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MANAGING URBAN LAND IN CHINA: THE EMERGING LEGAL FRAMEWORK AND ITS ROLE IN DEVELOPMENT

Mark T. Kremzner[†]

Abstract: This Article examines the emerging legal framework for urban land management in China with reference to several perspectives on the role of the state in economic development: modernization, dependency, and statism. A key function of the urban land management and planning regime in the People's Republic of China is to promote economic development. Similarly, law and legal institutions in the reform era are used as an instrument to secure development policies. China's urban land use laws have the purpose and effect of channeling capital into land development and urban renewal projects through the commodification of land use rights. While the central state has achieved some of its development objectives, it has also experienced setbacks and witnessed an erosion of its control over land uses.

I. INTRODUCTION

Land is a critical natural resource and factor of production, thus the way in which land is controlled and used affects patterns and processes of economic and social development.¹ In the People's Republic of China, the state has had a key role in managing land and guiding the country's economic and social development.² Following Deng Xiaoping's rise to

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¹ The linkage between land management and development has been widely studied with respect to agricultural land, but less so with respect to urban land. An example of a detailed agricultural land case study is DAVID FEENY, *THE POLITICAL ECONOMY OF PRODUCTIVITY: THAI AGRICULTURAL DEVELOPMENT, 1880-1975* (1982). Feeny's study draws upon the works of Douglass North, which argue that well defined property rights in land and other resources are necessary for economic and social development. DOUGLASS CECIL NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD* (1973); DOUGLASS CECIL NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990).

² The responsibility of the state for the economy is provided for in various places of the current Constitution of the People's Republic of China. ZHONGHUA RENMIN GONGHEGUO XIANFA (1982) [P.R.C. CONST. (1982)], *translated in* China L. for Foreign Bus. (CCH Australia Ltd.) ¶4-500 (1997). Article 7 of the 1982 Constitution proclaims "The state owned economy is the leading force in the national economy. The state ensures the consolidation and growth of the state owned economy." Article 8 declares that the state encourages, guides and assists the growth of the collective economy, and Article 11 declares that the state guides, assists and supervises the individual economy. The state and collectives formally hold title to all land throughout the country. Article 10 of the 1982 Constitution reads in part as follows: "Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law."

power in the late 1970s, new policies were implemented that altered the course of the nation's economic development path and the way in which rural and urban land was held and managed. The reform of the land management regime has contributed significantly to the nation's economic growth and development. Just as the de-collectivization of rural land led to great increases in agricultural output,³ so too has urban land reform accelerated the transformation of China's cities and urban economy. This Article examines the emerging legal framework for urban land management with reference to the state's pursuit of economic development objectives.⁴

II. PARADIGMS ON DEVELOPMENT AND THE ROLE OF THE STATE

The degree to which states chart and direct the course of development has been the object of much study and analysis. Several paradigms on the role of the state in economic development are described below and will be used as reference points to assess the role of the central state in managing urban land in China. While some of the basic assumptions and analytical methodologies utilized by each paradigm remain open to debate, they do provide a useful means for analyzing the role of the state in promoting and directing development.

³ See, e.g., Roy Prosterman et al., *Can China Feed Itself?*, SCI. AMER., Nov. 1996, at 90; Wang Zuo, *Zhongguo nongcun tudichan chuan zhidu xin lun* [*New Views on the System of Property Rights in Rural Land in China*], 5 ZHONGGUO NONGCUN JINGJI [CHINA RURAL ECONOMY] 16 (1994).

⁴ The Chinese state is distinguished by some political scientists from the Chinese Communist Party (hereafter CCP or Party) and refers to those institutions and government officials responsible for administrative, judicial and legislative affairs. See STATE AND SOCIETY IN CONTEMPORARY CHINA (Victor Nee & David Mozingo eds., 1983). Other scholars find no significance in drawing distinctions between the CCP and the state, because of their tight integration. See KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES (1988). Unless otherwise noted, this Article does not draw a sharp distinction between the state and the Party. There is also much recent scholarship on the distinction between the state and the local state. See CHINA DECONSTRUCTS—POLITICS, TRADE AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994); CHANGING CENTRAL-LOCAL RELATIONS IN CHINA: REFORM AND STATE CAPACITY (Jia Hao & Lin Zhimin eds., 1994). The distinction between central and local is problematic in discussions of urban land law. There are four levels of government in China each with legislative or rulemaking authority and Party and government institutions. Within a city all four levels of Party and government institutions may own land and/or hold land use rights. The four levels of government in descending order of authority are: national, or more accurately central (*zhongyang*), provincial (*sheng*), county (*xian*), and municipal or city (*shi*). Depending upon the size or status of a city, it may have a higher degree of authority than a county and contain counties within its administrative authority. Beijing, Shanghai, Tianjin and Chongqing all contain numerous counties and have the same degree of authority as provincial governments.

A. *The Modernization Paradigm*

Efforts by Western social scientists in the early 1950s to identify the reasons why some countries had undergone more rapid industrialization and urbanization than others focused on the conditions and experience of Western Europe and North America.⁵ Drawing upon ideas of evolution, modernity (as opposed to traditional values), and social change, modernization theorists conceived of development as an irreversible process whereby countries progress from a backward or undeveloped stage to an advanced or developed stage.⁶ In adopting the assumptions of liberal economic thought, the modernization paradigm maintains that free markets optimize efficiency in resource allocation thereby promoting growth. Government involvement in the market place often has been viewed as little more than an interference that distorts prices, hampers transactions and retards growth. For example, in advising China on urban land management reform, the World Bank has called upon the central government to “remove obstacles to market reform and deregulate urban planning.”⁷

The theoretical works and policy advice of law and development advocates have been used widely to justify and implement modernization programs.⁸ Before being subjected to serious criticism in the 1970s, the presumptions and proposals of the law and development movement were embraced by Western government foreign aid programs and international donor agencies in the 1960s.⁹ The movement emphasized the positive role that legal reform could play in economic and political development through the transfer of Western legal ideas and institutions.¹⁰ According

⁵ Modernization thought has been greatly influenced by the works of Max Weber. He attempted to show that the norms associated with the Protestant work ethic promoted economic accumulation and growth, whereas other social systems were based on norms and values that inhibited economic growth. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958).

⁶ See W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960) (regarding the five stages of economic growth); Raymond Vernon, *International Investment and International Trade in the Product Cycle*, 80 Q.J. ECON. 190 (1966) (regarding product cycle theory).

⁷ WORLD BANK, *CHINA: URBAN LAND MANAGEMENT IN AN EMERGING MARKET ECONOMY* 31 (1993).

⁸ John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AMER. J. COMP. L. 457 (1977).

⁹ N. Yasuda, *Law and Development in ASEAN Countries*, in *LAW AND DEVELOPMENT STUDIES IN ASEAN COUNTRIES* (T.M. Rahdie & N. Yasuda eds., 1991). For a criticism of the law and development by one of its former proponents, see David M Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV 1062, 1072-79.

¹⁰ Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969).

to law and development advocates, the rational legal institutions of the West (which encouraged long term investments, stimulated entrepreneurial activity, and provided greater certainty for private sector transactions) could be transplanted in less developed countries ("LDCs") to promote their growth and development.¹¹

The law and development movement currently is experiencing a limited renaissance in China. Law and development scholars and policy analysts from the West and China posit that economic development can be promoted and a socialist market economy established by setting up new rational legal institutions and promulgating comprehensive laws.¹² This view has been embraced by many of China's current leaders, who repeatedly have stated that law is an essential agent in moving China away from a planned economic system and towards a new socialist market economy.¹³ At the past two National Congresses of the Chinese Communist Party ("CCP"), Party leaders detailed the way in which law should be used to manage and regulate various facets of society and the economy in a bid to modernize the country.¹⁴

¹¹ Max Weber, Karl Marx, and Emile Durkheim, all of whom analyzed social institutions and the rise of capitalism in Western Europe, are cited frequently by contemporary law and development scholars. In particular, they owe an intellectual debt to Weber who demonstrated that the formal rational legal systems of Western European states provided predictable conditions for market transactions that facilitated investment and contributed to economic growth. See MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., 1968). For an analysis of Weber's influence on law and development theory see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

¹² See, e.g., WANG CHENGUANG, SUIZHI SHICHANG JINGJI DE JIANZI JUBU WANSHAN XIANGYING DE FALU TIXI [THE ESTABLISHMENT OF A MARKET ECONOMY AND THE GRADUAL PERFECTION OF THE LEGAL SYSTEM]. For an account of a recent United Nations Development Program led effort to transplant law to China see LEGISLATIVE DRAFTING FOR MARKET REFORM—SOME LESSONS FROM CHINA (Robert B. Seidman et al., eds., 1997).

¹³ Chen Yingge et al., *Wunian nei xingcheng shehui zhuyi shichang jingji falu tixi kuangjia* [Forming the Framework of the Legal System of the Socialist Market Economy in Five Years], T4 JINGJIFA [ECONOMIC LAW] 11 (1993). See also Chairman Qiao Shi Emphasizes Lawmaking for the Socialist Market Economy at the Eighth National People's Congress Standing Committee, Second Session, RENMIN RIBAO [PEOPLE'S DAILY], July 3, 1993, at 1 (discussing the statements of Qiao Shi, former chair of the National People's Congress Standing Committee on using law to establish a socialist market economy.); Pitman B. Potter, *Peng Zhen: Evolving Views on Party Organization and Law*, in CHINA'S ESTABLISHMENT INTELLECTUALS 21-50 (Carol Lee Hamrin & Timothy Cheek eds., 1986) (discussing the statements of Peng Zhen, Qiao's Shi's predecessor as Chair of the National People's Congress Standing Committee). For a succinct discussion of the instrumental uses of law in China in the post-Mao era see BARRETT L. MCCORMICK, *POLITICAL REFORM IN POST-MAO CHINA: DEMOCRACY AND BUREAUCRACY IN A LENINIST STATE* (1990).

¹⁴ Decision of the CPC Central Committee on Issues Concerning the Establishment of a Socialist Market Economic Structure, translated and reprinted in CHINA ECON. NEWS (Supplement No. 12), Nov. 29, 1993 [hereafter 14th National Congress Decision]. The 14th National Congress Decision called for the legal codification of the rules governing the socialist market economy and urged Party cadres to learn how to manage the economy by legal means.

B. *The Dependency Paradigm*

The dependency paradigm emerged in reaction to the modernization paradigm and was inspired by classical Marxist thought. Whereas modernization theory explains that development occurs as the result of factors internal to the economy and society of a country, early dependency theorists claimed that underdevelopment is the result of external capitalist forces.¹⁵ Early dependency theories were largely based on a world system perspective that placed the advanced capitalist nations at the core and countries with a colonial legacy or other exploitative history at the periphery. This structure is believed to perpetuate underdevelopment because capital is drawn out of the periphery and accumulates in the core thereby further polarizing the global economy.¹⁶

Responding to criticisms from both ends of the political spectrum on the lack of empirical rigor in their early work, dependency theorists modified their views in the 1970s and 1980s.¹⁷ Cardoso put forth the notion of "dependent development," which explained that an LDC can develop when mutually advantageous conditions exist for both it and the partnered advanced economy.¹⁸ By contrast, Wallerstein's world systems analysis explained that limited opportunities existed for LDCs to develop.¹⁹ Later dependency scholars utilized these and other theoretical models to demonstrate through numerous empirical studies that direct foreign investment, trade and aid decreased long term growth and increased inequality.²⁰ In general these studies demonstrated that LDCs

¹⁵ The initial inspiration from classical Marxist thought was rooted in Marx's contention that the forces of imperialism will bring about a capitalist stage of development. The early dependency theorists argued that the interactions between the capitalist core and LDCs did not bring about a capitalist mode of production but rather led to the extraction of accumulated funds and resources by the capitalist powers. PAUL BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957).

¹⁶ See, e.g., ANDRE GUNDER FRANK, *CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA: HISTORICAL STUDIES OF CHILE AND BRAZIL* (1967).

¹⁷ For example Bill Warren, a Marxist scholar, persuasively argued that some former colonial subjects underwent industrialization. See Bill Warren, *Imperialism and Capitalist Industrialization*, 81 *NEW LEFT REV.* 3 (1973).

¹⁸ Fernando Henrique Cardoso, *Associated Dependent Development: Theoretical and Political Implications*, in *AUTHORITARIAN BRAZIL* 142 (Alfred Stepan ed., 1973). See also PETER B. EVANS, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE, AND LOCAL CAPITAL IN BRAZIL* (1979); HYUN-CHIN LIM, *DEPENDENT DEVELOPMENT IN SOUTH KOREA, 1963-1979* (1985).

¹⁹ IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* (1979). For a critique of Wallerstein's views see Theda Skocpol, *Wallerstein's Capitalist System: A Theoretical and Historical Critique*, 82 *AMER. J. SOC.* 1075 (1977).

²⁰ There is a vast literature on dependency that investigates the influence and effect of foreign capital in many nations. For a survey of the academic literature see ROBERT A. PACKENHAM, *THE DEPENDENCY MOVEMENT: SCHOLARSHIP AND POLITICS IN DEVELOPMENT STUDIES* (1992). Much of the research for the formulation of dependency theory was based on conditions in Latin America. For an overview of some of the manifestations of dependency in general see, VOLKER BORNSCHIER & CHRISTOPHER CHASE-DUNN,

became reliant on foreign trade channels and overseas capital sources in the form of bank loans, direct investment, and donor aid. The influential role of foreign capital led to the co-opting or corruption of local elites and domestic institutions, which became instruments to further promote the interests of foreign capital.²¹ An alternative view is that dependency relationships are the product of domestic policies and not the result of global structural relationships.²²

Legal institutions in particular were seen as promoting and enhancing the domination of foreign capital, and thus the law and development movement came under attack for breeding underdevelopment.²³ Imported legal forms were used to legitimate resistance to change and to suppress reformist elements that aimed to raise the economic and social conditions for a broader spectrum of society.²⁴ While the governing regimes of many LDCs were sufficiently strong to retain political power at home, they remained dependent upon foreign capital and were unable to effectively manage or regulate their national resources or assets.²⁵ Finally, laws and legal institutions that privatized economic transactions and limited state involvement in commercial affairs were seen as inhibiting the ability of the central state to control private enterprise and foreign capital.²⁶

C. *The Statist Paradigm*

The statist paradigm holds that the state is a vital factor in promoting development. Statism reversed the negative attitudes towards

TRANSNATIONAL CORPORATIONS AND UNDERDEVELOPMENT (1985); Robert W. Jackman, *Dependence on Foreign Investment and Economic Growth in the Third World*, 34 WORLD POL. 175 (1982).

²¹ RICHARD ROBISON, *INDONESIA: THE RISE OF CAPITAL* (1986).

²² Stephan Haggard, *The Newly Industrializing Countries in the International System*, 38 WORLD POLITICS 343 (1986).

²³ For a more in depth analysis of the law and development movement and how it may perpetuate underdevelopment and dependency see Francis G. Snyder, *Law and Development in the Light of Dependency Theory*, 14 L. & SOC'Y REV. 723 (1980).

²⁴ For discussion on how transplanted Japanese and American law was used to expropriate the most valued farm lands in South Korea, see David I. Steinberg, *Law, Development, and Korean Society*, 3 J. COMP. ADMIN. 215 (1971). See also Thomas M. Franck, *New Development: Can American Legal Institutions Help Developing Countries*, 1972 WIS. L. REV. 767 (explaining that the 1971 coup in Turkey arose as a result of the way the judiciary frustrated economic reform and development plans); Daniel Lev, *Judicial Authority and the Struggle for an Indonesian Rechtsstaat*, 13 L. & SOC'Y REV. 37 (1978) (discussing elite subjugation of reform efforts); Neal A. Roberts, *The Supreme Court in a Developing Society: Progressive or Reactionary Force?: A Study of the Privy Purse Case in India*, 20 AM. J. COMP. L. 79 (1971) (describing how the Supreme Court of India promoted the interests of wealthy, empowered elites).

