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A CURRENT REVIEW OF CHINESE LAND-USE LAW AND POLICY: A “BREAKTHROUGH” IN RURAL REFORM?

Robin Dean and Tobias Damm-Luhr[†]

Abstract: Three decades ago, China moved from a communal system of farming to a system that granted more extensive land-use rights to individual households, starting rural China on a path to greater prosperity. Today, however, the law and policy promulgated by the Chinese government prevents farmers from fully realizing this prosperity. The Land Administration Law gives farmers thirty-year contractual rights to the land they farm and the Law on Rural Land Contracting strengthens this right by more specifically enumerating requirements for land contracting and the transfer of contractual rights. Nevertheless, the rural-urban gap is the worst it has been in decades and rural Chinese are left behind to watch their urban counterparts enjoy China’s recent economic success. Realizing the need for rural reform, the government has issued two policy directives that outline measures to increase land tenure security with the goals of doubling farmers’ incomes by 2020 and maintaining the country’s grain supply. While these documents are well intentioned, they are insufficient to fully address rural issues surrounding land tenure rights and do not represent a breakthrough in rural land reform. In order for the policy directives to be more effective, the Chinese government should define who exercises collective ownership rights over farmland, implement a rural registration system, and educate farmers concerning that system. By taking these steps, China will better ensure that conditions in its rural areas will begin to match the prosperity that was envisioned for them thirty years ago.

“You will all have more money in your pockets in the future.”

Hu Jintao to the residents of Xiaogang village, September 2008¹

I. INTRODUCTION

In 2008, the Chinese government celebrated the thirtieth anniversary of the economic reforms that brought China prosperity and growth.² These reforms included the introduction of the Household Responsibility System (“HRS”) to the Chinese countryside, which ended collectivized agriculture and heralded a return to individual farming.³ China’s increased prosperity, however, has been realized mainly in the country’s urban areas, where a

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¹ Wieland Wagner, *China’s Rural Revamp: The Legend of Xiaogang*, SPIEGELONLINE, Nov. 7, 2008, <http://www.spiegel.de/international/world/0,1518,589165,00.html> (last visited Nov. 20, 2009).

² *Land Reform in China: Promises, Promises*, THE ECONOMIST, Oct. 16, 2008, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=12437707#top.

³ Keliang Zhu et al., *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey*, 38 N.Y.U. J. INT’L L. & POL. 761, 769-70 (2006).

considerable middle class has emerged.⁴ Although those living in the Chinese countryside are better off than they were thirty years ago because of land-use reform, rural residents have not seen an increase in living standards commensurate with that of their urban counterparts.⁵ In fact, the income gap between rural and urban China continues to increase.⁶ Because of these widening inequalities, tension has grown in China's rural areas,⁷ where tens of thousands of peasant protests occur each year.⁸

The Chinese government views rural unrest as a threat to its stability and continued economic growth.⁹ Aware of the growing frustration in the countryside, the Chinese government and the Chinese Communist Party ("CCP") issued two policy documents in the last year, both of which concern the government's plans for strengthening the land-use rights of rural farmers. On October 12, 2008, the CCP issued the *Decision on Certain Issues Concerning the Advancement of Rural Reform and Development* ("2008 Decision"),¹⁰ which the CCP described as "the most significant land reform package in three decades."¹¹ Three months later, on February 2, 2009, the CCP together with the State Council, the highest executive organ of the

⁴ Maureen Fan, *In Southeast China, Skepticism on Land Reforms*, THE WASHINGTON POST, Oct. 30, 2008, available at <http://en.chinaelections.org/newsinfo.asp?newsid=19409>. Twenty-two percent of the Chinese population is considered middle class. Fei-Ling Wang, *Brewing Tensions While Maintaining Stabilities: The Dual Role of the Hukou System in Contemporary China*, 29.4 ASIAN PERSP. 85, 116 (2005).

⁵ See Fei-Ling Wang, *supra* note 4, at 101. Seventy-one percent of China's population is characterized as rural residents living in rural areas. *Id.* at 116.

⁶ *Id.* at 107 (stating that the gap in living standards and cultures of the urban and rural sectors has become increasingly wide in recent decades).

⁷ *China's Rulers Discuss Land Reform*, BBC NEWS, Oct. 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7660528.stm> (last visited Nov. 20, 2009) (characterizing the tension in rural areas as a growing frustration).

⁸ *Land Reform in China*, *supra* note 2.

⁹ Edward Cody, *In Face of Rural Unrest, China Rolls out Reforms*, THE WASHINGTON POST, Jan. 28, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/27/AR2006012701588.html>.

¹⁰ *Zhong gong zhong yang guan yu tui jin nong cun gai ge fa zhan ruo gan zhong da wen ti de jue ding* [Decision on Certain Issues Concerning the Advancement of Rural Reform and Development] (adopted by the Cent. Comm. of the Chinese Communist Party, Oct. 12, 2008), available at http://www.gov.cn/jrzq/2008-10/19/content_1125094.htm [hereinafter 2008 Decision]. (Note: Generally, the 2008 Decision is divided up into numbered sections. Some of these sections consist only of unnumbered paragraphs. Other sections consist of an unnumbered introductory paragraph followed by numbered paragraphs. The Decision also contains an unnumbered introductory and concluding paragraph. Thus, within this Comment, citations to the 2008 Decision will take the following forms: 1) a citation to a section with only unnumbered paragraphs will consist of a section number (sec. [no.]) followed by a paragraph number (para. [no.]) denoting the *order* in which the paragraph appears within that section; 2) a citation to a section with an unnumbered introductory paragraph followed by numbered paragraphs will consist of a section number followed by the *number that labels* the paragraph in that section; 3) a particular section's introductory paragraph will be cited using the section number and "introductory para."; 4) the introductory paragraph of the Decision itself will be cited to using "2008 Decision, introductory para.")

¹¹ Fan, *supra* note 4.

