He believed that this growth "could only be delivered by opening China wider to foreign investment and breaking the state's grip on the economy." Currently China's leadership has been talking about steering the country away from a blind pursuit of growth and paying more attention to the concerns of the marginalized. But it shows no desire to abandon Deng's formula for success." *Id.* China's future success depends upon foreign investment. Graham, *supra* note 81, at 269-70.