²⁵ JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

²⁶ Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 L. & SOC'Y REV. 39 (1985).

the state held by modernization and dependency theorists and emphasized the advantages that flow from states that take an active role in formulating and implementing growth strategies. The intellectual roots of the statist paradigm are based in part upon the works of Gerschenkorn, who argued that late developing states needed to intervene more strenuously to ensure rapid industrialization and catch up to advanced economies.²⁷ A leading reason for this is said to be the inability of the private sector in LDCs to organize and accumulate the capital necessary for building national infrastructure.

Statists have tended to focus their work on identifying those factors that are most critical for achieving swift and sustained growth. The East Asian newly industrialized countries (NICs) have been the center of much attention. Some studies emphasize that the strength of the state is important for bargaining with other states and organizations to improve opportunities for growth, win acceptance for domestic trade and investment policies, and obtain support or aid.²⁸ Others point to the role of the state in providing and improving infrastructure, encouraging foreign investment, adjusting fiscal flows, and directing funds into targeted industries to enhance growth.²⁹ Government policies that match domestic resources and production facilities with global markets may also improve growth rates.³⁰ Finally, the mixture of both import substitution and export production have been shown to yield beneficial industrial diversification and place a nation on a steady path of development.³¹

With respect to land management, statist policies have been employed to improve land for industrial interests, encourage the construction of housing and commercial space, and to promote the growth of the real estate sector. Singapore and Hong Kong have closely controlled land use to guide urban growth, and have regarded urban land

²⁷ ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE* (1962). See also BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985) (demonstrating that the content of national policies and the extent of state involvement yields different socio-economic results).

²⁸ ROBERT L. ROTHSTEIN, *THE WEAK IN THE WORLD OF THE STRONG: THE DEVELOPING COUNTRIES IN THE INTERNATIONAL SYSTEM* (1977); Steve Chan, *The Mouse That Roared: Taiwan's Management of Trade Relations With the United States*, 20 COMP. POL. STUD. 251 (1987).

²⁹ STEPHAN HAGGARD, *PATHWAYS FROM THE PERIPHERY: THE POLITICS OF GROWTH IN THE NEWLY INDUSTRIALIZED COUNTRIES* (1990); CHALMERS A. JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY 1925-1975* (1982).

³⁰ *MANUFACTURING MIRACLES: PATHS OF INDUSTRIALIZATION IN LATIN AMERICA AND EAST ASIA* (Gary Gereffi & Donald Wyman eds., 1990).

³¹ See, e.g., ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990).

management as critical for their socio-economic development.³² In Taiwan the central government has actively managed the transformation of land from agricultural to industrial purposes through a legal framework.³³ The Taiwan legislature passed laws to regulate the requisition of land from farmers for industrial purposes, bar land speculation, and encourage entrepreneurs to invest in land for industrial purposes. This legal regime led to the establishment of special export processing zones, the hi-tech Hsinchu Science Park, and more than sixty-eight industrial parks.³⁴

In summary, the role of the state and law in the development process is viewed differently by each of the paradigms. In contrast to the modernization paradigm, which views the state as a disruptive influence on markets and economic growth, and the dependency paradigm, which views the state as little more than an agent for the dominant classes and commercial interests, statism considers the state to be a key factor in promoting growth. The law and development movement, which contains a number of assumptions rooted in the modernization paradigm, sees law as critical to the establishment of a framework to ensure sustained socio-economic progress. Critics of the movement reject those assumptions and assert that Western, liberal based legal institutions have brought about widespread social and economic injustice.

III. BACKGROUND ON THE URBAN LAND MANAGEMENT REGIME

A. *Ownership and Control of Real Property*

After coming to power in 1949 the first tasks of the CCP in the cities were to consolidate political control and transform the pre-revolutionary bourgeoisie, consumer cities (*xiaofei chengshi*) to producer cities (*shengchan chengshi*).³⁵ State owned enterprises and urban collectives, controlled by various central and local level governments, slowly acquired large amounts of

³² MANUEL CASTELLS ET AL., ECONOMIC DEVELOPMENT AND HOUSING POLICY IN THE ASIAN PACIFIC RIM: A COMPARATIVE STUDY OF HONG KONG, SINGAPORE AND SHENZHEN SPECIAL ECONOMIC ZONE, MONOGRAPH 37 (June 1988).

³³ Martha Fitzpatrick Bishai, *The Development of Industrial Land in Taiwan: A Legal Framework for State Control*, 26 J. DEVELOPING AREAS 53 (1991); INDUSTRIAL DEVELOPMENT BUREAU, MINISTRY OF ECONOMIC AFFAIRS, ROC, THE DEVELOPMENT OF INDUSTRIAL DISTRICTS IN TAIWAN (1986).

³⁴ See Bishai, *supra* note 33, at 58.

³⁵ KAM WING CHAN, CITIES WITH INVISIBLE WALLS, REINTERPRETING URBANIZATION IN POST-1949 CHINA 10 (1994). Ironically, the successes that the CCP had in industrializing cities led to a host of other problems. Expanded industrial capacity required more housing for workers and infrastructure systems, both of which were neglected.

urban real estate. Party and government authorities requisitioned and allocated land to them free of charge according to economic plans drawn up by the Economic Planning Commission.³⁶ This practice led to widespread hoarding of land because enterprises and collectives typically requested larger allocations of land than actually needed and had no incentive to economize. While some land users had a surplus, others suffered shortages. The prohibition on land transfers and the absence of a land market exacerbated this imbalance in supply and demand.³⁷ Although a black market did exist for urban land, the penalties for land transactions discouraged most local Party cadres and enterprise directors.

While many urban dwellers retained their ownership interests in urban real estate, those labeled as class or state enemies had their property confiscated or reclaimed because of the failure to pay "back taxes."³⁸ By the late 1950s the state was considered to be the formal owner of nearly all urban real property. However, it was not until the promulgation of the 1982 Constitution that the law formally provided for state ownership of urban land.³⁹ Actual control of urban real property was divided among various central government ministries and agencies, and provincial, county and municipal governments.

B. *Urban Land Management*

Throughout most of the 1950s and 1960s, Soviet theory and practices on urban land management had an important influence on the form and development of Chinese cities.⁴⁰ This led to the formation of egalitarian and proletariat style cities, characterized by many uniform, self-sufficient neighborhoods centered around a particular enterprise or *danwei* (work

³⁶ Xiao Yang, *Tansho shiyong tudi shiyongquan churang xuyao de guihua gongshuo fangfa*, [Investigation of the Planning Method Necessary for Granted Land Use Rights] 1 CHENGSHI GUIHUA [CITY PLANNING REVIEW] 11 (1993); State Land Administration Bureau, *Tudi guanli tizhi he shiyong shidu gaige de changshi yu tanshao* [Tentative Reforms of the Land Administration and Use System], in ZHONGGUO JINGJI TIZHI GAIGE NIANQIAN [CHINA ECONOMIC REFORM ALMANAC] (1991).

³⁷ SONG JIATAI, ZONGTI CHENGSHI GUIHUA [COMPREHENSIVE CITY PLANNING] (1985).

³⁸ SHENGWUYUAN [POLITICAL AFFAIRS COMMISSION], GUANWU MUOSHOU ZHANFAN HANJIAN GUANLIAO ZIBENJIA JI FANGEMING FENZI CAICHAN DE ZHISHI [INSTRUCTIONS CONCERNING THE CONFISCATION OF THE PROPERTY OF WAR PRISONERS, TRAITORS, BUREAUCRATIC CAPITALISTS AND COUNTER REVOLUTIONARIES] (Feb. 4, 1951), reprinted in JIANMING FANGDICHAN SHENPAN SHOUCHE [CONCISE JUDICIAL HANDBOOK ON REAL ESTATE] 615 (Supreme People's Court Civil Law Bureau and People's Legal Publishing House eds., 1995).

³⁹ See *supra* note 2.

⁴⁰ See Q. SONG, XIANDAI CHENGSHI TUDI LIYONG GUIHUA [MODERN URBAN LAND USE PLANNING] (1992).

unit).⁴¹ Commercial areas were neglected and declined in terms of area and density.⁴² What available funds were not expended on building industrial capacity were spent on the construction of public places and Party and government buildings.⁴³

Urban land management took a step backwards during the Great Leap Forward (1958-1961) and Cultural Revolution (1966-1976) when the urban planning profession, comprised chiefly of architects, was criticized and dismantled.⁴⁴ During those periods most municipal governments had little or no role in land management and ceased to enact or enforce land use and planning regulations. Most matters concerning urban land were determined by Party officials at the municipal level or higher. Directives and decrees were circulated among those officials with a need to know or act upon their contents. Urban land planning was integrated into economic planning and was concerned primarily with the siting of manufacturing plants. The emphasis on creating producer cities resulted in a disproportionately high percentage of urban land being used for industrial purposes.⁴⁵ Furthermore, the lack of coordination among enterprises and government units in control of land resulted in many incompatible land uses, infrastructure failures and environmental problems.⁴⁶

Urban infrastructure deteriorated due to the lack of incentives and capital funds for maintenance and repair. Housing in particular suffered as widespread shortages arose from the 1960s onward. Housing was considered a consumptive good, not a productive good, therefore capital funds seldom were invested in housing construction or improvement.⁴⁷ Furthermore, because rental rates were set below replacement costs, local governing units

⁴¹ C.K. Leung & Y.W. Poon, *Urban Land Use of China's Medium Cities: A Case Study of Foshan*, 1(1) *ASIAN GEOGRAPHER* 1 (1982).

⁴² Wu Jin, *Historical Development of Chinese Urban Morphology*, 8 *PLANNING PERSPECTIVES* 20, 42-50 (1993).

⁴³ See ALFRED SCHINZ, *CITIES IN CHINA* (1989) (describing and illustrating the formalistic, grand style and designs for public buildings and spaces).

⁴⁴ Hok Lin Leung, *Strengths and Weaknesses of the Planning Profession in China*, *CHINA CITY PLAN. REV.*, Sept. 1989, at 59, 62; Yichun Xie & Frank J. Costa, *Urban Design Practice in Socialist China*, 13 *THIRD WORLD PLAN. REV.* 279 (1991).

⁴⁵ In 1981, 27.6% of the land area in China's largest cities contained industrial users. In contrast, industrial users in Japan for the same period occupied only 10.5% of urban land. *Policy Framework for the Development of Real Estate and the Real Estate Industry in China*, *CITY PLAN. REV.*, Mar. 1993, at 2, 11 [hereinafter *Policy Framework*].

⁴⁶ Ye Laisong, *Uniform Planning, Rational Layout and Integrated Development and Adequate Provision of Auxiliary Services*, 5 *CHENG XIANG JIANSHE* [URBAN RURAL CONSTRUCTION] 7, 8 (1987).

⁴⁷ Gill Chin Lim & Man Hyung Lee, *Political Ideology and Housing Policy in Modern China*, 8 *ENV'T PLAN. C. GOV'T & POL'Y* 477 (1990).

could not collect sufficient funds to maintain or repair existing housing. Lack of funds for the development and maintenance of infrastructure further compounded these problems.⁴⁸ From the early 1970s to mid 1980s, urban construction was financed primarily from a portion of the moneys collected from the industrial and commercial tax, a tax on the profits of urban based state owned enterprises, and a public works surcharge on utility fees.⁴⁹

With the establishment of the open door policy and the initiation of market experiments, new financing arrangements for the development and improvement of urban real property were tested in several cities by municipal governments.⁵⁰ Guangzhou unsuccessfully implemented a program for the collection of land use fees to subsidize the construction of new housing in 1978.⁵¹ Fushun, Liaoning Province introduced a land management system in 1983 that later received much attention. In an effort to economize and rationalize land use, city officials first conducted a land survey and then instituted a land use fee schedule.⁵² More than 13.6 million square meters of land that had been improperly occupied or utilized (approximately eleven percent of the total area of the city) were turned over to the municipal authorities and redistributed according to a new master plan.⁵³ Furthermore, the thirteen million RMB collected from the initial assessment of annual land use fees were used to fund new construction projects.⁵⁴ By 1984 many cities throughout China were establishing land use fee systems based on the Fushun experience.⁵⁵ In late 1987, Shenzhen officials pushed urban land reform

⁴⁸ Ye Rutang, *Enhance Awareness, Maintain Reform and Expedite Urban construction in China*, 1 CHENG XIANG JIANSHE [URBAN RURAL CONSTRUCTION] 6, 9 (1987); Tao Zengji, *Problems of Urban Construction and Finance: A View of the City Structure of Shanghai*, in ZHONGGUO CAIZHENG WENTI [CHINA'S FINANCIAL PROBLEMS] 690 (Ministry of Finance ed., 1981).

⁴⁹ Cai Yuzhi, *Woguo chengshi weihu jianshe zijin de lishi yanbian*, [Historical Trends in the Construction Funds for Maintaining Our Country's Cities] 4 CAIZHENG [FINANCE] 25, 27-28 (1985).

⁵⁰ The reform of the urban land management system involved a restructuring of property rights in real property and a reappraisal of China's economy system. The search and experimentation for new approaches towards managing urban land occurred simultaneously with the debates over ownership and management of state owned enterprises and the extent to which central planning should be retained or utilized. For a more detailed discussion of the debates on these issues see YAN SUN, *THE CHINESE REASSESSMENT OF SOCIALISM, 1976-1992* (1995).

⁵¹ Wang Xianjin, *Lun chengshi tudi shiyong zhidu gaige*, [A Discussion on the Reform of the Urban Land Use System] 9 QIUSHI [SEEK TRUTH] 36 (1988).

⁵² Zhou Cheng et al., *Chengshi tudi youchang shiyong shizai bixing* [Payment for Land Use in Cities is Imperative], 6 JINGJI LILUN YU JINGJI GUANLI [ECONOMIC THEORY AND ECONOMIC MANAGEMENT] 65 (1987).

⁵³ Li Ning, *Chengshi tudi guanlishidushang de yixiang tupo* [A Breakthrough in the System of Urban Land Management] 7 CHENGXIANG JIANSHE [URBAN AND RURAL CONSTRUCTION] 17, 20 (1985).

⁵⁴ See *id.*

⁵⁵ *Chengxiang jianshe xinsi* [Urban and Rural Construction News] 12 CHENGXIANG JIANSHE [URBAN AND RURAL CONSTRUCTION] 47 (1985).

further by holding the first auction in China for the use rights to a parcel of land, even though no national legislation existed that permitted them to do so.⁵⁶ As calls were being made to implement land use fees nationwide, debates continued on whether the urban land reforms should proceed or be brought to a halt.⁵⁷ Party and government leaders were divided over a number of ideologically sensitive issues concerning land ownership, commodification of land, and rent.

IV. UNLEASHING THE PRODUCTIVE POTENTIAL OF URBAN LAND THROUGH ITS COMMODIFICATION

A. *Ideological and Political Considerations*

Classic Marxist doctrine holds that land is not a commodity and has no exchange value, because it exists naturally and is not the product of labor.⁵⁸ This notion was the ideological justification for prohibitions on the sale or lease of land during the Maoist era, and the reason why land was transferred free of charge by central planning authorities. For conservative Party ideologues, ideas of land leases and sales of land use rights was antithetical to Marxist-Maoist ideology.⁵⁹ Having the state lease land would be tantamount to the state assuming the status of a landlord. The historic mission of the Party had been to guard the population from exploitation by landlords. If the Party condoned the leasing of land by the state and the reappearance of landlordism, it risked forfeiting its legitimacy.

By the mid-1980s, the issue of urban land leasing was being openly debated in academic journals and the media. Reformers justified land leases and the imposition of land use fees by reinterpreting Marx's writings on land

⁵⁶ The auction was held in December 1987 and involved the sale of approximately 10,000 square yards of residentially zoned land to a local development enterprise. Shanghai municipal officials auctioned the first use rights to a parcel of land for hard currency in 1988 to Japanese based Sun Enterprises Ltd. See Harold Rose, *Shenzhen Encourages Land Auctions Through Adoption of Liberal Policies*, ASIAN WALL ST. J., 1989 at 12.