Chinese government, released a document entitled *Certain Opinions of the State Council and the Central Committee of the Chinese Communist Party on Promoting the Stable Development of Agriculture and Continuing to Increase Farmers' Incomes in 2009* ("2009 No. 1 Document").¹² (Collectively, the 2008 Decision and the 2009 No. 1 Document will be referred to throughout as the "Policy Documents.") The Policy Documents articulate the government's goals for rural development, including increasing rural incomes by the year 2020 and providing for better implementation of farmers' land-use rights in order to maintain agricultural yield.¹³

The Chinese government and the CCP tout these policy developments as a "breakthrough" that will create a "new upsurge" in rural reform.¹⁴ In the current economic downturn, the Chinese government seems especially keen to make rural Chinese citizens into domestic spenders as a way of coming through the crisis with the economy intact.¹⁵ Indeed, the 2009 No. 1 Document explicitly states that farmers, and the countryside generally, have great significance for expanding domestic demand, and are a highly important factor in improving people's livelihoods.¹⁶ Increasing the prosperity of the countryside would benefit the Chinese economy as a whole by increasing domestic demand.¹⁷ But rural residents are more skeptical. In response to the 2008 Decision, a farmer named Li, who lives in the rice and corn growing village of Xinyi in Guangdong province, stated that he did not think the new reforms "will give us more protection. We have no expectations."¹⁸

This Comment argues that, viewing the policy documents in light of the current legal regime that governs land-use rights, the changes espoused in the Policy Documents are well-intentioned but ultimately insufficient to raise living standards in the countryside, halt the conversion of agricultural

¹² *Zhong gong zhong yang Guo wu yuan guan yu er ling ling jiu nian cu jin nong ye wen ding fa zhan nong min chi xu zeng shou de ruo gan yi jian* [Certain Opinions of the State Council and the Cent. Comm. of the Chinese Communist Party on Promoting the Stable Development of Agriculture and Continuing to Increase Farmers' Income in 2009] (adopted by the Cent. Comm. of the Chinese Communist Party and the State Council, Dec. 31, 2008), available at http://www.gov.cn/jrzq/2009-02/01/content_1218759.htm [hereinafter 2009 No. 1 Document]. (Note: Within the 2009 No. 1 Document, all paragraphs are numbered except for the four introductory paragraphs and the two concluding paragraphs. This Comment cites to the numbered paragraphs with "para. [no.]", and to the introductory paragraphs with "introductory para. [no.].")

¹³ *Id.* introductory para. 2.

¹⁴ *Land Reform in China*, *supra* note 2.

¹⁵ *China Stresses Domestic Demand in Stimulating Growth as Crisis Harms Export*, GOV.CN, Mar. 5, 2009, http://news.xinhuanet.com/english/2009-03/05/content_10945808.htm. (last visited Nov. 3, 2009).

¹⁶ 2009 No. 1 Document, *supra* note 12, introductory para. 4.

¹⁷ Fei-Ling Wang, *supra* note 4, at 108 (stating that "raising the purchasing power of the rural Chinese majority would probably provide the Chinese economy with a great push in the years ahead").

¹⁸ Fan, *supra* note 4.

land, and provide for a more secure grain supply.¹⁹ Part II provides an overview of the history of rural land-use rights in China since 1949 and the current legal structure governing those rights. Part III introduces the changes to current land-use law that the Chinese government and the CCP have put forth through the Policy Documents. Part III also demonstrates that these changes have the goals of maintaining grain supply and doubling farmers' incomes. Part IV argues that while the policy promoted by the Chinese government has great potential, it fails to provide rural farmers with stable land-use rights that will spur further economic growth and promote rural stability. Part IV also includes recommendations to improve rural land-use rights. Part V concludes that the Chinese government's most recent policy, while a step in the right direction, does not constitute a "breakthrough" in rural reform.

II. SINCE 1949, RURAL LAND-USE LAW IN CHINA HAS EVOLVED TO CONFER AN INCREASING NUMBER OF RIGHTS ON FARMERS

From the founding of the People's Republic of China ("PRC"), 1949 to the present, Chinese farmers had only a brief opportunity to own farmland outright.²⁰ In 1951, the Chinese government started collectivizing rural land ownership,²¹ and it was not until 1979 that farmers obtained individualized use rights to the land they worked (i.e., farmers had rights to use pieces of farmland for finite terms, but rural collectives still held ownership of the land).²² Since then, the government has gradually extended the term of farmers' use rights and issued policy documents to better ensure that farmers can hold their use rights for the full term.²³ The newest legal developments, including the Land Administration Law ("LAL"),²⁴ the Law on the

¹⁹ Throughout this comment, the terms "land-use rights" or "use rights" mean the obligations and benefits that flow from laws governing the way land is put to use.

²⁰ Benjamin W. James, *Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap*, 20 COLUM. J. ASIAN L. 451, 458 (2007).

²¹ *Id.*

²² Keliang Zhu & Roy Prosterman, *From Land Rights to Economic Boom: A 17-Province Survey Reveals That More Secure Land Rights Can Boost the Incomes and Consumption Power of China's 850 Million Rural Residents*, CHINA BUS. REV., July-Aug. 2006, at 46, available at <http://www.chinabusinessreview.com/public/0607/zhu.html>.

²³ See Ping Li, *Rural Land Tenure Reforms in China: Issues, Regulations and Prospects for Additional Reform*, 3 LAND SETTLEMENT AND COOPERATIVES (SPECIAL EDITION) 59, 61 (2003), available at http://www.rdiland.org/PDF/PDF_Publications/LP-RuralLandTenureReforms.pdf.

²⁴ Land Administration Law (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, revised Dec. 29, 1988, Aug. 29, 1998, and Aug. 28, 2004, effective Aug. 28, 2004), translated in http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/BasicLaws/P020060620320252818532.pdf (P.R.C.) [hereinafter Land Administration Law].

Contracting of Rural Land (“RLCL”),²⁵ and the Property Rights Law (“Property Law”),²⁶ have focused on strengthening farmers’ use rights while maintaining China’s underlying socialist system of collective ownership for rural land.²⁷ This Section details the developments that occurred since the PRC’s founding in 1949. Section A discusses the situation of rural land rights in the PRC from 1949 until “reform and opening up” in 1978.²⁸ Section B describes the introduction and development of individualized use rights to farmland from 1978 onwards. Finally, Section C discusses the laws currently in effect that pertain to rural land-use, and describes how the difficulties in implementing these laws have caused social and economic problems in the Chinese countryside.

A. *From 1949 to 1978, China’s Rural Property System was Largely Characterized by Collective Ownership*

Upon the founding of the PRC in 1949 under the leadership of the CCP and Mao Zedong, the Chinese government confiscated rural land from landlords and redistributed it to farmers, effectively granting farmers private ownership of land.²⁹ However, this situation did not last long. From 1951 to 1956, the CCP forced farmers to consolidate their land holdings into large agricultural producers’ cooperatives comprised of about 160 households each.³⁰ Then, after 1958, the CCP decided to organize rural households into giant “people’s communes” of around 5,000 households each, where everyone contributed work to the best of his or her ability and received basic necessities in return.³¹ Most of China’s rural land became collectively

²⁵ Law on Land Contract in Rural Areas (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2002, effective Mar. 1 2003), translated in http://english.gov.cn/laws/2005-10/09/content_75300.htm (P.R.C.) [hereinafter Law on Land Contract in Rural Areas].

²⁶ Property Rights Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), translated in <http://faolex.fao.org/docs/pdf/chn72735.pdf> (P.R.C.) [hereinafter Property Law].

²⁷ These laws are described in more detail below. See *infra* Parts II.C.1, II.C.2, II.C.3, and II.C.4.

²⁸ The period of “reform and opening-up” was marked by a wide-ranging program of social and economic reforms, initiated by Deng Xiaoping in 1978. U.K. Foreign and Commonwealth Office, *Country Profile: China*, <http://www.fco.gov.uk/en/about-the-fco/country-profiles/asia-oceania/china?profile=history&pg=30> (last visited Oct. 14, 2009). The reforms sought to modernize China’s economy, develop China’s foreign relations (especially with Western countries), and implement gradual, limited liberalization of Chinese society. *Id.*

²⁹ James, *supra* note 20, at 458.

³⁰ *Id.*

³¹ *Id.* at 459.

owned and managed by the people's communes, with the exception of small plots of homesteads (宅基地) and "self-reserved" lands (自留地).³²

The total collectivization of agriculture marked the beginning of Mao Zedong's "Great Leap Forward,"³³ an effort to quickly transform China into an industrial power,³⁴ which lasted from 1958 to 1961.³⁵ Collectivization of rural land allowed the State to reach into farmers' grain supply, and the government imposed compulsory sales of grain at a low fixed price.³⁶ This, coupled with a crippling grain shortage as well as natural disasters, led to widespread famine and the deaths of ten to twenty million people, nearly all of whom were rural farmers.³⁷ Not until the late 1970s did farmers begin to gain more rights to the land they worked.³⁸

B. *The Household Responsibility System Provided Individual Farming Households with Contractual Use Rights to Farmland*

Deng Xiaoping's rise to power as China's de facto leader in 1978 began the period of "reform and opening up" (改革开放)³⁹ and changed the nature of rural land ownership as well.⁴⁰ As part of Deng's process of "reform and opening up," the Chinese government instituted the HRS (家庭承包经营制度) in 1979.⁴¹ Under this system, village collective economic organizations ("collectives") allocated land-use rights to individual households via contract,⁴² which was a change from the previous arrangement where households only possessed the right to use homesteads

³² Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 214 (2004). Self-reserved lands are small lots assigned to grow produce for self-consumption. Theoretically, even these plots were collectively owned. *Id.* The Chinese legal term "homestead" only refers to the portion of land on which a family's home sits, and does not imply the same legal protections as associated with this term in the United States. Geoffrey Korff, *The Village and the City: Law, Property, and Economic Development in Rural China*, 35 SYRACUSE J. INT'L L. & COM. 399, 414 (2008).

³³ This period was called the "Great Leap Forward" because Mao envisioned transitioning from feudalism directly into communism, thereby "leaping over" a capitalist stage, which was normally required in the Marxist historical framework. James, *supra* note 20, at 459.

³⁴ Dennis Tao Yang, *China's Agricultural Crisis and Famine of 1959-1961: A Survey and Comparison to Soviet Famines*, 50 COMPARATIVE ECONOMIC STUDIES 1, 1 (2008), available at <https://secure.palgrave-journals.com/ces/journal/v50/n1/pdf/ces20084a.pdf>.

³⁵ *Id.*

³⁶ Ching Kwan Lee & Mark Selden, *China's Durable Inequality: Legacies of Revolution and Pitfalls of Reform*, ASIA-PAC. J.: JAPAN FOCUS, Jan. 21, 2007, available at http://japanfocus.org/-M_-Selden/2329.

³⁷ *Id.*

³⁸ See Huang, *supra* note 32, at 215-16.

³⁹ See U.K. Foreign and Commonwealth Office, *supra* note 28.

⁴⁰ See Zhu & Prosterman, *supra* note 22, at 46.

⁴¹ *Id.*

⁴² *Id.*

and “self-reserved” lands.⁴³ The collectives distributed these land-use rights in a largely egalitarian fashion, although differences among regions persisted due to variations in land per capita.⁴⁴

The HRS achieved some measure of success, but it did not guarantee land-use rights for farmers in the long-term. Initially, from 1979 to 1984, income in rural areas grew under the HRS by eleven percent each year, resulting in the narrowest rural-urban income gap since the early 1970s.⁴⁵ However, from 1983 to 1998, the duration of the use rights granted to individual households and the frequency and types of administrative land readjustments varied greatly from region to region.⁴⁶ Because the HRS did not legally require written land-use contracts, which could specify terms of use of the allocated land or other significant privileges and obligations associated with the use rights, the vast majority of Chinese farm households did not have them.⁴⁷ These flaws in the HRS made it difficult for farmers to rely on their land-use rights as a basis for any future planning of their operations.⁴⁸

To address these and other problems with the HRS, the Communist Party issued a series of policy documents that attempted to improve the security of farmers’ land-use rights by: 1) extending the terms of these rights; and 2) limiting the ability of local officials to readjust the amount of land a household could use.⁴⁹ When the Chinese government first introduced the HRS, farmers entered into land contracts for a period of three years.⁵⁰ Rural Work Document No. 1, which the Party issued in 1984, urged local officials to prolong the contractual term of land-use rights to fifteen

⁴³ See Huang, *supra* note 32, at 214.

⁴⁴ Ping Li, *supra* note 23, at 60.

⁴⁵ See Zhu & Prosterman, *supra* note 22, at 46.