⁵⁷ For example, the director of the urban construction bureau in the Ministry of Construction called for deepening the implementation of the land use fee program as soon as possible. See Ye Weijun, *Yao zhuhao chengshi jichu sheshi de jianshe* [Seize Upon Construction of Basic Infrastructure for Cities] 10 CHENGXIANG JIANSHE [URBAN AND RURAL CONSTRUCTION] 7 (1985).

⁵⁸ Marx put forward his views on land rent in the early 1860's in THEORIES OF SURPLUS VALUE later in 1894 in CAPITAL III. See KARL MARX, THEORIES OF SURPLUS VALUE (G.A. Bonners & Emile Burns trans., 1951); CAPITAL III (Pelican Marx Library edition). For a discussion of Maoist interpretations of Marx's view on land rent see Chen Xiuhua, *A Discussion of the Commodification of Land for Urban Construction*, 61 JIANGHAN LUNTAN [JIANGHAN TRIBUNE] 1 (1985).

⁵⁹ Stephen Morgan, *China: Ideology on the Block*, FAR E. ECON. REV., July 14, 1988, at 22.

rent.⁶⁰ They asserted that urban land could have exchange value because of the transformation in its use in an urban economy.⁶¹ Presuming that urban land had value it logically followed, according to some theorists, that the state legitimately could grant rights to use a parcel of land in exchange for payment equivalent to the transformed value.⁶² While this would result in the commodification of the use rights to land, its ownership technically would remain under the ownership of the "whole people," or the state. This formulation also proved to be in accord with the final provisions of the then newly promulgated 1986 General Principles of the Civil Law, which holds that the right to use property is one of four constituent elements that comprise property ownership.⁶³

The increasing momentum in support of the commodification of land use rights coincided with calls to accord the real estate industry independent status. A number of ministries and agencies lobbied in favor of the real estate industry. Chief among them were the Ministry of Construction ("MOC") and

⁶⁰ Qi Mingshen, *Dui chengshi tudi shangpin de zhiyi* [Doubts Concerning Urban Land as a Commodity], 61 JIANGHAN LUNTAN [JIANGHAN TRIBUNE] 4 (1985).

⁶¹ Some writers argued that urban land, while not a commodity, could contain value because it had labor applied to it when it was transformed from agricultural land. See *id.* at 10. Other writers viewed urban land as being composed of two essential elements: a natural resource and a product of human labor. The labor applied to land gave that element of land a certain value which could provide a basis for establishing price in an exchange transaction. Chen Xiuhua, *Lun jianzhu diduan de shangpinxing* [A Discussion on the Commodification of Construction Land Sector], 61 JIANGHAN LUNTAN [JIANGHAN TRIBUNE] 1, 2 (1985). Additional support and justification for the commodification of land use rights came from policy researchers working on rural land issues. The transferability of land was considered critical for sustaining growth in the agricultural sector and for shifting some land into industrial uses to spur the growth of small towns and cities. See DU RUNSHENG, *ZHONGGUO XIANG JINGJI GAIGE*, [CHINESE RURAL ECONOMIC REFORM] 228-34 (1985). Du likened the use right of land to a contractual right, rather than a property right, in an attempt to avoid comparisons with private property. *Id.* at 230.

⁶² Liang Zhisen, *Woguo dichan ye gaige de tantao* [An Inquiry into the Reform of Our Country's Real Estate Business] 4 NANHUA SHIFAN DAXUE XUEBAO [SOUTH CHINA NORMAL UNIVERSITY JOURNAL] 17 (1985).

⁶³ Article 71 of the GPCL provides that ownership is comprised of four constituent powers and functions (*quanneng*): possession (*zhanyou*), use (*shiyong*), disposition (*chufen de zhangli*), and right to benefit (*shouyiquan*). ZHONGHUA RENMIN GONGHE GUOMIN FATONGZE, 1986 [hereinafter GPCL], translated in CHINA L. FOR FOREIGN BUS., ¶19-150. During the same time of the debates on land rent, legal scholars and others were attempting to reach a consensus on the types of property rights to receive legal recognition. At the Thirteenth Session of the Standing Committee of the National People's Congress ("NPC") in November 1985, Wang Hanbin, then Chair of the Committee for Law Building, emphasized the need for recognizing the right to use land in accord with a contract (*chengbao quan*) to further economic reform. See Edward J. Epstein, *The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond*, 52 LAW & CONT. PROBS. 177, 188 (1989). This approach ultimately proved acceptable because it did not run counter to the inviolable socialist principle of state ownership and conformed to Marxist theory on ownership, which draws a distinction between the legal and economic functions of property. The economic function of capital, according to Marx, was realized when lesser property rights were distinguished from the ownership of capital. *Id.* at 189.

the Ministry of Finance, both of which stood to gain economically and politically from the legalization of real estate markets. By late 1984 the State Planning Commission ("SPC")⁶⁴ granted the real estate industry independent status, which led to the creation of new regulatory institutions to oversee construction enterprises, land management agencies, and associated financial and administrative organizations.⁶⁵ In 1987 the real estate industry got another boost when it was declared to be a production, as opposed to consumption, based industry.⁶⁶ This pronouncement led to an increase in the availability of investment funds for land development and construction projects. The enhanced status of the real estate industry and the government organs that regulated it strengthened the political clout of those favoring the commodification of land use rights.

Another divisive issue surrounding the urban land commodification debate was the role of foreign capital.⁶⁷ A conservative faction of Party members led by Chen Yun strongly opposed the sale of land use rights or leasing of land to foreign investors. They claimed that a policy allowing foreigners to obtain property rights in Chinese soil would be tantamount to the re-establishment of foreign concessions of the treaty port era.⁶⁸ Somewhat less xenophobic opponents of land commodification argued that foreign investment in land was part of an erroneous internationally oriented development policy that would result in dependence upon foreign markets and capital.⁶⁹ These voices were concerned that China's enterprises and

⁶⁴ The State Planning Commission had a critical role in central economic planning during the Maoist era. In particular it determined input (including capital investment, land and labor) and output requirements for enterprises and collectives. It also played a key role in locating enterprises, allocating land and providing infrastructure services. Thus, the decisions and actions of the SPC have significant impact upon urban planning and land use issues. With the decline of central economic planning, the SPC has seen its influence erode, relative to other governmental organs and ministries. For more on the SPC see THOMAS P. LYONS, *ECONOMIC INTEGRATION AND PLANNING IN MAOIST CHINA* (1987).

⁶⁵ *Policy Framework*, *supra* note 45, at 3.

⁶⁶ *See id.*

⁶⁷ In contrast rural land management reform explicitly ruled out the possibility of a role for foreign capital. Foreigners were only granted permission to invest in rural land for the purpose of aiding agricultural development in late 1996. Tom Korski, *Crop Land Open to Foreigners*, S. CHINA MORNING POST, Oct. 12, 1996, at 3.

⁶⁸ *See id.* See also Wu Jincai, *Invigorate the Land*, Xinhua Domestic Service, Sept. 5, 1992, translated in FEDERAL BROADCAST INFORMATION SERVICE—CHINA DAILY REPORT [hereafter FBIS-CHINA DAILY REP.], Sept. 9, 1992, at 41.

⁶⁹ For views opposed to an outward looking development model in China, see Liu Changli, *Jinkou tidai shi woguo ganchao shijie gongye daguo de zhangchi* [Import Substitution is China's Long Term Strategy for Catching Up with or Surpassing the Developed Countries], 8 JINGJI YANJIU [ECONOMIC RESEARCH] 34 (1987); Xia Shen, *Lun zhongguo waixiang jingji fajan de zhanlue xuanze* [The Strategic Options of the Development of China's Externally Oriented Economy], 9 CAIMAO JINGJI [FINANCE AND TRADE ECONOMICS] 11 (1988).

collectives lacked the financial resources to purchase land use rights. Domestic interests consequently would be forced to scale back or even terminate their operations in the face of high land costs, and foreign businesses would gain a dominant position.⁷⁰

Those favoring foreign investment in urban land argued that allowing foreigners the right to use land would be a good way to encourage the flow of much needed hard currency into China. In 1985 then Premier Zhao Ziyang publicly promoted the idea of land leases to foreigners as a way of raising funds for capital investments.⁷¹ He was supported by a number of local Party secretaries in Shanghai and other cities who either favored an outward oriented development strategy or simply were in search of funds for construction projects. Reformers also explained that foreign capital would have a positive ripple effect, whereby developed urban areas would in time attract more technologically advanced businesses.⁷² As Deng Xiaoping later reportedly explained "it is necessary to obtain some money by means of land so that the development of other industries can be brought along, incomes be increased and benefit can be obtained."⁷³ Reform of the urban land regime was considered a prerequisite for the development of the "third tier," or service sector, of the economy. The existence of a robust service sector was considered emblematic of advanced economies. According to this logic, if China's real estate industry prospered, it nearly guaranteed the growth and success of the banking, finance and insurance industries.⁷⁴

The debates on the commodification of urban land use rights ran on until the Thirteenth Party Congress held session in October 1987. In the end, pragmatic considerations won over ideological ones, as most CCP members were concerned with finding new sources of revenue to finance development

⁷⁰ The extent to which China's development strategy should rely upon foreign capital has long been the subject of much discussion. In the mid-1980s, the risks associated with foreign capital were closely analyzed and debated. Many reformers believed that those risks could be controlled and were outweighed by the benefits that foreign investment would bring. A consensus seems to have emerged in favor of this view by late 1987 as Zhao Ziyang adopted an export oriented development strategy. Zhao's decision was influenced in part on the visionary plan advanced by Wang Jian, who emphasized the benefits that would flow from the industrialization of coastal cities and SEZs and the foreign exchange earned through trade and investment. Wang Jian, *Xuanze zhenggui zhang fajan zhanlue* [Selecting the Correct Long Term Development Strategy], JINGJI RIBAO [ECONOMIC DAILY], Jan. 5, 1988, at 3.

⁷¹ Louise do Rosario, *A Capital Idea*, FAR E. ECON. REV., Oct. 15, 1987, at 33.

⁷² ZHONGGUO FANGDICHAN SHICHANG GAILUN [SURVEY OF REAL ESTATE MARKET IN CHINA] 237 (Song Chunhua ed., 1995).

⁷³ Xu Xingji, *Theoretical Exploration*, GUANGMING RIBAO, May 2, 1992, at 3, translated in FBIS-CHINA DAILY REP., June 2, 1992, at 26.

⁷⁴ *Policy Framework*, supra note 45.

projects or encouraging higher levels of foreign investment.⁷⁵ In the aftermath of the Party Congress, work began on modifying the legal regime to conform to the new political reality. At the National People's Congress ("NPC") on April 12, 1988, the Constitution was amended to read: "the right to use land may be transferred according to law."⁷⁶ In December 1988 the NPC amended Article 2 of the Land Management Law by adding the following language: "the right to use State owned or collectively owned land may be assigned pursuant to the law."⁷⁷

B. *Financing Urban Development Through Grant Fees*

The Provisional Regulations of the PRC on the Grant and Assignment of the Right to Use State Owned Urban Land, promulgated by the State Council in May 1990⁷⁸ distinguish urban from rural land and establish two forms of urban land use rights: (1) "grant for value" (*youchang churang*), whereby the state grants the right to use a parcel of land upon payment of a "grant," or "transfer," fee (*churang fei*); and, (2) "administrative allocation" (*hubao*),⁷⁹ whereby the state allocates the land use right free of charge.⁸⁰ Grant fees vary widely among urban areas and may be based upon rational factors, such as proposed use, location, and environmental conditions, as well as arbitrary factors such as the identity of the purchaser. Some localities have enacted grant fee schedules in an

⁷⁵ For example, Vice Premier Tian Jiyun and Jiang Rugao, then director of the Shanghai Land Administration Bureau, emphasized the need to raise revenue for the rehabilitation and development of urban infrastructure. Tian urged his fellow Party members to consider the benefits that flowed from the Hong Kong system, where the government was enriched greatly by the sale of land use rights, yet still retained ownership of the land. See *supra* note 45.

⁷⁶ P.R.C. CONST., art. 10.

⁷⁷ Zhonghua Renmin Gongheguo Tudi Guanlifa, Ch. 1, art. 2 (amended 1988), translated in CHINA L. FOR FOREIGN BUS., ¶14-715 [hereinafter LAND MANAGEMENT LAW].

⁷⁸ Zhonghua Renmin Gongheguo Chengzhen Guoyou Tudi Shiyongguan Churang He Zhuanrang Zhanhang Tiaoli, translated in CHINA L. FOR FOREIGN BUS., ¶14-716 [hereinafter 1990 URBAN LAND USE REGULATIONS].

⁷⁹ Allocated land use rights have no fixed term, but have limited allowable uses and are subject to a number of restrictions on their subsequent transfer or assignment. They are typically issued for infrastructure projects, as well as for utility, transportation, educational, civic and military purposes or other specified State projects. *Id.* arts. 43-47; Urban Real Estate Administration Law of the People's Republic of China, art. 23 [hereinafter the 1995 Real Estate Law], translated in CHINA L. & PRAC., Oct. 3, 1994, at 23.

⁸⁰ 1990 URBAN LAND USE REGULATIONS, arts. 8, 14. Granted land use rights have fixed terms, varying according to use, which upon expiration revert to the state. The terms of granted land use rights range from a low of 40 years for land used in commercial or recreational projects to a high of 70 years for land used in constructing housing. Industrial and technological uses have a maximum term of 50 years. The term may be extended upon approval by the state. 1990 URBAN LAND USE REGULATIONS, art. 12.

effort to standardize prices, but these have not been closely followed.⁸¹ Attempts to standardize and control grant fees on a nationwide basis periodically are made by central authorities with limited success.⁸²

According to the 1995 Urban Real Estate Administration Law and earlier issued State Council decrees, all revenues collected from grant fees must be accounted for and submitted to public finance authorities.⁸³ Thereafter, the revenues must be used to improve urban land or build infrastructure facilities.⁸⁴ While statistics vary widely on the amount of revenue that has been collected from grant fees, those from the State Land Administration ("SLA")⁸⁵ indicate that 44,000 plots of land totaling 79,000 hectares had been granted out by the end of 1993, earning the central government 123 billion RMB (US \$14.86 billion) from grant fees.⁸⁶ This is significantly less than what was originally anticipated.⁸⁷ In some cases grant fees have not even covered the costs of putting the land into a marketable condition and relocating displaced residents and enterprises.⁸⁸ Several municipal governments, such as Guangzhou, have been more successful in realizing gains through grant fees because of more detailed regulations and enhanced enforcement measures.⁸⁹

⁸¹ See Shenzhen Special Economic Zone, Land Prices for Use of Land Granted by Agreement and Reduction and Exemption of Payment Regulations, translated in CHINA L. & PRAC., Oct. 28, 1991, at 54. See also Shanghai Shi Tudi Shiyangquan Youchang Zhuanrang Banfa, translated in CHINA L. FOR FOREIGN BUS., ¶91-034, [hereinafter Shanghai Land Compensation Rules].

⁸² See, e.g., CHINA L. & PRAC., July/Aug. 1996, at 9.

⁸³ 1995 Real Estate Law, art. 18. For additional analysis of the 1995 Real Estate Law see Mark T. Kremzner, *Managing and Regulating Land Use Rights in China: New Urban Real Estate Law*, E. ASIAN EXECUTIVE REP., Oct. 15, 1994, at 9.

⁸⁴ 1995 Real Estate Law, art. 18.

⁸⁵ The State Land Administration Bureau [hereinafter SLA] was established in 1986 as part of the implementation of the LAND MANAGEMENT LAW. The SLA is directly under the State Council, the highest organ of government authority in China. As explained in Article 5 of the LAND MANAGEMENT LAW, the SLA is "responsible for uniform management of land throughout the country." It administers state owned land in urban and rural areas, including the requisition of land and the granting and allocation of land use rights.

⁸⁶ ZHONGGUO FANGDICHAN SHICHANG GAILUN [SURVEY OF THE REAL ESTATE MARKET IN CHINA] 234 (Song Chunhua ed. 1995). According to China Daily reports, by the end of 1982 the central government earned 50 billion RMB (US \$8.7 billion) from land use rights. Liang Chao, *7 Cities Chosen as Pilot for Real Estate*, CHINA DAILY, May 4, 1993, at 3.

⁸⁷ *China Real Estate Should Be Under Control*, CHINA DAILY, Jan. 30, 1996, available in LEXIS, News Library, Asiapc File.

⁸⁸ In Shenzhen, during the period 1980 to 1987, grant fees and related charges collected by the local government totaled 38 million RMB, an amount that did not cover land preparation expenses. Henry Zheng, *The Special Economic Zones and Coastal Cities in DOING BUSINESS IN CHINA* 20-43 (William P. Streng & Allen D. Wilcox eds., 1993).

⁸⁹ Henny Sender, *Be Sure to Bring Money*, FAR E. ECON. REV., Aug. 12, 1993, at 72-73. By the end of 1992, the Guangdong Provincial government reportedly earned 9.4 billion RMB (US \$1.6 billion) from land use rights on 7000 hectares of land. This accounted for 45 percent of the annual revenue of the provincial government. See SURVEY OF THE REAL ESTATE MARKET IN CHINA, *supra* note 86.

Negotiated grants, which is the way most land use rights have been sold, have resulted in the conveyance of land use rights at prices significantly below those that might be obtained in a more competitively based scheme.⁹⁰ It is not uncommon for local officials to agree to grant land use rights at lower prices and then share in the windfall profits obtained through subsequent transactions.⁹¹ Proposals to abolish the negotiated sales method were seriously considered during the drafting of the 1995 Real Estate Law, but ultimately rejected as unfeasible. Instead, the 1995 Real Estate Law requires that auction or bid methods be employed when land use rights are granted for the purposes of constructing commercial, tourist, recreational facilities or luxury housing "where conditions exist." The Law does not specify what these conditions are.⁹² Shortly after the 1995 Real Estate Law went into effect, the SLA issued procedures to establish minimum prices for land use rights granted by agreement.⁹³

Even when other methods have been used to sell land use rights, grant fees have been reduced in an effort by local officials to attract domestic enterprises or foreign invested projects. Most municipal governments are eager to have industries established within their jurisdiction, because they provide a source of employment, are a potential source of future revenue through the levying of various fees, and enhance the power and prestige of local officials.⁹⁴ Localities compete with one another for the siting of enterprises and foreign invested projects, which places downward pressure on grant fee prices.⁹⁵ Moreover, local authorities have taken a larger share of the revenue acquired through grant fees. In order to obtain the initial support of localities for the reform of the urban land system, the central government agreed to share a portion of the funds collected

⁹⁰ There are three methods for the purchase and acquisition of a granted land use right: auction, requests for bids, and negotiated agreements. See 1990 URBAN LAND USE REGULATIONS, art. 18.

⁹¹ *Zou Jiahua Strongly Attacks Corrupt Officials in Land Department*, MING PAO, Aug. 3, 1993 at 2, translated in FBIS-CHINA DAILY REP., Aug. 6, 1993, at 26.

⁹² 1995 Real Estate Law, art. 12. Several of the larger urban areas, such as Guangzhou and Shanghai, that have engaged in auction and bidding procedures have the administrative and organizational capability in place to conduct competitive sales of land use rights, whereas some smaller cities do not.

⁹³ See CHINA L. & PRAC., Oct. 1, 1995 at 7.

⁹⁴ Larger urban areas are more likely to receive permission from provincial and central authorities to expend funds to build better infrastructure, civic and leisure facilities, which in turn attracts more foreign and domestic investment. For example in Shunde, Guangdong Province municipal officials succeeded in encouraging a large number of enterprises to buy land use rights and set up manufacturing and assembly facilities. The increase in the municipal budget and population of the city satisfied the internal requirements of higher level governments thereby enabling Shunde municipal officials to gain approval to build new athletic facilities and a civic arena; upgrade and widen city roads; and install new IDD telecommunications equipment. Interview with Chinese planning consultant to Guangzhou Municipal Government in Shunde (Dec. 1996).

⁹⁵ See YOU-TIEN HSING, MAKING CAPITALISM IN CHINA: THE TAIWAN CONNECTION (1998).

from the grant of land use rights.⁹⁶ Over time, local governments not only have bargained for a larger share, but have concealed from central officials both the quantity of land granted out and the amount of money or other consideration received, despite repeated efforts by central authorities to regulate and discipline local governments.⁹⁷ The central government therefore has witnessed a steady decline in the amount of revenue it extracts from land use right grants that can be used for urban development.

While many municipalities have reduced grant fees to encourage investment, there has been a large diversion of money away from urban infrastructure and housing construction, despite legal prohibitions on such activity. Some of this is due to the corruption of local officials, who misappropriate and embezzle funds.⁹⁸ However, the overwhelming majority of grant fees have been channeled into other government departments or invested in local state or collectively owned manufacturing enterprises.⁹⁹ Although these funds may directly or indirectly stimulate growth and economic development, it is of a different nature than intended. Efforts are periodically made by municipal and provincial governments to stop these abuses through the issuance of rules detailing how fees collected from land use rights are to be collected and disposed of, but with little success.¹⁰⁰ These rules typically require grant fees and an authorized payment warrant to be passed directly to the municipal financial bureau, which is to ensure that the funds be spent primarily on land development and the construction of urban infrastructure.¹⁰¹

⁹⁶ This is an example of how central leaders garnished political support for their socio-economic reforms from provincial and local leaders through the implementation of a fiscal decentralization and revenue sharing strategy popularly called "eating in separate kitchens" (*fen zao chifan*). The sharing of revenues tilted toward the provinces over time and left the central treasury short of funds. For a more detailed discussion see SUSAN L. SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* (1993).

⁹⁷ Originally the central treasury was to retain 40% of the income from grant fees, but this has been reduced to 32%. See *The Perplexity Facing Real Estate—Notes on Covering Reform of the Land Use System in Guangdong and Fujian*, RENMIN RIBAO, Nov. 5, 1992, translated in FBIS-CHINA DAILY REP. Dec 3, 1992, at 44.

⁹⁸ Zou Jiahua Strongly Attacks Corrupt Officials in Land Department, *supra* note 91.

⁹⁹ In March 1995, the State Land Administration and Ministry of Finance issued jointly the Circular to Strengthen the Administration of Collection of Land Use Right Grant Fees. See CHINA L. AND PRAC., May 8, 1995 at 9. On June 12, 1995 the State Land Administration issued the Tentative Provisions for the Supervision of Land. See FANGDICHAN SHENPAN SHOUCHE [JUDICIAL HANDBOOK ON REAL ESTATE] (Supreme People's Court Civil Law Bureau & People's Legal Publishing House eds., 1995). See also *Suggestions on Control of Real Estate Market*, Xinhua Domestic Service, Aug. 13, 1993, translated in FBIS-CHINA DAILY REP., Aug. 20, 1993, at 30; *Government Loses US \$3.5 Billion in Real Estate Market*, Aug. 23, 1993, HONG KONG AFP, reprinted in FBIS-CHINA DAILY REP., Aug. 23, 1993, at 40.

¹⁰⁰ See, e.g., Rules for the Collection and Management of Charges for Granted Land Use Rights promulgated by the Beijing Municipal Government in September 1994. The full text of the rules appears in Chinese in MING PAO, Sept. 17, 1994, at E-1.

¹⁰¹ See *id.*

In addition to grant fees, there are other fees and a variety of taxes imposed by central, provincial, and local governments on both granted and allocated land use rights. These include annual land use fees (*tudi shiyong fei*),¹⁰² land development charges, construction taxes and land use value added taxes. Land use value added taxes are imposed on the revenue obtained by the owners of land use rights who assign their rights or any structures upon the land. The Tentative Regulations on Land Value Added Tax and associated Implementing Rules for the Tentative Regulations on Land Value Added Tax, promulgated by the Ministry of Finance, detail the allowable deductions on gains from such assignments and the procedures for payment and collection of the tax.¹⁰³ Real estate taxes, based on the assessed value of the land use right and any attached structures, are due on an annual basis.

C. *Land Development in a Market Economy*

1. *Regulating Urban Land Transactions*

The conversion of land into a marketable commodity has posed a challenge for policy and law makers. They generally believe that a legal framework that protects property interests and allows those interests to circulate more efficiently will result in more investments in urban construction projects and purchases of real estate.¹⁰⁴ At the same time they want to ensure that the state maintains control over urban land uses and real estate markets. How China strikes a balance between free markets in urban real estate and state control of those markets is indicative of the development path it is travelling upon.

In addition to establishing a national framework for the acquisition from the state of land use rights, the 1990 Urban Land Use Regulations legitimized the secondary market¹⁰⁵ by setting forth the procedures by

¹⁰² The annual land use fee is generally a small sum of money paid to the municipality and underscores the fact that the property interest of the grantee is in the nature of a leasehold. *See, e.g.*, Shanghai Land Compensation Rules, art. 2(5).

¹⁰³ The Tentative Regulations on Land Value Added Tax, *translated in* CHINA ECON. NEWS, Jan. 17, 1994, at 7 [hereinafter Land VAT Regulations]; The Implementing Rules for the Tentative Regulations on Land Value Added Tax, *translated in* CHINA L. & PRAC., Mar. 31, 1995, at 23 [hereinafter Land VAT Implementing Rules].

¹⁰⁴ SURVEY OF THE REAL ESTATE MARKET IN CHINA, *supra* note 86, at 240-44; *Policy Framework*, *supra* note 45.

¹⁰⁵ The sale and purchase of land use rights from the state is often referred to as the primary market, whereas transactions in land use rights between the original grantee of the state and another party is

which granted and allocated land use rights could be mortgaged, leased or assigned (*zhuanrang*) by means of sale, exchange or gift.¹⁰⁶ The 1992 Provisional Measures on the Administration of Allocated Land Use Rights further clarified the procedures for the assignment and transfer of allocated land use rights.¹⁰⁷ While both the 1990 Urban Land Use Regulations and 1992 Provisional Measures were instrumental in unleashing the productive potential of urban land, they did not purport to create free markets in real estate. On the contrary, a key role was reserved for the state to monitor and regulate all land use right transactions.¹⁰⁸ Under the 1990 Urban Land Use Right Regulations and 1992 Provisional Measures, the price and terms of all land transactions must be approved by the SLA. Furthermore, the SLA was given discretionary authority to adjust transaction prices and preemptive rights to purchase, at a price it deems proper, any land use rights transferred "substantially lower than the market price."¹⁰⁹ The 1995 Real Estate Law withdrew the preemptive rights and price adjusting authority of the SLA, but continues to require parties to a land transaction to disclose the price and terms of their final agreement.¹¹⁰ In addition, the 1995 Real Estate Law proposed the creation of a national standardized appraisal system, under which the state is to formulate measures for determining the value of land and real estate with reference to local

considered the secondary market. For a quantitative analysis of the secondary market for land use rights in Shanghai see LI LING HIN, *PRIVATIZATION OF URBAN LAND IN SHANGHAI* (1996).

¹⁰⁶ Article 19 of the 1990 Urban Land Use Right Regulations defines the term "assignment of the right to use land" (*zhuanrang tudi shiyong chuan*) as "the act by which a land user passes on the right to use land [originally granted by the state], and includes sale, exchange and gifts." Assignments of land use rights are distinct from leases and mortgages. 1990 URBAN LAND USE REGULATIONS, arts. 19-38.

¹⁰⁷ Huabo Tudi Shiyongquan Guangli Zhanhang Banfa, translated in CHINA L. FOREIGN BUS., ¶14-713, [hereinafter 1992 Provisional Measures]. Before allocated land use rights are assigned (i.e. sale, exchange or gifting) they must be converted into granted land use rights. This requires that a fee for grant of land use rights (*tudi shiyongchuan chuzujin*) be paid. 1992 Provisional Measures, art. 6; 1990 LAND USE REGULATIONS, art. 45; 1995 Real Estate Law, art. 39.

¹⁰⁸ The SLA intervenes in the secondary market to maintain higher price levels so that the state can obtain more revenue from the sale of land use rights in the primary market. The primary market prices have a significant influence on the secondary market because land costs account for sizable percentage of the final selling price, depending on the type of project and particular location. In Guangzhou for example, the price for land use rights constitutes 20% of the final sales price of low to middle cost housing, and was seen as adversely affecting the supply of housing. This presents the government with a dilemma and pits the SLA against the MOC. Whereas the SLA desires to maximize revenue from the sale of land use rights, the MOC wants to maximize revenues flowing from construction projects. See *Guangzhou Risks Investors' Ire by Tackling Land Costs Problem*, S. CHINA MORNING POST, Sept. 14, 1996, at 12. For a thorough discussion of the role of the state in regulating supply and demand of urban land see SURVEY OF REAL ESTATE MARKET IN CHINA, *supra* note 86, chs. 2, 3.

¹⁰⁹ 1990 LAND USE REGULATIONS, art. 26.

¹¹⁰ 1995 Real Estate Law, art. 34.

conditions.¹¹¹ Despite these changes in national law, many municipal and provincial land use regulations continue to provide local authorities with preemptive rights, and these regulations remain in effect.¹¹²

To eliminate corruption and bring order to what essentially is a futures market in housing, the MOC promulgated in late 1994 the Administration of the Pre-Sale of Urban Commodity Buildings Procedures.¹¹³ The Pre-Sale Procedures establish the terms and conditions for the pre-sale of real estate. Pre-sale transactions must be registered with and approved by the local Real Property Administration Department under the MOC.¹¹⁴ All proceeds from pre-sales must be invested in "relevant construction projects."¹¹⁵ This requirement was aimed at curtailing the common practice by construction companies of depositing pre-sale proceeds in foreign bank accounts and leaving projects unfinished.¹¹⁶

A strong state presence also is evident in the leasing market. In mid-1995 the MOC promulgated the Administration of the Leasing of Urban Premises Procedures.¹¹⁷ These Procedures detail the form and procedures for executing a lease and require all leases to be examined and approved by municipal authorities before they enter into effect. Parties to a lease pertaining to non-residential premises may negotiate freely rent and most other terms. The rental price and terms of residential premises must conform to the policies and requirements of the relevant municipal government.¹¹⁸

During the past several years, new legislation and rules have been implemented at the national level detailing the procedures for recording

¹¹¹ 1995 Real Estate Law, arts. 32-33; Liang Chao, *Laws To Put Brakes on Illegal Land Deals*, CHINA DAILY, Mar. 31, 1994, at 1.

¹¹² See, e.g., Shanghai Municipality PRC Land Administration Law Implementing Procedures, art. 31, translated in CHINA L. & PRAC., Dec. 15, 1994, at 32.

¹¹³ The Administration of the Pre-Sale of Urban Commodity Buildings Procedures, translated in CHINA L. & PRAC., Jan. 27, 1995, at 41 [hereinafter Pre-Sale Procedures].

¹¹⁴ *Id.* arts. 8-11.

¹¹⁵ *Id.* arts. 5, 11, 13(2).

¹¹⁶ Louise do Rosario, *House of Cards*, FAR E. ECON. REV., July. 14, 1994, at 54.

¹¹⁷ The Administration of the Leasing of Urban Premises Procedures, translated in CHINA L. & PRAC., Dec. 1995/Jan. 1996, at 36, [hereinafter Urban Lease Procedures]. This national piece of legislation was modeled upon the Shenzhen Special Economic Zone Premises Leasing Regulations issued in 1993 and the Guangdong Province Regulations on the Leasing of Premises in Cities and Towns issued in mid-1994.