⁴⁶ See Ping Li, *supra* note 2323, at 60. This conclusion resulted from surveys conducted by the Rural Development Institute during this 15-year period. Ping Li divides “readjustments” into comprehensive and partial readjustments. *Id.* at 60 n.1. In comprehensive readjustments, all farmland in a village is returned to the collective and redistributed among all households, assigning each household entirely new land. Partial readjustments consist of adding to or taking from a household’s holdings as its size changes.

⁴⁷ See Ping Li, *supra* note 23, at 60. The new system also brought environmental consequences because farmers used lands however they could to increase short-term gain without considering the long-term consequences of their actions. See Korff, *supra* note 32, at 409. For instance, land-use restrictions were unclear, so many farmers with livestock allowed overgrazing, which negatively affected land quality. Also, farmers’ use of chemical fertilizer increased, resulting in polluted groundwater that generally continues to affect all of China.

⁴⁸ See Zhu et al., *supra* note 3, at 770-71.

⁴⁹ See Ping Li, *supra* note 23, at 60-61.

⁵⁰ Samuel P.S. Ho & George C.S. Lin, *Emerging Land Markets in Rural and Urban China: Policies and Practices*, 175 CHINA Q. 681, 689 (2003).

years or more.⁵¹ In 1993, the CCP Central Committee and the State Council issued Document No. 11, stating that the use term could be extended for an additional thirty years after the fifteen-year use term mentioned in the 1984 document expired.⁵² And in 1997, the *Notice Concerning Further Stabilizing and Protecting the Rural Land Contracting Relationship* (“Document No. 16”) re-emphasized the need to extend terms of use for thirty years.⁵³ This Notice also tackled the readjustment problem by clearly prohibiting extensive readjustments, encouraging local adoption of a no-readjustment policy, and requiring approval of any minor readjustment plans by two-thirds of the villager-assembly as well as by the township and country governments.⁵⁴ These policy documents addressed the problems with length of use rights and frequent readjustments. In the years that followed, the Chinese government essentially codified the measures in these policy documents into formal laws, which similarly concentrate on providing farmers with reliable use rights to their land.⁵⁵

C. *Current Rural Land-Use Law Has Strengthened the Tenure Security of Rural Farmers*

The current PRC Constitution, adopted in 1982 and amended in 2004, provides the foundation for China’s legal system, including the rural land-use rights system.⁵⁶ Three statutes give further shape to these land-use rights: the 1986 LAL (土地管理法);⁵⁷ the 2002 RLCL (土地承包法);⁵⁸ and the 2007 Property Law (物权法).⁵⁹ Supplemented by policy statements issued by the Party and the State Council, these laws form the main statutory structure for rural land-use rights in China today. The following sections describe the pertinent provisions of these laws in order to give context to the subsequent discussion of current Chinese policy regarding those laws and the rights that flow from them. Section 1 will set forth the major constitutional principles governing the ownership of land in China. Sections 2, 3, and 4 then detail the laws that give further shape to the way land is held and used. Through the different phases of the development of land-use law, farmers’ land tenure rights have been increasingly strengthened.

⁵¹ Ping Li, *supra* note 23, at 61.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *infra* Parts II.C.2, II.C.3, and II.C.4.

⁵⁶ See generally XIAN FA (2004) (P.R.C.).

⁵⁷ Land Administration Law, *supra* note 24.

⁵⁸ Law on Land Contract in Rural Areas, *supra* note 25.

⁵⁹ Property Law, *supra* note 26.

1. *The Constitution Establishes the Principles of Rural Land-Use in China*

In contrast to constitutions that set up a system for private ownership of land by individuals, the Chinese Constitution mandates ownership of land by the state and collectives. Article 6 articulates the principle that “the basis of the socialist economic system of the [PRC] is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.”⁶⁰ Article 6 does not, however, identify the “collective” owner or elaborate on who comprises that group. The basic principles of land ownership are laid out in Article 10, which divides land in China into two categories: urban and rural.⁶¹ This article establishes that “land in the cities is owned by the state and land in the rural and suburban areas is owned by collectives.”⁶² These two articles taken together prevent the private ownership of land in China. Article 5 further prevents the Chinese legal system from permitting private land ownership by stating “no law or administrative or local rules and regulations shall contravene the Constitution.”⁶³ Thus, the Chinese Constitution does not leave any room for private persons to own land individually.

While it forbids individual ownership of land, the Chinese Constitution does not prohibit individuals from obtaining use rights to land. Indeed, Article 8 establishes the HRS discussed above.⁶⁴ Further, Article 10 allows for the transfer of the use of land according to law.⁶⁵ Article 10 also mandates that those who use the land make “rational” use of it.⁶⁶ This basic structure of collective ownership of rural land and granting the issuance of individual use rights to rural land serves as a foundation for the more detailed provisions of the laws described below.

2. *The LAL Was Adopted to Strengthen the Administration of Land*

The LAL is the most comprehensive land administration law in the PRC⁶⁷ and it legally implements many of the constitutional provisions

⁶⁰ XIAN FA art. 6, § 1 (2004) (P.R.C.).

⁶¹ James, *supra* note 20, at 465.

⁶² XIAN FA art. 10, §§ 1, 2 (2004) (P.R.C.).

⁶³ *Id.* art. 5.

⁶⁴ *Id.* art.8. *See supra* Part II.B. “Working people” who are members of the collective have the right to “farm plots of cropland and hilly land allotted for private use, engage in household sideline production, and raise privately owned livestock.” XIAN FA art. 8, § 2 (2004) (P.R.C.).

⁶⁵ XIAN FA art. 10, § 3 (2004) (P.R.C.).

⁶⁶ *Id.* art. 10, § 5.

⁶⁷ Isabelle I.H. Wan et al., *A Professional’s Guide to PRC Land Legislation* 106 (5th ed. 2004).

discussed above. As such, it sets out several important provisions, including rules about granting use rights to rural farmers through HRS contracts.⁶⁸ The purposes of the LAL are to strengthen the administration of land, safeguard the socialist public ownership of land, protect developing land resources, and ensure the rational use and protection of cultivated land.⁶⁹ To accomplish those goals, Article 3 mandates that “[t]he people’s government at all levels shall take measures to make an overall plan for the use of land to strictly administer, protect and develop land resources and curb any illegal occupation of land.”⁷⁰ Article 4 elaborates, stating, “A strict control is to place on the transformation of land for farm use to that for construction use in order to control the total amount of land for construction use and exercise a special protection on cultivated land.”⁷¹ On paper at least, these provisions appear to provide a relatively high degree of tenure security not only to the land itself, but also to the tenure rights of farmers.