¹¹⁸ Urban Lease Procedures, art. 7.

and determining property titles,¹¹⁹ settling land disputes,¹²⁰ and establishing security interests and mortgages.¹²¹ The legislation and rules on these matters aim to improve the protection of property interests in real property and simplify the procedures for safeguarding those interests to encourage both foreign and domestic investment. While market transactions may be facilitated by these rules, the prominent role of the state in monitoring transactions and resolving disputes is significant. Finally, in an effort to better monitor businesses engaged in urban real estate construction and sales, the Ministry of Construction promulgated the Administration of Urban Real Property Development Tentative Procedures in early 1995.¹²² These Procedures require every business engaged in the construction and sale of urban real property to be established and approved as a real property development enterprise (*fangdichan kaifa chiye*).¹²³ To obtain approval a real property development enterprise ("RPDE") must satisfy minimal capitalization

¹¹⁹ The Land Registration Rules were promulgated by the SLA and came into effect on November 18, 1989. They are reprinted in ZUXIN FANGDICHAN SHENPAN SIFA JIESHI JI XIANGGUAN FALU GUIFAN (1996), at 102. On December 28, 1995, the SLA promulgated the amended and revised Land Registration Rules, which came into effect on February 1, 1996. For a discussion of the revised Land Registration Rules see D. Clarke & N. Howson, *Developing P.R.C. Property and Real Estate Law: Revised Registration Rules*, 18 E. ASIAN EXECUTIVE REP. 4 (1996). Additionally, the Provisions for Determining Land Ownership and Land Use Rights, which were promulgated by the SLA and entered into effect on May 1, 1995 detail the principles and methods for clarifying and determining property rights in land. The Provisions are reprinted in ZUXIN FANGDICHAN SHENPAN SIFA JIESHI JI XIANGGUAN FALU GUIFAN (1996) at 135.

¹²⁰ The Provisional Measures for the Handling of Land Title Disputes were promulgated by the SLA on December 18, 1995 and entered into effect on February 1, 1996. The Measures are summarized in CHINA L. & PRAC., Nov. 1996, at 8; see also 3(8) CHINA LEGAL DEV. BULL. 18 (1996). The Measures set forth the procedures for resolving land title disputes, first through consultations, and if unsuccessful through mediation by the SLA.

¹²¹ The Security Law of the People's Republic of China, was promulgated by the NPC on June 30, 1995 and became effective on October 1, 1995. It is reprinted and translated in CHINA L. & PRAC., Aug. 11, 1995, at 21. The Security Law sets forth the basic principles and procedures by which interests in real estate may be used as collateral in securing financing. While the Security Law leaves unanswered a number of issues on mortgages of land use rights and real estate, it does establish a basic framework that has been supplemented by central government regulations and local legislation specifically addressing mortgages of urban land and attached structures. These include the Measures for the Administration of Urban Real Estate Mortgages, which were promulgated by the MOC on May 9, 1997 and became effective on June 1, 1997, and the Circular on Issues Relating to the Mortgage and Registration of Land Use Rights, which were issued by the State Land Administration on January 3, 1997 and became effective that same date. The MOC Measures are summarized in 4(6) CHINA LEG. DEV. BULL. 1 (1997). The SLA Circular is reprinted in ZHONGGUO RENMIN GONGHEGUO GUOWUYUAN GONGBAO [PRC STATE COUNCIL BULLETIN], Apr. 21, 1997, at 575.

¹²² The Administration of Urban Real Property Development Tentative Procedures [hereafter Urban Development Procedures] were promulgated on January 23, 1995 and became effective on March 1, 1995. They are reprinted and translated in CHINA L. & PRAC., Oct. 1, 1995, at 46.

¹²³ *Id.* art. 26.

standards, have a fixed place of business, and a minimum number of certified technical and business personnel.¹²⁴ The Urban Development Procedures also require RPDEs to adhere to urban land use and construction rules.¹²⁵

2. *Discouraging Idleness and Speculation*

The conversion of land into a commodity does not ensure that its productive potential will be harnessed. Owners of land use rights frequently hold land for speculative purposes, lack the capital to develop it, or may be unsure of how and when they want to develop land. This is considered neither desirable nor productive under China's urban land law regime. A survey of national and local legislation as well as central government circulars suggests that productive uses of urban land are those that result in the reclamation or improvement of land and the construction of desirable projects with "high demand," such as affordable housing, manufacturing enterprises, and infrastructure facilities.¹²⁶ The emphasis on avoiding waste and using land productively is a norm with a long history in China and continues to be expressed in national and local laws. For example, the 1982 Constitution imposes an affirmative duty on all organizations and individuals to ensure that land is used rationally, and the Land Management Law directs all levels of government to implement policies to develop and rationally use land.¹²⁷

¹²⁴ Real property development enterprises must have registered capital and working capital funds of at least 1 million RMB. They also must have at least four employees with professional certificates in real property and architectural engineering and at least two employees with accounting certificates. *Id.* Art. 28. RPDEs must be established as either a limited liability company or company limited by shares in accordance with the Company Law. *Id.* Art. 27. Article 27 also states that businesses meeting the description of real property development enterprises that are not structured according to the Company Law shall be restructured gradually in compliance with the Company Law. The Company Law of the PRC (*Zhonghua Renmin Gongheguo Gongsifa*) was adopted by the NPC in December 1993 and came into effect on July 1, 1994. It is reprinted and translated in CHINA L. FOR FOREIGN BUS., ¶13-518.

¹²⁵ Urban Development Procedures, part 2.

¹²⁶ *New Rules Tighten Control Over Real Estate Market*, Xinhua Domestic Service, Aug. 13, 1993, translated in FBIS-CHINA DAILY REP., Aug. 17, 1993, at 29-30; *Suggestions on the Control of the Real Estate Market*, Xinhua Domestic Service, Aug. 13, 1993, translated in FBIS-CHINA DAILY REP., Aug. 20, 1993, at 30-31 (digesting the contents of a document jointly issued by the Ministry of Construction, State Land Administration, State Administration for Industry and Commerce (SAIC), and the State Administration of Taxation).

¹²⁷ P.R.C. CONST., art. 10. See LAND MANAGEMENT LAW, art. 3, 4. An example of local legislation complying with the directions of the Land Management Law is the Shanghai Land Administration Law Implementing Procedures adopted by the Shanghai Municipal People's Congress on February 4, 1994 and effective on May 1, 1994, reprinted and translated in CHINA L. & PRAC., Dec. 15, 1994, at 32.

To ensure that land is not wasted or lies idle, there are provisions in several key urban land laws that allow land use rights to be withdrawn by the SLA if development is not undertaken in a timely manner or if it is abandoned. The Land Management Law stipulates that land use rights may be revoked if the land is not used for two successive years according to the approved use.¹²⁸ The 1990 Urban Land Use Right Regulations have a slightly different provision and specifies the sanctions that may be imposed. It requires the holder of a land use right to develop or utilize the land in accordance with the schedule and conditions specified in the land use right grant contract (*tudi shiyongchuan churang hetong*).¹²⁹ Failure to comply could result in punishment ranging from the issuance of a warning and imposition of a fine to loss of the land use right without compensation.¹³⁰ The 1995 Real Estate Law and the Urban Development Procedures revised this approach on discouraging land idleness. Both require development to begin within one year of the start date set forth in the granting contract, otherwise an idle land fee (*tudi xianzhi fei*) equivalent to not more than twenty percent of the original grant fee may be imposed.¹³¹ If development upon granted land does not start within two years of the start date, then the land use rights may be recovered by the state without compensation.¹³²

Land speculation has been a particularly troublesome issue for central level authorities. Speculative activities make it difficult for urban planners in the MOC to control development and urban growth, and for authorities in the SLA to control real estate prices in areas adjacent to development projects. Secondly, government authorities, particularly those at the central level, are unable to tap into the revenue from gains earned in speculative deals. Finally, speculation is an activity that is widely associated with the evils and excesses of capitalism. While talk of controlling speculation and terminating the get-rich-quick schemes of real estate developers is politically popular, the results have been less concrete. Many government and Party authorities at all levels have personal or economic interests in land deals. They receive kickbacks or share profits with construction and real estate companies that develop and sell urban properties.¹³³

¹²⁸ LAND MANAGEMENT LAW, art. 19.

¹²⁹ Granted land use rights are issued to the holder or owner of the land use rights by the local branch office of the SLA under the terms of a land use right grant contract. See 1995 Real Estate Law, art. 14.

¹³⁰ 1990 URBAN LAND USE REGULATIONS, art. 17.

¹³¹ 1995 Real Estate Law, art. 25; Urban Development Procedures, art. 12.

¹³² The idle land fee and other penalties may not be imposed if development is delayed due to force majeure, an act of the government, or requisite preliminary work. 1995 Real Estate Law, art. 25; Urban Development Procedures.

¹³³ Land Bureau Director on Real Estate Rules, Xinhua Domestic Service, July 24, 1993, translated in FBIS-CHINA DAILY REP., July 27, 1993, at 39-40.

At the 1993 National Land Conference, delegates concluded that fiscal measures should be employed to discourage land speculation and recapture lost revenues.¹³⁴ The Land VAT Regulations and accompanying implementing rules impose a progressive tax on the revenue or other consideration realized on the net gain from the assignment or resale of land use rights and other real property. The costs and expenses incurred in "land development," "construction of new buildings," and "obtaining and selling the property" are deductible.¹³⁵

The 1995 Real Estate Law also contains measures to discourage land speculation by barring assignments (i.e. sales, leases, or mortgages) of granted land until at least twenty-five percent of the total amount of investment or contracted development is completed.¹³⁶ For large tracts of land where infrastructure is to be installed, all development work agreed to in the land use grant contract must be completed fully before the land use rights may be assigned, unless the land use right grant contract or allocation document provides that development work may proceed in discrete stages.¹³⁷ Under the Urban Development Procedures, a commensurate level of funds may be invested for each particular stage of a development project according to the schedule in the grant contract or allocation document.¹³⁸ Thus, when a particular stage of a project is completed, it may be assigned.

V. ENCOURAGING AND GUIDING FOREIGN INVESTMENT¹³⁹

While the legal framework for the acquisition and transfer of land use rights was a critical step in stimulating foreign investment in urban land development and real estate construction projects, additional measures have been taken to specifically address foreign investment. The State Council Provisional

¹³⁴ According to Wang Xianjin, then Director of the SLA, the Land VAT Regulations were necessary to recapture lost revenues from illegal land dealings both on the part of local officials and real estate developers. *Land Director Announces Curbs on Speculation*, ZHONGGUO TONGXUN SHE, Mar. 25, 1993, reprinted in FBIS-CHINA DAILY REP., Mar. 26, 1993, at 65.

¹³⁵ Article 7 of the Land VAT Regulations established four rate categories depending upon the amount of added value. The terms "land development" and "construction of new buildings" are defined in detail in Article 7 of the Land VAT Implementing Rules.

¹³⁶ 1995 Real Estate Law, art. 38.

¹³⁷ See *id.*

¹³⁸ Urban Development Procedures, art. 13.

¹³⁹ There are numerous regulatory issues that are determinative of foreign investment flows, such as taxation, foreign exchange, and labor. The discussion here is limited to an overview of policies and legislation concerned primarily with investment in urban land. A full discussion of the legal framework for inducing foreign investment in China is beyond the scope of this paper. For a detailed analysis of the foreign investment legal regime in China and its successes and limitations see PITMAN POTTER, FOREIGN BUSINESS LAW IN CHINA—PAST PROGRESS AND FUTURE CHALLENGES (1995).

Regulations on the Use of Land for Construction by Sino-Foreign Joint Ventures were an early attempt to ease the way for foreign investors to develop real estate.¹⁴⁰ However, irregular and unpredictable practices coupled with ambivalent central government officials tended to frustrate rather than encourage investment in urban land development and construction during much of the 1980s. Local officials frequently used ad hoc methods in issuing and regulating land use rights, and there were claims that grant fees were determined in an arbitrary manner.

A significant turning point arrived in 1990 with the promulgation by the State Council of the Provisional Administrative Measures Governing Commercial Land Development and Management by Foreign Investors.¹⁴¹ These Measures were designed explicitly for the purpose of encouraging foreign capital to invest in and improve land sites for the construction of industrial, commercial and residential facilities, thereby boosting local economies.¹⁴² As one Chinese commentator explained, the intent of this type of law was to change the strategy of "building the nest to attract the birds" into "attracting the birds to build the nest."¹⁴³ The 1990 Commercial Land Development Measures outline the procedures by which foreigners may acquire from the state granted land use rights to large tracts of land for comprehensive development, which means: leveling, clearing and draining the land; installing utilities, transportation networks and communication facilities; and preparing sites for various types of end users.¹⁴⁴ Upon completion of the work, the land use rights to the improved land may be either held and managed by the foreign investor or assigned. Many

¹⁴⁰ The Provisional Regulations on the Use of Land for Construction by Sino-Foreign Joint Ventures were issued by the State Council in July 1980. 1 ZHONGGUO RENMIN GONGHEGUO FANGDICHAN FAGUI XUANBIAN (1979-1991) [1 COMPENDIUM OF REAL ESTATE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1991)] 30 (1992).

¹⁴¹ Waishang Touzi Kaifa Jingying Chengpian Tudi Zhanhang Guangli Banfa [The Provisional Administrative Measures Governing Commercial Land Development and Management by Foreign Investors] [hereinafter 1990 Commercial Land Development Measures] were promulgated by the State Council on May 19, 1990 and became effective that same day. They are reprinted and translated in CHINA L. FOR FOREIGN BUS., ¶14-723.

¹⁴² In keeping with other national legislation and policies, technologically advanced and exporting enterprises are encouraged to locate on the developed land. See 1990 Commercial Land Development Measures, art. 10.

¹⁴³ Jiang Yaping, *Dui Fangdichan Gaige*, RENMIN RIBAO, Nov. 6, 1992, at 2.

¹⁴⁴ See 1990 Commercial Land Development Measures, art. 2. The term "large tract of land" is not defined specifically in the Measures. However, the Measures have two separate categories for project approvals: (1) for projects of up to 1000 *mu* (1 *mu* equals 0.0667 hectares) of arable land, or 2000 *mu* of non-arable land and within the investment limit of local approval authorities; and, (2) for projects over the limits set forth in the first category. 1990 Commercial Land Development Measures, art. 3.

provincial and municipal governments have introduced their own versions of comprehensive large tract development legislation.¹⁴⁵

A similar type of legislation promulgated at the provincial and municipal levels are the procedures for the grant and assignment of land use rights in economic and technological development zones ("ETDZs"). Designed to attract export oriented and high technology firms, ETDZ legislation typically provides greater flexibility on the duration of the grant term, has streamlined procedures and conditions for the assignment of property interests, and in some cases, reduced grant fees.¹⁴⁶ ETDZ development generally has been quite successful in attracting investment.¹⁴⁷ By early 1993, ETDZ development had become so rampant in the coastal provinces that vast areas of prime agricultural land within or near urban areas had been occupied and developed. Investigations by the State Council found that many county and municipal governments, eager to draw in foreign investors, had set up ETDZs without proper authorization from higher level authorities.¹⁴⁸ In mid-1993, the State Council issued a notice calling for limitations upon ETDZ approvals and the strengthening of regulatory oversight by responsible government officials.¹⁴⁹ In 1996 and 1997, the State Council again

¹⁴⁵ See, e.g., Fujian Province Interim Regulations on Encouraging Foreign Investment In Development of and Engagement in Business Relating to Large Tracts of Land by Foreign Business Entities, promulgated and effective on May 22, 1991 by the Fujian Provincial People's Government, *reprinted and translated in* CHINA L. & PRAC., Oct. 28, 1991, at 46. These regulations were the first such types of issued at the provincial level after the 1990 Commercial Land Development Measures. For similar legislation in other provinces or cities see 1,2 ZHONGGUO RENMIN GONGHEGUO FANGDICHAN FAGUI XUANBIAN (1979-1991) [1,2 COMPENDIUM OF REAL ESTATE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1991)] (Huatie Consulting Company eds., 1992).