The most pertinent provision to the current discussion, Article 14, establishes the contractual rights of individual farmers under the HRS. It reads, “[I]and collectively owned by farmers shall be contracted out to be run by members of the collective economic organizations for use in crop farming, forestry, animal husbandry, and fisheries production under a term of 30 years.”⁷² It further establishes that a written contract be formed and signed between the contractee and the contractor.⁷³ By signing the contract, farmers agree to use the land rationally and for agricultural purposes.⁷⁴

The LAL also contains provisions should a farmer want to alter his land-use rights during the contractual term. Article 14 states, “[w]ithin the validity of the contract, the adjustment of land contracted by individual contractors shall get the consent from two-thirds majority vote of the villagers’ congress or over two-thirds of villagers’ representatives.”⁷⁵ This consent must be approved on the township and country levels by requiring a two-thirds vote of the village members before land may be reallocated.⁷⁶

Finally, the LAL generally designates an organization to act in the name of the collective owner of rural land, and provides for a registration

⁶⁸ See generally Land Administration Law, *supra* note 24.

⁶⁹ Land Administration Law, *supra* note 24, art. 1.

⁷⁰ *Id.* art. 3.

⁷¹ *Id.* art. 4.

⁷² *Id.* art. 14.

⁷³ *Id.* The relationship established is between the farmer and the “collective” as the contractee and contractor. Because farmers may not own land privately, if they want to farm a plot to the exclusion of others, they must contract with the legal owners of the land, the collectives. James, *supra* note 20, at 468.

⁷⁴ Land Administration Law, *supra* note 24, art. 14.

⁷⁵ *Id.*

⁷⁶ *Id.*

system.⁷⁷ However, these parts of the LAL are quite vaguely worded. Article 10 states, “[i]n lands collectively owned by farmers[,] those [that] have been allocated to villagers for collective ownership according to law shall be operated and managed by village collective economic organizations or villagers’ committee.”⁷⁸ While appearing to designate a representative to make decisions in the name of the collective owners of rural land, this article leaves the term “village collective economic organizations” open to wide interpretation. Article 11 provides for the registration of lands that are collectively owned, stating that “[The] People’s government at the county level shall register and put on record lands collectively owned by farmers and issue certificates to certify the ownership concerned.”⁷⁹ However, the article fails to mandate registration at the local level or provide details about how such a system should work. This Comment discusses these two deficiencies in more detail below, as they are also present in the most current Chinese policy on rural land-use rights.

3. *The Law on the Contracting of Rural Land Improves the Land-Use System Established in the LAL*

The RLCL, passed in 2002, expands on farmers’ contractual land-use rights contained in the LAL by adding to those rights, delineating them in greater detail and providing increased protections for those rights.⁸⁰ Chapter Two, Section 1 of the RLCL sets out the rights and obligations of the contractor.⁸¹ One of the rights the contractor enjoys is to “[transfer] the right to land contractual management,”⁸² a right that the LAL does not contain. The RLCL specifically defines the scope of the transferability of land, stipulating that farmers may lease, assign, exchange, and carry out other transactions of contracted land, with the exception of sale and mortgage.⁸³

⁷⁷ *Id.* arts. 10, 11.

⁷⁸ Land Administration Law, *supra* note 24, art. 10.

⁷⁹ *Id.* art. 11.

⁸⁰ See generally Law on Land Contract in Rural Areas, *supra* note 25, art. 1.

⁸¹ The “contractor” is defined within the RLCL as the “peasant household of the collective economic organization concerned.” *Id.* art. 15.

⁸² *Id.* art. 16, § 1. We chose to translate the Chinese word “流转” as “transfer” and “转让” as “assign.” The online English version of the RLCL translates “流转” as “circulate” and “转让” as “transfer.” See generally Law on Land Contract in Rural Areas, *supra* note 25. However, we felt that “transfer” is more idiomatic than “circulate” and is general enough to match the wider scope that the meaning of “流转” encompasses. Also, “转让” has the more specific meaning of “assign.” See A CHINESE-ENGLISH DICTIONARY 1660 (Revised ed. 1997) (where “转让” is translated as “transfer the ownership of” and “转让人” is translated as “assignor.”) See also Huang, *supra* note 32, at 221 (in which Huang translates the term “转让” as “assignment”).

⁸³ *Id.* arts. 32-43.

The RLCL also mandates that parties to a land-use rights transfer conclude a written contract, and gives the particulars for what should be included in that contract.⁸⁴ In addition to granting the ability to transfer land-use rights, the RLCL protects farmers' rights to use the land by ending the practice of land readjustment, something that was allowed by the LAL with a two-thirds vote.⁸⁵ The RLCL, like the LAL, does not identify the owner of the collective or provide for a detailed registration system. Section IV of this comment will focus on how these provisions could be strengthened to give farmers even more secure land-use rights.

4. *The Property Law Adheres to the Concept of Socialist Collective Ownership and Reiterates the Protections Found in the LAL and RLCL*

The Property Law, which became effective in October 2007,⁸⁶ provides an equal measure of legal protection to the systems of property ownership (state-owned, collectively-owned, and privately-owned) in China, but does little to change the way that land is owned, managed, and used in the rural areas.⁸⁷ Primarily, the Property Law explicitly adheres to the basic concept that rural collectives operate under a dual system with centralized management overseen by the collective and decentralized operation falling to the individual household under contract.⁸⁸ In general, the law reiterates the protections and structures provided for in the LAL and RLCL, and although the law provides for protection of private property, the law unequivocally repudiates the concept that the idea of private property would extend to land or other properties exclusively owned by collectives.⁸⁹

5. *The Development of the Chinese Countryside Continues to Lag Behind That of Urban Areas Despite the Current Land-Use Legal Regime*

Chinese farmers view the rural land-use system as a major factor preventing them from improving their financial status as their urban

⁸⁴ *Id.* art. 37. The contract for transfer should include the same information as the original contract between the household and the collective economic organization.

⁸⁵ WAN ET AL., *supra* note 67, at 107.

⁸⁶ Property Law, *supra* note 26.

⁸⁷ See James, *supra* note 20, at 473-74 (stating that the new law does very little to change the conditions of the peasants).

⁸⁸ Property Law, *supra* note 26, art. 124.

⁸⁹ See XIAN FA art. 10 (2004) (P.R.C.); Property Law, *supra* note 26, arts. 41, 56, 63.

counterparts have done.⁹⁰ In fact, the primary cause of rural unrest stems from land-related conflicts.⁹¹ Despite the protections for rural land-use rights codified within the LAL, the RLCL, and the Property Law, the rural-urban income gap steadily increased throughout the 1990s and into this century.⁹² The inherent implementation problems that flow from the Chinese governmental structure (including the weak judiciary and lack of oversight and transparency in the government hierarchy) have been well documented.⁹³ In the rural land context, if reform in law or policy is to be successful, it must be implemented at the grassroots level.⁹⁴

Difficulties with implementation and enforcement of rural land-use rights at the local level seem to be a central factor in the growing rural-urban gap.⁹⁵ The RLCL and LAL state that each household receive a contract for their land-use rights, but not even half of all rural households hold a registered contract to their land, and fewer still believe that their thirty-year contract will be honored for its total duration.⁹⁶ Fewer than two years after the LAL was revised, the Ministry of Agriculture announced that ninety-eight percent of villages had implemented the contracting system.⁹⁷ However, the implementation of the LAL was far less successful than the statistics indicated, according to a survey of 1,600 households in seventeen provinces conducted in 2005 by the Rural Development Institute (“RDI”).⁹⁸ The survey showed that only forty-five percent of farm households had received a written land-use contract,⁹⁹ and surveys conducted by the same organization in 1999 and 2001 indicated that only forty percent of

⁹⁰ James, *supra* note 20, at 476.

⁹¹ See e.g., Zhu et al., *supra* note 3, at 766 (“[L]and-related conflicts . . . are now the top rural grievance in China”).

⁹² *Id.* at 765.

⁹³ See, e.g., IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 18 (Jianfu Chen et al. eds., 2002) (describing the general situation regarding the implementation of law in China as unsatisfactory, if not dismal or in crisis).

⁹⁴ Zhu et al., *supra* note 3, at 834 (“[P]owerful evidence supports the view that any solution to these issues must include, as a central element, providing farmers with greater tenure security. This requires significant legal and policy reforms, and their concrete implementation at the grassroots level.”).

⁹⁵ See *id.* at 833-34.

⁹⁶ RURAL DEVELOPMENT INSTITUTE, OUR WORK: CHINA, http://www.rdiland.org/OURWORK/OurWork_China.html (last visited Oct. 16, 2009) [hereinafter RDI]. These numbers are based on sample surveys conducted in 1999 and 2001. *Id.*

⁹⁷ Zhu et al., *supra* note 3, at 766.

⁹⁸ See generally Zhu et al., *supra* note 3. RDI is a Seattle-based organization dedicated to securing land rights internationally. See About RDI, <http://www.rdiland.org/ABOUTRDI/About.html> (last visited Oct. 16, 2009).

⁹⁹ Zhu et al., *supra* note 3, at 788.

households were confident in their land tenure (that their land would not be readjusted or expropriated).¹⁰⁰

Additionally, the government can easily circumvent the protections afforded by the LAL and the RLCL through the law of eminent domain, which allows the government to expropriate a farmer's land in the public interest¹⁰¹ and requires the government to compensate the farmer at a very low price if he or she is compensated at all.¹⁰² Additionally, rural farmers are not entitled to the same free benefits to which urban dwellers are entitled, such as basic medical care, elementary education, and social security, thus deepening the disparity.¹⁰³

Finally, the Chinese government and the CCP consider the rapid conversion of arable land to non-agricultural use, which has been extensive since the beginning of China's economic reform, as a pressing issue.¹⁰⁴ This conversion is spurred by the growing needs of urban areas, including urbanization, industrialization, and road construction.¹⁰⁵ Such conversion is surely troubling to a government focused on raising the income of its rural residents by boosting productivity and maintaining farmland for grain security purposes. The following sections examine how current Chinese policy focuses on ameliorating these rural concerns by reinforcing the land-use rights of farmers under the current legal regime, and analyzes the probable success of such attempts.

III. THE CHINESE GOVERNMENT AND THE CCP SEEK TO MAINTAIN GRAIN SUPPLY AND INCREASE FARMERS' INCOMES BY INTRODUCING SEVERAL POLICY CHANGES TO THE RURAL LAND-USE REGIME

In October 2008 and February 2009, respectively, the CCP Central Committee (中共中央) issued two policy documents concerning rural reform—the 2008 Decision and the 2009 No. 1 Document (collectively “the Policy Documents”). The Policy Documents are arguably a part of the current body of Chinese law concerning rural land-use rights, because government officials often treat similar documents as having the force of

¹⁰⁰ See RDI, *supra* note 96.

¹⁰¹ XIAN FA art. 10 (2004) (P.R.C.).

¹⁰² See Zhu et al., *supra* note 3, at 825-27. Studies have shown that it is typical for farmers to receive only 10-20% of the compensation. *Id.* at 826. The rest is retained by the collectives or local governments. *Id.*

¹⁰³ *Id.* at 765. “Per capita government spending on social welfare for urban residents in the 1990s was some thirty times greater than in rural areas.” Fei-Ling Wang, *supra* note 4, at 107.

¹⁰⁴ See Samuel P.S. Ho and George C.S. Lin, *Non-Agricultural Land Use in Post-Reform China*, 179 *China Q.* 758, 760 (2004).

¹⁰⁵ See *id.* at 762-64.

law. The Policy Documents state reforms to the current rural land-use rights system, which include indefinite terms in farmers' land-use contracts, growth of rural land-use rights markets, and maintaining the agricultural use of farmland. The intended effects of these policy measures are to increase farmers' incomes and maintain grain security. Sections A and B will attempt to situate the Policy Documents within the context of Chinese governance. Sections C, D, and E will discuss the specific changes the Policy Documents put forth and the goals that they hope to accomplish.