¹⁴⁶ See, e.g., the Guangzhou Economic and Technical Development Zone Grant and Assignment for Consideration of Leaseholds Procedures Guangzhou ETDZ Procedures promulgated by the Guangzhou Municipal People's Government on August 25, 1992 and effective on that date, *reprinted and translated in* CHINA L. & PRAC., June 3, 1993, at 33. These Procedures repealed and replaced the 1988 Guangzhou Economic and Technical Development Zone Grant and Assignment for Consideration of Leaseholds Procedures, which were the first legislation of their kind in China. Guangzhou Jingji Jishu Kaifaju Tudi Shiyongquan Youchang Churang He Zhuanrang Banfa [The 1988 Guangzhou ETDZ Procedures], *reprinted and translated in* CHINA L. FOR FOREIGN BUS., ¶85,035. For a discussion on the success of the Guangzhou ETDZ Procedures in attracting foreign investment see ANTHONY WALKER, LAND, PROPERTY AND CONSTRUCTION IN THE PEOPLE'S REPUBLIC OF CHINA, LEAVETT & BAILEY SURVEYORS STUDY 54-56 (1991).

¹⁴⁷ See Zhao Wen, *Investors Plunging into PRC Real Estate*, ZHONGGUO TONGXUN SHE, Nov. 8, 1992, *translated in* FBIS-CHINA DAILY REP., Nov. 25, 1992, at 52 (detailing the extent of investment by Taiwan investors throughout China).

¹⁴⁸ *Development Areas Under Strict Examination*, CHINA ECON. NEWS, May 31, 1993, at 2.

¹⁴⁹ In mid-1993, Guangdong provincial officials determined to cease issuing permits for development zone projects. Similar decisions were made by other coastal provincial governments at the request of the State Council. See Chun Wen-i, *Over 100 Development Zones Abolished or Merged to Restore Farmland*, WEN WEI PO, May 27, 1993, at 2, *translated in* FBIS-CHINA DAILY REP., June 3, 1993, at 40; Jiang Jun, *Coastal Areas Cut Development Zones by Over 75 Percent*, Xinhua Domestic Service, Aug. 11, 1993, *translated in* FBIS-CHINA DAILY REP., Aug. 23, 1993, at 41.

ordered provincial governments to limit approvals for the development of ETDZs.¹⁵⁰

A tension exists between providing inducements to investors in the form of decreased taxes and fees while simultaneously maximizing revenue flows to the government and avoiding an overheated economy. This tension tends to unravel in a series of repetitive cycles.¹⁵¹ Investment activity rises following the implementation of legislation and policies containing incentives for investors, but then contracts after officials impose measures to control the economy or levy new fees.¹⁵² In the early 1990s, the State Council targeted property developers with incentive packages including reduced tax rates and land use fees.¹⁵³ Funds poured into urban land development projects, but by 1993 slowed as the central government ordered compliance with the austerity program designed by then Vice Premier Zhu Rongji.¹⁵⁴ Local governments, strapped for cash, levied numerous fees on investors. In Shanghai, for example, government departments in 1995 levied nearly one hundred types of fees on real estate developers.¹⁵⁵ In 1997 the Ministry of Construction, in an attempt to draw in higher levels of foreign investment, called for the elimination of nearly fifty types of fee collections on property development projects.¹⁵⁶

¹⁵⁰ *Fujian Province Campaigns to Tighten Use of Arable Land*, Xinhua Domestic Service, May 27, 1997, translated in BBC SUMMARY OF WORLD BROADCASTS, Part 3-Asia Pacific; China, Agriculture; FE/W0489/WG.

¹⁵¹ See, e.g., Patrick Tyler, *China Ends Austerity Drive in Favor of Yet More Growth*, NEW YORK TIMES, Nov. 23, 1993, at 1; Carl Goldstein, *Growth at Any Cost*, FAR E. ECON. REV., Nov. 25, 1993, at 16 (describing how austerity measures imposed six months earlier were scrapped and efforts being made to increase investment and accelerate development).

¹⁵² One of the earlier and more noteworthy pieces of national legislation that provided foreign investors with preferential treatment in this regard was the 1986 State Council Provisions for the Encouragement of Foreign Investment, commonly known as the "22 Articles." Although not implemented for land developers, the 22 Articles promised to stabilize and reduce land use fees for foreign invested export oriented or high technology enterprises. This and other incentives offered in the 22 Articles helped to bring about an increase in foreign investment and urban development for several years. The Provisions for the Encouragement of Foreign Investment are reprinted and translated in CHINA L. FOR FOREIGN BUS., ¶13-509.

¹⁵³ *Circular on Real Estate Development Released*, Xinhua Domestic Service, Nov. 22, 1992, translated in FBIS-CHINA DAILY REP., Nov. 25, 1992, at 29. The State Council circular called for the development of urban land and real estate at a faster pace in order to expedite urban construction and economic development. To achieve this objective local governments were directed to rationally assess land prices to improve land utilization rates. However, the incentives and preferential treatment offered to foreign investors undertaking urban land development projects could not exceed the limits imposed by central authorities. See also Wang Yong, *China on Brink of Real Estate Boom*, CHINA DAILY, Aug. 28, 1992, at 2.

¹⁵⁴ See *id.*; Ma Chenguang, *NPC Bill to Cool Down Land Deals in Big Cities*, CHINA DAILY, June 29, 1994, at 1.

¹⁵⁵ The fees increased construction and delivery costs by approximately 33%. See *China: Excessive Fees Pique Many Local Land Developers*, SHANGHAI STAR, Oct. 17, 1995, at 4.

¹⁵⁶ *Profile—China's Real Estate Industry*, ASIA PULSE, Mar. 21, 1997, available in LEXIS, AllAsia Newsfile.

Foreign capital has played an important, yet not dominant, role in China's real estate and property development industry.¹⁵⁷ By the mid-1990s, approximately one quarter of the 20,000 registered property development enterprises were foreign invested.¹⁵⁸ The amount of foreign funds invested in urban land development projects fluctuates from year to year. However, the proportion of foreign investment in the nation's real estate sector relative to domestic investment rose through the late 1980s, but has held steady through most of the 1990s.¹⁵⁹ In 1992, approximately US \$710 million was invested in the urban land development and real estate construction sector, which constituted one quarter of the total amount of funds invested in this sector.¹⁶⁰ In 1994, approximately US \$4 billion of foreign funds flowed into urban land development projects, which again represented nearly one quarter of all investment in the urban land development and real estate construction sector.¹⁶¹ The amount of foreign funds invested in urban land development and real estate relative to all other foreign invested projects rose significantly from the mid-1980s to mid-1990s.¹⁶² However, the distribution of land development and real estate construction projects with foreign investment is uneven and concentrated in a relatively small number of urban centers.¹⁶³

¹⁵⁷ Total foreign investment in real estate in 1992 was two to three times higher than the aggregate levels for the five year period from 1987-1991. See *Real Estate Continues to Heat Up*, CHINA ECON. NEWS, Dec. 7, 1992, at 6; *Real Estate Sector Appeals to Overseas Developers*, Xinhua Domestic Service, June 5, 1996, available in LEXIS, AllAsia Newsfile. The origin of funds characterized as foreign invested is a difficult but important issue. Due to the special incentives and tax advantages available to foreign invested enterprises, many firms in China establish offshore investment vehicles that recycle money back into China under the rubric of a "foreign enterprise." According to World Bank guestimates up to one quarter of all foreign capital flowing into China in 1992 may have originated from China and passed through such offshore vehicles. Thus, the actual figures on foreign capital invested in China must be discounted bearing this factor in mind. See PETER HARROLD & RAJIV LALL, WORLD BANK DISCUSSION PAPER NO. 215, CHINA, REFORM AND DEVELOPMENT IN 1992-93, 24 (1993).

¹⁵⁸ *Real Estate Business Lures Foreign Developers*, CHINA DAILY, June 6, 1996, at 1; ZHONGGUO FANGDICHAN SHICHANG GAILUN [SURVEY OF REAL ESTATE MARKET IN CHINA] 255-56 (Song Chunhua ed., 1995).

¹⁵⁹ See *Real Estate Business Lures Foreign Developers*, supra note 158.

¹⁶⁰ This also represented approximately 6.2% of all foreign investment funds actually committed in China for 1992. See *id.*; Yang Yingshi, *Rulings Stabilize Property Markets*, CHINA DAILY, June 27, 1995. See also ZHONGHUA RENMIN GONGHEGUO DUIWAI JINGJI MAOYIBU XINWEN [BULLETIN OF THE PRC MINISTRY OF FOREIGN TRADE AND ECONOMIC RELATIONS] 10 (Apr. 25, 1994).

¹⁶¹ ZHONGGUO FANGDICHAN SHICHANG GAILUN [SURVEY OF REAL ESTATE MARKET IN CHINA] 256 (Song Chunhua ed., 1995).

¹⁶² In 1992, four percent of all foreign investment was in urban real estate, by 1996 this figure rose to ten percent. *Real Estate Business Lures Foreign Developers*, CHINA DAILY, June 6, 1996, at 1.

¹⁶³ See Ren Kan, *Investors Fuel Real Estate Fire in Fujian*, CHINA DAILY, Oct. 2, 1992, at 2; Jesse Wong, *China's Residential Real Estate Market Booms*, ASIAN WALL ST. J. WKLY., Feb. 17, 1992, at 2; *Guangzhou Real Estate Attracts Foreign Investment*, Xinhua Domestic Service, June 20, 1992, translated in FBIS-CHINA DAILY REP., June 22, 1992, at 34. For reports on Beijing and Shanghai respectively, see

The issue of what role foreign capital ought to play in urban land development is far from settled. While few central or local officials are wholly opposed to foreign investment, most agree that it needs to be limited and properly channeled.¹⁶⁴ The reasons for restricting foreign capital are more often motivated by protectionism than concerns over dependency. For example, some officials in the Ministry of Construction have stated that they would like to curtail the activities of foreign RPDEs so that domestic firms could increase their lead in the real estate industry.¹⁶⁵ Others want to see foreign capital used primarily in land development projects that would result in either the transfer of advanced foreign design know-how and construction technology, or aid in solving the nation's urban housing crisis.

In early 1992, central authorities began demanding local authorities to place strict limits on the construction of buildings with "limited market potential," such as luxury villas and apartments, high class hotels and commercial office buildings, many of which had high vacancy rates.¹⁶⁶ These types of projects were criticized as being non-productive, consumption oriented, lacking overall market value, and of little benefit for national development. They also urged that efforts be made to direct foreign capital into housing and urban renewal projects. In late 1992, the State Council issued a Notice calling for local officials to provide guidance to foreign investors and link the granting of land use rights to projects encouraged by the state.¹⁶⁷ This was followed in mid-1993 by an MOC announcement calling upon all commercial real estate developers to devote at

Lincoln Kaye, *Prolonging the Agony*, FAR E. ECON. REV., Apr. 30, 1992, at 40; Richard Pomfret, *The Road to Reality*, CHINA TRADE REP., Mar. 1992, at 5.

¹⁶⁴ The rapid rise in the total amount of foreign investment in real estate periodically has sparked calls to reduce the extent and influence of foreign capital in China's urban land markets. See Wu Jincal, *Invigorate the Land*, Xinhua Domestic Service, Sept. 5, 1992, translated in FBIS-CHINA DAILY REP., Sept. 9, 1992, at 41.

¹⁶⁵ *Id.*; see also Ta Tan-hui, *China Will Continue to Expand Real Estate Business*, WEN WEI PO, Aug. 25, 1993, at 2, translated in FBIS-CHINA DAILY REP., Aug. 26, 1993, at 43 (reporting that Bao Zonghua, director of the State Construction Ministry Policy Research Center, said that while foreign investors should be encouraged to aid in the development of urban real estate, their role should be limited to large scale projects). See also *Minister of Construction Speaks on Ways to Accelerate Development of Real Estate Industry*, CHING CHI TAO PAO, Oct. 26, 1992, at 4, translated in FBIS-CHINA DAILY REP., Nov. 24, 1992, at 35 (wherein Construction Minister Hou Jie stated that foreign investment should be involved mainly in the construction of high class or difficult real estate projects or housing that is sold to overseas buyers).

¹⁶⁶ For example, at a national conference in 1992 Zou Jiahua, then Vice Premier, advocated channeling foreign capital into moderate and low income housing projects. See *Zou Jiahua on Housing, Real Estate Reform*, Xinhua Domestic Service, translated in FBIS-CHINA DAILY REP., Aug. 19, 1992, at 34. See also *New Regulations for Real Estate Development*, CHINA ECON. NEWS, No. 47, Dec. 7, 1992, at 2.

¹⁶⁷ See Guanyu fajan fangdichanye ruogan wenti de tungzhi [Notice on Several Issues Concerning the Real Estate Industry] issued by the State Council on Nov. 4, 1992, reprinted in ZUIXIN FANGDICHAN SHENPAN SIFA JIESHI JI XIANGGUAN FALU GUIFAN 245 (1996). A summary of the Notice appears in *Circular on Real Estate Development Released*, Xinhua Domestic Service, Nov. 22, 1992, translated in FBIS-CHINA DAILY REP., Nov. 25, 1992, at 29.

least twenty percent of their annual development budgets for the construction of standard housing, and a joint policy declaration issued by the MOC, SLA, State Tax Administration and the State Administration of Industry and Commerce requiring at least twenty percent of the land area used in commodity housing (*shangpinfang*) to be reserved for the construction of "low profit residential housing" (*weili jumin zhuzhai*).¹⁶⁸ These approaches to solving the shortage of urban housing soon were modified out of concerns that investors would be driven away.

What has evolved over the past few years is a policy and legal framework that provides incentives for investors to construct residential housing, while limiting those projects that do not advance the economic development goals of the country. Thus, the 1995 Real Estate Law calls for the state to adopt preferential tax and other measures to encourage and support real estate development enterprises to develop and build residential buildings.¹⁶⁹ In mid-1995, the State Council issued a Notice on the Strict Control of Luxury Real Estate Development Projects, calling for foreign investment to be directed towards the renovation of older areas within cities and ordinary housing projects.¹⁷⁰ Furthermore, that Notice requires all foreign invested real estate projects involving more than US \$30 million to be examined and approved by the State Planning Commission, while projects in excess of US \$100 million must be approved by the State Council. As an incentive to increase the stock of "ordinary, standard residential buildings" (*putong, biaozhun zhuzhai*) as opposed to "high class apartments," "villas," or "resorts," the Land VAT Regulations exempt from taxation the amount realized on the "construction and sale of ordinary standard residential buildings" where the added value realized does not exceed twenty percent after the deduction of expenses.¹⁷¹ At the local level there

¹⁶⁸ Li Hong, *Nationwide Crackdown Boost for New Homes*, CHINA DAILY, July 31, 1993, at 4; Guanyu jiachang fangdichan shichang hungguan gauanli zujin fangdichanye jiankang chixu fajan de yijian [Opinion Concerning the Strengthening the Macro Management of the Real Estate Market and Advancing the Health and Sustainability Real Estate Industry Development], issued on Aug. 10, 1993, sec. 6, reprinted in ZUXIN FANGDICHAN SHENPAN SIFA JIESHI JI XIANGGUAN FALU GUIFAN 251 (1996).

¹⁶⁹ 1995 Real Estate Law, art. 28. Article 4 of the 1995 Real Estate Law requires the state to "support the construction of residential houses to gradually improve the living conditions of local residents."

¹⁷⁰ CHINA L. & PRAC., Aug. 11, 1995, at 10-11.