A. *The Policy Documents Reflect Larger Concerns about Stability in the Chinese Countryside*

The CCP Central Committee promulgated the 2008 Decision on October 12, 2008, under the pressure generated by rural unrest and the looming economic crisis.¹⁰⁶ The focus of that session was rural reform and development, in order to “build up a new socialist countryside.”¹⁰⁷ In the 2008 Decision, the CCP lists the above-mentioned effects of the suggested reforms, but also includes language that reflects its concern about stability in rural areas. For instance, the CCP states its desires to “absolutely and fundamentally eliminate the phenomenon of poverty,” and continually designate the problem of feeding around a billion people as a high priority in maintaining peace.¹⁰⁸ Such goals indicate that the government believes much work must still be done in order to promote a stable and productive countryside.¹⁰⁹

Likewise, the 2009 No. 1 Document forms a part of the CCP's and Chinese government's work towards greater rural stability.¹¹⁰ Each February, the CCP Central Committee together with the State Council issue a policy directive, entitled the Number One Central Document.¹¹¹ Since 2004, these directives have continually highlighted and attempted to address the strides yet to be made to ameliorate the critical problems accompanying

¹⁰⁶ See 2008 Decision, *supra* note 10; *China Agrees to Land Reform Package*, BBC NEWS, Oct. 12, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7665907.stm>.

¹⁰⁷ See 2008 Decision, *supra* note 10, introductory para.

¹⁰⁸ *Id.* sec. 2, para. 4.

¹⁰⁹ See *id.* sec. 1, paras. 4, 5 and 6.

¹¹⁰ 2009 No. 1 Document, *supra* note 12. The 2009 No. 1 Document was issued jointly on February 1, 2009 by the CCP Central Committee and the State Council. Jun Wang, *For the Livelihood of Farmers*, RADIO 86, Feb. 17, 2009, available at <http://www.radio86.co.uk/china-insight/from-chinese-media/9776/for-the-livelihood-of-farmers>.

¹¹¹ See *No. 1 Central Document Focuses on Rural Issues for 5th Year*, CHINA VIEW.CN, Jan. 30, 2008, http://news.xinhuanet.com/english/2008-01/30/content_7529372.htm (last visited Nov. 3, 2009).

the goal of rural development.¹¹² Like those before it, this year's Number One Central Document primarily discusses rural reform.¹¹³

B. The Policy Documents Will Likely be Followed by Government Officials as if They Were Law

Before analyzing the Policy Documents that are the focus of this Comment (the 2008 Decision and the 2009 No. 1 Document), it is vital to understand the overall role that policy plays in Chinese governance.¹¹⁴ In China, the distinction between law and policy is often blurred.¹¹⁵ Policy directives issued by the Chinese government and/or the CCP are a common form of government mandate and are followed by lower government organs, even though they are not technically binding.¹¹⁶ Policy undoubtedly embodies the principles that guide major official action as well as revisions in the law.¹¹⁷ A glimpse into the treatment and trajectory of past directives issued by the CCP and the State Council illustrates the important place of

¹¹² See *id.* In the previous five No. 1 Documents, key phrases were “increasing farmers’ incomes” (2004), “improving agricultural production capacity” (2005), “pushing forward the modern ‘countryside’ scheme” (2006), “developing modern agriculture” (2007), and “fortifying the base of agriculture and seeking ways to integrate urban with rural areas” (2008).

¹¹³ Jun Wang, *supra* note 110.

¹¹⁴ The Policy Documents were issued by the Central Committee of the Chinese Communist Party and the State Council. The State Council is the chief administrative authority of the PRC and is most akin to the cabinet of the executive branch in the United States government. KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 177 (2nd ed. 2003). Although the NPC is the main legislative branch of the Chinese government, the State Council is empowered to issue regulations in order to implement specific statutory provisions. XIAN FA art. 89 (2004) (P.R.C.). The State Council also has the authority to issue normative documents entitled “resolutions” (*juanyi*) and “decisions” (*jueding*). Jianfu Chen et al., *supra* note 93, at 119. Such documents have the force of law. *Id.*

¹¹⁵ ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA* 95 (2004).

¹¹⁶ Zhu et al., *supra* note 3, at 771. The Policy Documents that are the focus of this comment are not technically binding because the CCP, the body that issued the 2008 Decision and jointly issued the 2009 No. 1 Document with the State Council, is not empowered through the Constitution or the Law on Legislation to make laws. And although the State Council, the joint issuer of the 2009 No. 1 Document, and has the authority to make law, the 2009 No. 1 Document was not issued as a regulation or any other kind of formally legally binding document.

¹¹⁷ A thorough exposition of the interaction between policy and law in China is not possible within the confines of this comment. For a more detailed analysis, see generally MURRAY SCOT TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS* (1999). In this book, Tanner explains the ill-defined relationship between the formal legal system and the Communist Party: “The perennial debate over the relative authoritativeness of ‘laws’ versus Party ‘policy,’ a debate which has raged since the earliest years of the People’s Republic, has never been resolved with any useful clarity. Many Party leaders and legal scholars have argued that laws possess a special authoritativeness and stability because they reflect the Party’s distilled wisdom and experience, developed in carrying out policy over a long period. . . . [T]he Party has never resolved the authoritativeness debate by taking the above assertion to its appropriate logical conclusion and officially declaring state law superior to Party policy.” *Id.* at 32-33.

policy in Chinese governance. The treatment of the Central Committee's decisions demonstrates that policy has tangible, quasi-legal effects. First, in China, the CCP shapes and decides all major political, social, and economic policy issues.¹¹⁸ One source of such policy is the annual plenum of the CCP Central Committee.¹¹⁹ Policy resulting from Central Committee plenums is often given *pro forma* approval by the National People's Congress ("NPC") during its annual meeting in March.¹²⁰ Second, those in China talk about policy as if it had binding legal effect. For example, in discussing the 2008 Decision, scholars and government advisers stated that the new policy would allow rural farmers to engage in the unrestricted trade of their land-use contracts.¹²¹

Also, government officials use policy during speeches to spur change and encourage adherence to Party laws and policies. The latest example of this phenomenon comes from the fourth plenary session of the seventeenth CCP Central Committee, which convened in September 2009.¹²² The goal of that plenum was to enhance democracy and fight corruption.¹²³ In October, a senior Chinese leader, Zhou Yongkang, referred to the policy issued from the plenum and not Chinese law when he called for efforts to improve the work of the Chinese judiciary.¹²⁴ Anecdotally, these examples show the strong role that policy plays in Chinese governance.