¹⁷¹ Land VAT Regulations, art. 8. Article 11 of the Land VAT Implementing Rules attempts to define the term "ordinary standard residential buildings," but ultimately provides higher level officials (provincial or centrally administered municipality level or higher) with the discretion to differentiate between luxury and ordinary housing.

is also legislation providing foreign investors with incentives to construct ordinary housing and improve urban neighborhoods.¹⁷²

VI. PLANNING LAND USES FOR MODERN CITIES

In the late 1970s and early 1980s, the State Council and State Planning Commission determined that the urban land planning system had to be reformed if the nation's cities were to contribute effectively to the national economic development effort.¹⁷³ As a result, city mayors were given responsibilities for overseeing land use planning; laws were introduced establishing a basic organizational framework; urban planning professionals, many who were castigated during the Cultural Revolution, were politically rehabilitated; and the scope of urban planning was broadened, thereby replacing the narrow focus on industrial location which had been the pre-occupation of a generation of economic planners. From the mid-1980s onward, urban planners and municipal officials urged that the nation's cities had to be restructured if China was to compete successfully in the international economy. They recommended relocating manufacturing and warehouse facilities to the urban fringes, reconfiguring central business districts, upgrading infrastructure systems, and separating residential areas from commercial and industrial districts.¹⁷⁴ Similar

¹⁷² Shanghai has led the way in implementing legislation and has reaped considerable benefits. Particularly noteworthy is the *Shanghaishi waizi neixiao pingjia zhuzhai fajan shougou guanli banfa* [Shanghai Municipality Procedures for the Administration of the Development and Purchase of Low Cost Residential Housing Built with Foreign Capital for the Domestic Market] promulgated by the Shanghai People's Government on August 30, 1995 and reprinted in *SHANGHAISHI FANGDICAHN KAIFA JINGYING SHIYONG FAGUI* [Practical Laws and Regulations for Shanghai City Real Estate Development and Management] 108 (1995). These procedures detail the way in which foreign capital should be used in acquiring land use rights, compensating and resettling residents, construction requirements, and the purchase and sale of low cost housing. The annual return on funds invested from offshore can not exceed 15%. For a discussion of the development and implementation of Shanghai's low cost housing policy, see Shi Geng, *Shanghai Encourages Foreign Investors to Build Houses for Domestic Sales*, *CHINA ECON. NEWS*, Mar. 28, 1994, at 3; *Shanghai Opens Housing Development to Foreigners*, *Xinhua Domestic Service*, Jan. 31, 1994, translated in *FBIS-CHINA DAILY REP.*, Feb. 1, 1994, at 49; *Shanghai Urges Foreign Investment in Housing Projects*, *Xinhua Domestic Service*, Mar. 8, 1994, translated in *FBIS-CHINA DAILY REP.*, Mar. 11, 1994, at 60. On the accomplishments of land development and urban construction see *SHANGHAISHI WAI GUO TOUZI GONGZUO WEIYUANHUI* [SHANGHAI CITY FOREIGN INVESTMENT WORKING COMMITTEE], *SHANGHAH TOUZI ZHINAN 1997* [1997 Shanghai Investment Guidebook].

¹⁷³ In 1978, the State Council organized the Third National Urban Working Conference, and in 1980, the State Planning Commission organized the Urban Planning Conference, both of which addressed the role of municipal governments in promoting economic and social development through controlled urban growth.

¹⁷⁴ See Yang Zhongguang, *Chengshi tudi shiyong shidu de guoji bijiao* [An International Comparison of Urban Land Use Systems], in *ZHONGGUO CHENGSHI TUDI SHIYONG YU GUANLI* [URBAN LAND USE AND MANAGEMENT IN CHINA] 1-47 (Chinese Academy of Social Sciences, Institute of Finance and Trade Economics et al. eds., 1994). Officials in Shanghai have been highly active in promoting their city as world class

conclusions and recommendations were reached by the World Bank. According to the World Bank's published report, globally competitive cities in the next century will require "vibrant producers' service sectors," and the transformation of China's urban land use patterns to a knowledge-based economy will "require an accompanying unprecedented revolution in urban land management."¹⁷⁵ To achieve this, the World Bank recommended a series of economic and legal reforms echoing the prescriptions of the law and development movement two decades earlier.¹⁷⁶ To date the restructuring of the urban land planning regime has emphasized a mix of central planning and market measures. The use of law as a tool to bring order to guide land utilization and implement urban plans is widely regarded as critical for the development of modern cities.¹⁷⁷ What follows is an overview of the formal legal framework, and a discussion of some aspects of its operation.

A. *The Formal Legal Framework for Urban Planning*

The Land Management Law, Urban Planning Law,¹⁷⁸ and 1995 Real Estate Law establish an integrated urban planning legal framework that aims to modernize cities, coordinate urban land uses, and regulate the growth of urban areas. To achieve these objectives, these national laws attempt to control the amount of land available for urban development and expansion¹⁷⁹

metropolis. An enormous amount of construction has changed the city over the past decade. Numerous sprawling and polluting manufacturing facilities have been moved out of the city center, 18 economic and technological zones have been established, service oriented industries have been concentrated special core areas of the city, most notably in Pudong, and much progress has been made on improving the stock of housing. See Shi Geng, *Shanghai Encourages Foreign Investors to Build Houses for Domestic Sales*, 12 CHINA ECON. NEWS 3 (Mar. 28, 1994) (describing efforts being made by city officials to build Shanghai into an international metropolis of world standards). See also Pamela Yatsko, *Future Shock: Shanghai Remakes Itself as Workers Search for a Role*, FAR E. ECON. REV., Aug. 29, 1996, at 58.

¹⁷⁵ WORLD BANK, CHINA: URBAN LAND MANAGEMENT IN AN EMERGING MARKET ECONOMY, xiii (1993).

¹⁷⁶ The World Bank report emphasizes the use of free markets and stresses the need for the legal system to recognize and enforce property rights. See *id.* ch. 1, 2.

¹⁷⁷ See NPC Studies *Legal Management of Real Estate*, Xinhua Domestic Service, May 9, 1994, translated in FBIS CHINA DAILY REP., May 10, 1994, at 36; Doje Cering, *Thoughts on Actively Developing Small Cities and Towns*, Renmin Ribao, Aug. 4, 1993, at 5, translated in FBIS-CHINA DAILY REP., Aug. 13, 1993, at 13; Ta Tan-hui, *China Will Continue to Expand Real Estate Business*, WEN WEI PO, Aug. 25, 1993 at 2, translated in FBIS-CHINA DAILY REP., Aug. 26, 1993, at 43; Jiang Yaping, *Land Bureau Director on Real Estate Rules*, Xinhua Domestic Service, July 24, 1993, translated in FBIS-CHINA DAILY REP., July 27, 1993, at 39.

¹⁷⁸ The Urban Planning Law of the PRC, was promulgated by the NPC in December 1989 and became effective on April 1, 1990. It is translated in CHINA L. FOR FOREIGN BUS., ¶14-535(4).

¹⁷⁹ The currently defined areas of cities often contain a substantial amount of agricultural land. Article 4 of the Urban Planning Law defines the meaning of small, medium and large scale cities based on the size of the non-agriculturally employed population residing within the legal boundaries of the city. *Id.* For more on the

and the way in which particular parcels of land are used. The legal framework evidences the legacy of central economic planning institutions, where the current urban planning regime originated from. In particular, the legal framework is premised on the belief that plans based primarily upon the interests and instructions of central authorities will be closely adhered to by municipal authorities.

1. *The Detailed and Overall City Plans*

All municipal governments are required to formulate two types of urban plans that "scientifically forecast local needs."¹⁸⁰ The detailed city plan (*chengshi xiangxi guihua*) addresses building height, density limits, construction standards, and the particulars of specific proposed development projects, including floor area plans.¹⁸¹ The overall city plan (*chengshi zongti guihua*) addresses matters such as zoning, land use layout, construction standards, transportation systems and green space.¹⁸² The overall city plan must be coordinated with several other land management plans that have been approved by higher level authorities. These are the national land plan (*guotu guihua*), regional plan (*quyu*), waterway and lowland plan (*jianghe liuyu guihua*) and the overall land utilization plan (*tudi liyong zongti guihua*).¹⁸³ The overall city plan must be submitted to higher level authorities for approval, thereafter the detailed city plan may be submitted to the municipal people's government for approval.¹⁸⁴ Upon approval of the overall and detailed city plans, all land within a municipality must be used according to the contents and requirements of the approved overall and detailed urban plans. Overall urban plans are supposed to have a term of approximately ten to twenty years, while detailed urban plans often are revised every several years.¹⁸⁵ In addition to these national urban planning law provisions, there

amount of agricultural land contained within cities and the size of urban populations employed in agricultural production. Anthony Gar-On Yeh & Xu Xueqiang, *Changes in City Size and Regional Distribution, 1953-1986*, in CHINESE URBAN REFORM—WHAT MODEL NOW? 49 (R. Yin-Wang Kwok, et al. eds., 1990)

¹⁸⁰ Urban Planning Law, art 13.

¹⁸¹ *Id.* art. 20.

¹⁸² *Id.* art. 19; see also *Some Problems in the Present Practice of City Planning*, 5(4) CHINA CITY PLAN. REV. 8 (1989).

¹⁸³ Urban Planning Law, art. 7. The SPC is responsible for preparing the national land plan and the waterway and lowland plan from the central to county levels. The MOC is responsible for preparing the regional plan from the central to county levels.

¹⁸⁴ *Id.* art. 21.

¹⁸⁵ Article 22 of the Urban Planning Law permits plans to be amended partially in light of the requirements of economic and social development. Amendments that involve significant changes to the overall layout of the city must be inspected and approved by the relevant people's congress or its standing committee.

may be locally promulgated rules detailing urban planning procedures and requirements. While many medium and small sized municipalities have little land use legislation, most major cities do.¹⁸⁶

2. *Land Utilization Plans*

China's current urbanization policy seeks to minimize the growth of large urban areas and facilitate the "appropriate development" of medium and small cities.¹⁸⁷ There are two planning systems that operate to help secure this objective. The overall land utilization plans are employed to balance agricultural and non-agricultural land uses and serve to guide the course and direction of urban development on a larger scale. The "land use grant plans" (*tudi shiyong churang jihua*) are more of a micro-management tool, which serve to monitor specific land development and construction projects within a municipality or county.

The Land Management Law directs each level of government to prepare an overall land utilization plan, which must be approved by the next higher level of government before being implemented.¹⁸⁸ The SLA is required to prepare the overall land utilization plan at the national level and plays a key role at lower levels of government.¹⁸⁹ The SLA tends to take a conservative approach towards urban development and favors restricting the conversion of agricultural land to urban uses. This is because the SLA is partly responsible for ensuring that there are sufficient amounts of arable land available to satisfy the food requirements of the nation.¹⁹⁰ Therefore, from

¹⁸⁶ Beijing, Guangzhou, Shanghai and the Special Economic Zone of Shenzhen have the most developed body of law on urban planning and land use. See *Some Problems in the Present Practice of City Planning*, 5(4) CHINA CITY PLANNING REVIEW 8 (1989). The leading urban planning procedures and rules of Shanghai are reprinted in SHANGHAISHI FANGDICAHN KAIFA JINGYING SHIYONG FAGUI [PRACTICAL LAWS AND REGULATIONS FOR SHANGHAI CITY REAL ESTATE DEVELOPMENT AND MANAGEMENT] 122-69 (1995). For the planning procedures of Shenzhen see SHENZHENSHI GUIHUA GUOTUJU YIFA XINGZHENG SHOUCHE [LEGAL ADMINISTRATION HANDBOOK OF SHENZHEN CITY URBAN PLANNING AND STATE LAND ADMINISTRATION BUREAU] (1996). The urban land use legislation of Shenzhen and Shanghai serve as models for a growing number of small and medium sized cities. One of these is Zhongshan, which has developed a sizable body of law on urban planning based primarily on legislation from nearby Shenzhen. See ZHONGSHANSHI CHENGSHI GUIHUA GAUNLI WENJIAN HUIBIAN [COMPILED URBAN PLANNING ADMINISTRATION DOCUMENTS OF ZHONGSHAN CITY] (1995).

¹⁸⁷ Urban Planning Law, art. 4; KAM WING CHAN, *supra* note 35, at ch. 4.

¹⁸⁸ LAND MANAGEMENT LAW, art. 15.

¹⁸⁹ The State Council approves the SLA's national overall land utilization plan. Implementing Rules of the LAND MANAGEMENT LAW, promulgated by the State Council on January 4, 1991 and entered into effect on February 1, 1991, art. 12, reprinted and translated in CHINA L. FOR FOREIGN BUS., ¶14-717.

¹⁹⁰ The SLA frequently clashes with the MOC, which generally has a pro-development perspective, over urban land planning issues. The two government units have had an ongoing bureaucratic turf battle,

the perspective of national level SLA authorities, the overall land utilization plans are to be prepared in such a way as to conserve supplies of arable land, maximize agricultural output and ensure the proper development of non-arable land.¹⁹¹ The standards and policy objectives established by the SLA in the national overall land utilization plan are supposed to be incorporated into the overall land utilization plans prepared by lower level governments.¹⁹²

Each year provincial level governments and the State Council establish quotas on the amount of land use rights that may be granted out by each municipal government. To demonstrate their compliance with their stipulated quota, municipal governments must prepare land use right grant plans informing provincial or higher level authorities of the total area of the specific parcels of land that will be granted out.¹⁹³ The municipal or county level offices of the SLA and MOC jointly determine the conditions and terms upon which each parcel of land within each municipality may be granted out. In the absence of approval from higher level authorities, municipal governments may not grant land use rights.¹⁹⁴ The land use right grant plan also is included in the "annual land use plan for construction" (*niandu jianshe yongdi jihua*), which is submitted to the SPC and made a part of the "national economic and social development plans" (*guomin jingji he shehui fajan jihua*). This arrangement is designed to allow higher level authorities to monitor and regulate the pace of urban construction and the amount of land consumed for urban development.

Much undeveloped land at the urban fringe or in suburban areas is frequently owned by collectives, not the state. Collective owned land is consumed as urban areas expand. In the event collective owned land is

which the State Council has been unable to resolve. Article 6 of the 1995 Real Estate Law calls upon the SLA and Ministry of Construction to "each attend to their own duties and closely coordinate and handle real property administration work throughout the country in accordance with the division of functions and powers specified by the State Council."

¹⁹¹ See JIBEN NONGTIAN BAOHU TIAOLI SHIYI [AN INTERPRETATION OF FUNDAMENTAL AGRICULTURAL LAND PROTECTION REGULATIONS] 1-17 (State Council Legal System Bureau, et al. eds., 1994); TUDI GUANLI ZHONGDE XINGZHENG SUSONG [THE ADMINISTRATION OF LAWSUITS IN LAND MANAGEMENT] 9-15 (Ge Hengmei, et al. eds., 1992).

¹⁹² In this regard, the formal urban planning process tends to be a top-down exercise, whereby local authorities are to comply with higher level stipulations. This is in contrast to the urban planning process in countries without a legacy of central planning. For example, in the United States, municipal planning tends to be more of a grassroots issue, where municipal planning authorities respond to the interests of local industries and businesses, landowners and taxpayers. See RUTHERFORD PLATT, *LAND USE AND SOCIETY—GEOGRAPHY, LAW AND PUBLIC POLICY* 234 (1996).

¹⁹³ 1995 Real Estate Law, art. 9. These plans are prepared by the municipal government, including the local departments of urban planning, real estate administration, and construction.

¹⁹⁴ *Id.* art. 10.

required for urban construction, permission must be obtained from the municipal or county government branch of the SLA to requisition and convert collective owned land to state owned land.¹⁹⁵ In determining whether to approve a requisition and conversion request, the SLA will consider whether there are adequate supplies of arable land for local food needs and if the construction project will have a net socio-economic benefit for the surrounding area. When more than 1000 *mu* of arable land or 2000 *mu* of non-arable land is involved, then approval must also be obtained from the State Council.¹⁹⁶ Along with other local government offices, the SLA also may be involved in ensuring that the land developer pays the requisite compensation and resettlement fees to displaced residents of the collective and that the applicant has satisfactorily taken steps to find new employment for affected agricultural workers.¹⁹⁷

3. *Implementation of Urban Land Plans*

All urban land use rights granted out by municipal authorities must comply with the provisions of the overall and detailed urban plans, the overall land use plan, and the annual construction land use plan.¹⁹⁸ When a developer or investor, typically a RPDE, approaches a municipal government to obtain land use rights or permission to use land for construction purposes it will be directed to prepare and submit a "proposal on construction requirements for real property development project" (*fangdichan kaifa xiangmu jianshe tiaojian yijianshu*). This proposal must detail all aspects of the construction project including land and infrastructure requirements, building design and the construction schedule. If the proposal is approved, the RPDE will enter into a "land use right grant contract" (*tudi shiyongchuan churang hetong*) with the local SLA office or the municipal government.¹⁹⁹ In addition the RPDE must obtain a "planning permit for land to be used in

¹⁹⁵ *Id.* art. 8; LAND MANAGEMENT LAW, art. 6. The application of the developer must contain approvals for the proposed construction in accordance with the annual land used for construction plans. LAND MANAGEMENT LAW, art. 18.

¹⁹⁶ LAND MANAGEMENT LAW, art. 25; Implementing Rules of the LAND MANAGEMENT LAW, art. 21.

¹⁹⁷ LAND MANAGEMENT LAW, art. 27-32.

¹⁹⁸ 1995 Real Estate Law, art. 9.

¹⁹⁹ The land use contract obliges the RPDE to comply with the details set forth in its proposal on construction requirements for real property development project. Urban Development Procedures, art. 6. In addition the land use contract contains the terms and conditions for the sale and purchase of land use rights. 1995 Real Estate Law, art. 14.

construction" (*jianshe tudi guihua xukezheng*),²⁰⁰ and a "construction project planning permit" (*jianshe gongcheng guihua xukezheng*).²⁰¹ After obtaining these permits and entering into the land use contract, the RPDE may begin construction work. Upon completion of a construction project, a final inspection is made to determine whether the RPDE has complied with all applicable land use and planning regulations and fulfilled the terms of the land use contract. If the RPDE does not obtain final inspection approval, it may not transfer any interest in the land or construction project.²⁰²

B. *Urban Planning and Development in Practice*

The formal legal framework provides the state with a significant degree of authority to plan urban land uses. However, in practice the central government has not obtained the desired planning and orderly uses of urban land that the formal law seemingly provides. One reason for this is that the interests and objectives of central government officials differ significantly from those of local authorities. This has made it difficult for central authorities to secure the cooperation of local officials and obtain proper enforcement of the formal legal framework.

Central level planning authorities are interested in city and land use plans based on accurate local data. They want to more effectively coordinate urban growth and land use within a broader region. From the perspective of central authorities, urban land planning should ensure that there are sufficient amounts of agricultural land available to supply food to urban centers, and that there are adequate infrastructure facilities for industrial, commercial and residential facilities. Cities with industrial or commercial facilities that succeed in generating new jobs may be allowed to expand and convert agricultural land to urban uses. Those that have succeeded in attracting foreign investment may be allowed to convert agricultural land to urban uses and establish ET Dzs or similar types of preferential zones. The formal legal framework is premised upon coordination and cooperation among urban areas. Yet the reality of the economic reform era is that cities and districts within cities are engaged in fierce

²⁰⁰ The urban planning department under the MOC issues the planning permit for land to be used in construction after verifying the location and boundaries of the land where the construction project is to be built. Urban Planning Law, art. 31; Urban Development Procedures, art. 9.

²⁰¹ The construction project planning permit is issued by the urban planning department under the MOC after it verifies and approves that the proposed construction project complies with all design and construction requirements and the provisions of the detailed city plan. Urban Planning Law, art. 32; Urban Development Procedures, art. 9.

²⁰² Urban Development Procedures, art. 16.

competition to have domestic and foreign enterprises locate within their boundaries and to be connected to or supplied with infrastructure, systems such as transport networks, power lines and water supplies.

Municipal Party chairs and city mayors pursue their own set of objectives, which coincide little with those of central authorities. Local officials frequently manipulate information fed to higher authorities and tailor the content of city and land use plans to advance their particular economic development and political strategies.²⁰³ The factual information set forth in the overall city plans may be intentionally misleading or erroneous. Figures on the amount of agricultural and urban land are reduced in order to prevent higher level authorities from properly calculating the actual amount of revenue earned from taxes and land use grants. Agricultural yields might be adjusted upward or industrial expansion and employment rates exaggerated to justify, or obtain permission for, conversion of arable land to urban uses. From the perspective of municipal authorities urban planning is about promoting local development, facilitating job growth and increasing the status of their city vis-à-vis other political units. Increased status of a city confers greater administrative authority upon local officials, thus freeing them from some of the restrictions and demands imposed by higher level authorities. As a city expands, so too does the political power base of municipal Party secretaries and city mayors. Thus, for many local authorities urban planning is not about controlling growth and land uses, but merely about growing as rapidly as possible.

Local level urban planning also is significantly more political, and less scientific than called for under the Urban Planning Law. Each municipal Party chair typically assembles a small committee, known as a "small leadership group" (*lingdaoxiaozu*) composed of officials from an array of commissions and local offices.²⁰⁴ The small leadership group discusses and negotiates a broad range issues such as where particular industries are to be situated, what land is to be utilized for agricultural needs, and the requirements and location of infrastructure (roads, power, water, sewer, etc.) While technical planning factors, such as environmental conditions or proximity to conflicting uses are addressed, these often are not overriding considerations. Commercial or political interests typically prevail.²⁰⁵ As many frustrated professionals in MOC urban

²⁰³ Interviews with urban planning officials, in Chengdu, Shanghai and Guangzhou (July & Aug. 1997).

²⁰⁴ Typically the small leadership group is composed of one or two representatives from the SLA, SPC, MOC, Environmental Protection Commission, Administration of Industry and Commerce Commission, Transportation Commission, Finance Commission and Agriculture Commission. In some cases the Military Commission or Public Security Bureau will send a representative.

²⁰⁵ Interview with urban planning official, in Chengdu (Aug. 1997). In one case, the urban planning department had determined that heavy industry should be situated in the southeastern portion of the city

planning departments across China will admit, their technical recommendations often are not followed. Rather, they receive instructions from the small leadership group on how the overall and detailed city plans should be prepared. Afterwards the city plans receive an unofficial approval by the municipal Party secretary, and sometimes the mayor, and are sent upward for approval as required by the Urban Planning Law. In most locales city plans change within a few years, whenever a new municipal Party secretary takes office or other political conditions change.

Municipal officials also exercise a high degree of discretion in enforcing city and land use plans. Investors and developers, both domestic and foreign, will negotiate with municipal officials over such issues as project location, site layout and building design. Beyond the application and permitting stage, compliance with the urban plans is more problematic. Once construction begins, either on a project that has properly obtained all necessary permits or one that has not, enforcement often is a politically charged affair. After obtaining information from an enforcement committee, superior officials may decide not to enforce or prosecute the matter, perhaps because of a personal or political connection with the violator. If the decision is made to enforce, a negotiated solution may be reached that permits the structure or project to continue within prescribed limits. This is such a typical occurrence that developers frequently prepare a site and pour foundations as quickly as possible, knowing that there is a strong likelihood that a settlement can be reached allowing the structure to stand.²⁰⁶ During the period 1990 to 1995, more than two hundred million square meters of illegally built floor space was constructed.²⁰⁷ In mid-1995 the Ministry of Construction announced that it would launch a campaign to enforce urban planning in six hundred cities throughout the country.²⁰⁸ More significant than

where air and water pollution from plants would have less impact on city residents. However, the supporters of a state owned enterprise succeeded in obtaining a site for a factory in the northern part of the city due to better transportation links and proximity to warehouses and suppliers.

²⁰⁶ A notable case in point concerns the construction of two restaurants and karaoke bars on park land in central Chengdu. The structures were allowed to remain and be completed, because the developers succeeded in convincing local MOC authorities that the costs of removal would outweigh the harm done by the construction. Interview with urban planning official, in Chengdu (Aug. 1997).

²⁰⁷ Yang Yingshi, *China: Plans to Govern Building*, CHINA DAILY, May 30, 1995.

²⁰⁸ Many of these violations however are not committed by the holders of granted land use rights, but by the holders or occupiers of administratively allocated land use rights, many of whom are state enterprises, central ministries, municipal agencies, and the defense establishment. While administrative allocated land is subject to the requirements of the detailed urban plans, the holders of such land are not required to enter into land use contracts with the SLA detailing uses and construction design. *Id.*

official response is the increase in the incidence of private enforcement actions, whereby citizens bring suit to prevent or remedy illegal land uses.²⁰⁹

Some of the most serious defects in the urban planning system have been in securing compliance with the land supply plans. Over the past decade so much arable land reportedly has been improperly converted to urban uses that SLA officials have warned the nation is on the brink of becoming dependent upon foreign imports of food.²¹⁰ There are several reasons for the breakdown of the land supply regulation system. First, municipal governments have failed or neglected to comply with the land quotas issued to them by higher level authorities. Second, investors and land development companies simply enter into deals with collectives or local officials for the purchase and acquisition of collectively owned land without obtaining approval to requisition, convert and obtain land use rights through the SLA.²¹¹

In response to these problems, the SLA, in cooperation with the SPC, initiated a series of investigations and campaigns beginning in the mid-1990s. In 1996, the SLA and SPC jointly implemented procedures to limit the issuance of land use permits according to the annual construction use land plan and prohibit any construction not authorized under that plan.²¹² To ensure compliance by

²⁰⁹ The most common avenue of redress for individuals or groups (typically neighborhood committees) is under the GPCL. Specifically, Article 83 has been successfully used on several occasions by residents in Shanghai who sued the city and obtained a monetary remedy or injunctive relief. Interviews with urban planning officials, in Shanghai (July 1997). Article 83 of the General Principles of Civil Law allows a person to obtain relief when a neighboring party has caused obstructions, losses or other damages to his or her property.

²¹⁰ See Ivan Tang, *City Growth Eats into Farmland*, S. CHINA MORNING POST, Mar. 30 1997, at 6; Vice-Premier Zou Jiahua on Need for Strict Farmland Management Measures, Xinhua News Agency, reprinted in BBC SUMMARY OF WORLD BROADCASTS, China, Economy, Apr. 5, 1997, available in LEXIS, Asiapc Library, BBCSWB File.

²¹¹ This frequently occurs on the outskirts of cities or in suburban areas. Generally, once land is acquired from a collective, a wall is built around the boundaries thereby preventing members of the collective to grow crops on the land. In southern China, developers and speculators no longer bother to build walls around land, but merely demarcate the boundaries with wire or rope. In many cases, the persons and families that once farmed the land are forced off and receive inadequate or no compensation or resettlement subsidy as required under the LAND MANAGEMENT LAW. For accounts on the decline in arable land and its improper occupation see Chen Zhiyuan, *Study on the Causes Underlying the Loss and Diminution of Arable Land—The Legal Counter Policy*, 6(5) ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] 52 (1997); ROY L. PROSTERMAN ET AL., REFORMING CHINA'S RURAL LAND SYSTEM 23 (1994).

²¹² See Procedures for the Planning and Management of Construction Use Land promulgated jointly by the SLA and SPC on October 1, 1996. The Procedures, designed to protect the supply of arable land, give the SLA broad authority to investigate the land granting practices of provincial and local government officials. They also make provincial government officials responsible for approving projects on smaller areas of land. *China Strengthens Control of Construction Use Land to Protect Farmland*, Xinhua News Agency, reprinted in BBC SUMMARY OF WORLD BROADCASTS, China, Oct. 4, 1996, available in LEXIS, Asiapc Library, BBCSWB File. See also Regulations for the Protection of Primary Farmland promulgated by the SLA on August 18, 1994 and effective on October 1, 1994, reprinted in *Agriculture: Regulations for Protecting Basic Farmland*, Xinhua News Agency, reprinted in BBC SUMMARY OF WORLD BROADCASTS, China, Oct. 26, 1994, available in LEXIS,

local officials, the procedures stipulate that any government unit that violates its annual land use plan quota shall have its annual construction quota reduced and the offending government official criminally prosecuted. In April 1997, additional steps were taken when the SLA placed a moratorium on all non-agricultural land uses. Along with the Ministry of Supervision and other central government departments the SLA launched a nationwide investigation to determine whether local and provincial officials were complying and enforcing properly all national land management laws.²¹³ Significantly, in an effort to ensure the continued flow of foreign capital, the SLA announced that foreign funded development projects would be exempt from the land use freeze.²¹⁴

VII. CONCLUSION

This Article began with the proposition that China has been promoting economic development through the legal reform of the urban land management regime. Several paradigms on the role of the state in economic development were presented: modernization, dependency and statism. China's experience in reforming its urban land management regime does not wholly resemble or fit neatly into a single particular development paradigm, but does contain elements of each paradigm.

Over the past two decades, China has purposely used law as an instrument to transform its economy into one that relies less on central planning and more on market mechanisms. In doing so it has converted urban land from a resource distributed by the state into a commodity that is sold initially by the state and which subsequently may be exchanged through market transactions. Unlike the prescriptions of the modernization paradigm, which call for a reduced state presence in

Asiapc Library, BBCSWB File. The Regulations authorize the imposition of idle land use fees on arable land taken out of production for development purposes when construction work has not begun in a timely manner.

²¹³ Extensive investigations into all construction projects initiated during the period January 1, 1991 to April 14, 1997 were made to determine whether there was any arable land improperly converted to non-agricultural uses. In addition local officials were probed to find out if they properly followed procedures, particularly in regards to the granting of land use rights and issuance of permits for commercial projects, development zones, and luxury uses such as golf courses and villas. See *China to Send Out Investigators to Check Illegal, Wasteful Land Use*, Xinhua News Agency, reprinted in BBC SUMMARY OF WORLD BROADCASTS, July 12, 1997, available in LEXIS, Asiapc Library, BBCSWB File; Tom Korski, *Government to Clamp Down on Land Use Deals*, S. CHINA MORNING POST, Mar. 18 1997, at 4; Ivan Tang, *City Growth Eats into Farmland*, S. CHINA MORNING POST, Mar. 30 1997, at 6.

²¹⁴ Pan Mingcai, director of the construction land department of the State Land Administration (SLA), reportedly said that overseas-backed projects had been encouraged to use idle land in development zones, obtain use rights to wasteland and enter into joint ventures with Chinese companies which could invest their land use rights. *Foreign Funded Projects Set to Escape China Land Freeze*, ASIA PULSE, June 16, 1997.

markets, the legal reforms provide for a strong state presence. Thus, the state maintains a monopoly position in the primary market for land use rights and endeavors to manipulate transactions in the secondary market. Under this approach, central authorities have succeeded in collecting large amounts of revenue that have been used to reclaim and develop additional supplies of urban land, build city infrastructure systems and construct housing. These achievements bear some resemblance to the statist oriented development programs instituted in some of the more successful newly industrialized East Asian economies.

In contrast to the statist models, however, the central state in China has had to contend increasingly with the challenges posed by local authorities and commercial interests. Local governments are taking an ever larger share of the revenue obtained from sales of land use rights. Moreover, competition among localities has depressed prices of land use rights in many urban areas. Beyond the sale of land use rights, China's urban land regime also does not correspond closely with the statism model. Local authorities have not consistently enforced the substantive or procedural aspects of the legal framework for land planning promulgated by themselves or central authorities. The lack of local enforcement is a manifestation of local economic development ambitions that do not necessarily coincide with those of the center. Thus, there is a disjuncture between the formal legal framework for land use planning developed by the center and the way land is actually used at the local level. Where land use plans have been effectively carried out, such as in some areas of Shanghai, local rather than central authorities generally have taken the initiative and guided the process.

To some extent the dynamics between central and local authorities are similar to some of the symptoms associated with the dependency paradigm. However, unlike the dependency paradigm where foreign capital is considered to be the primary corrupting agent, local authorities are influenced more by domestic capital and local interests, than by foreign ones. Most investment in China's urban land markets are from domestic sources. While foreign capital is encouraged under the legal framework, local officials frequently give preferential treatment to domestic interests. Thus, for example, the best building sites in a city generally are reserved for local land development and real estate companies. In addition, while local sources of capital are well-known to local Party and government officials, the origin of what is termed "foreign" capital is unclear. This is because of the proliferation of

offshore investment companies and trusts by Chinese enterprises and organizations. Finally, foreign investors periodically are faced with the imposition of unofficial fees and charges that tend to negate the advantages offered under the formal legal framework.

In conclusion, the purpose and effect of the reform of the legal framework for managing urban land has been to promote economic development. However, the effectiveness of that framework and the precise character of China's urban development remain an open question.