Additionally, policy issued by the Chinese government often eventually becomes a part of the legal corpus. For example, in 1993, the

¹¹⁸ LIEBERTHAL, *supra* note 114, at 234 (stating that the "Chinese Communist party retains the power to decide all major political, social, and economic policy issues."). Lieberthal continues, "[T]he party's continuing relevance stems from its ongoing monopoly on the exercise of political power . . . party bodies make the major decisions on the major substantive issues that confront not only the government but all public institutions." *Id.* at 241. Also, according to Chinese law scholar Randall Peerenboom, the CCP Central Committee is one of three groups that have lawmaking power in China (the other two are the State Council and the NPC). RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD THE RULE OF LAW* 223 (Cambridge 2002). Although the CCP has lost the ability to control unilaterally control the lawmaking process, Party power has not disappeared. *Id.* at 189. In fact, "[t]he Party undeniably is still a major force, capable of getting its way on key issues . . ." *Id.*

¹¹⁹ LIEBERTHAL, *supra* note 114, at 174. The Central Committee meets once or twice a year to discuss and announce policies. *Id.* The 2008 Decision was adopted by the third plenary session of the Seventeenth CCP Central Committee. See 2008 Decision, *supra* note 10.

¹²⁰ See, Edward Wong, *China Announces Land Policy Aimed at Promoting Income Growth in Countryside*, N.Y. TIMES, Oct. 12, 2008, <http://www.nytimes.com/2008/10/13/world/asia/13china.html> (last visited Nov. 20, 2009).

¹²¹ *Id.*

¹²² See *CPC Central Committee Closes Plenum, Vows to Enhance Democracy, Fight Corruption*, CHINA VIEW, Sept. 18, 2009, http://news.xinhuanet.com/english/2009-09/18/content_12075992.htm (last visited Nov. 20, 2009).

¹²³ *Id.*

¹²⁴ *Senior Chinese Leader Calls for Strengthened Efforts in Judicial Work*, CHINA VIEW, Oct. 10, 2009, http://news.xinhuanet.com/english/2009-10/10/content_12208696.htm (last visited Nov. 20, 2009).

Chinese government and the CCP Central Committee issued a policy directive that set forth the intention of providing farmers with thirty-year contractual rights.¹²⁵ The thirty-year policy was then implemented at the village level and put into practice.¹²⁶ Five years later, in 1998, the policy provision was formally codified as law in the LAL.¹²⁷

In short, policy in China operates differently than it does elsewhere in the world; policy has immediate, tangible, and quasi-legal effects. Thus, when discussing the Policy Documents that are the subject of this comment, one must bear in mind that policy has repercussions beyond the four corners of the documents. This is especially important when contemplating whether the current policy of the Chinese government represents a “breakthrough” in rural reform.

C. The Policy Documents Suggest Three Main Changes to Current Rural Land-Use Law

Taken together, the Policy Documents promote three major changes to rural land-use law. First, the Policy Documents indicate that the contractual land-use terms will expand from thirty to an indefinite number of years. Second, the CCP and the government institute reforms that will spur the growth of rural land-use rights markets. Finally, the CCP and the government reinforce their commitment to maintaining the agricultural use of farmland by mandating that agricultural land not be converted to non-agricultural uses.

1. The Policy Documents Suggest that the Duration of Rural Contractual Land-Use Rights Will be Indefinite

In both Policy Documents, the government emphasizes a desire to eliminate the thirty-year time frame for farmers’ contractual land-use rights. The language of both documents extends this thirty-year right indefinitely. The 2008 Decision indicates the need to “[g]rant farmers more complete and secure contractual land management rights; the stability of the present land contract relationships is to be ensured and these relationships will *remain unchanged for a very long time*” (“长久不变”) (emphasis added).¹²⁸

¹²⁵ Zhu et al., *supra* note 3, at 771. At that time, farmers had fifteen-year contractual rights in their land and the government was concerned about the rural land-use tenure problem. *Id.*

¹²⁶ Telephone Interview with Keliang Zhu, Staff Attorney, Rural Development Institute (Feb. 6, 2009).

¹²⁷ Land Administration Law, *supra* note 24, art 14.

¹²⁸ 2008 Decision, *supra* note 10, sec. 3, para. 1.

Similarly, the 2009 No. 1 Document mandates, “give farmers more complete and guaranteed land contract rights, maintain the stability of the current land contract relationship, [these relationships] will *remain unchanged for a very long time*” (“长久不变”) (emphasis added).¹²⁹

During the drafting of the 2008 Decision, the exact language referring to farmers’ contractual term changed twice.¹³⁰ One draft stated that contractual rights would remain unchanged “for a long term” (“长期不变”).¹³¹ The other stated that land-use rights would be “fixed perpetually” (“永久不变”).¹³² The central leadership opted for the more flexible language (“remain unchanged for a very long time”).¹³³ Although the 2008 Decision does not define the phrase, if the policy is implemented by local governments, the land-use rights of farmers could be on par with or possibly extend beyond those for urban dwellers, who currently enjoy seventy-year rights to the land they occupy.¹³⁴ Granting farmers indefinite rights to farm their land would be an unprecedented step towards promoting a more stable Chinese countryside that, coupled with the two changes below, would represent a dramatic shift in the way that land is held and used.

2. *The Policy Documents Promote the Growth of Markets in Rural Land-Use Rights by Removing Restrictions on Assignment and Providing for Necessary Market Institutions*

The Policy Documents also express a desire to create rural markets for the transfer of land-use rights,¹³⁵ specifically by providing the institutions necessary to build up such markets and by removing the legal limit on assignment of use rights contained in the RLCL.¹³⁶ In the 2009 No. 1 Document, the CCP states as a goal: “Establish and perfect markets for transferring contractual land management rights. . . . Encourage localities that have the capacity to develop transfer service organizations to provide information sharing, advice on regulations, valuation, contract signing

¹²⁹ 2009 No. 1 Document, *supra* note 12, para. 17.

¹³⁰ Telephone Interview with Keliang Zhu, *supra* note 126.

¹³¹ *Id.*

¹³² *Id.*

¹³³ 2008 Decision, *supra* note 10, sec. 3, para. 1; 2009 No. 1 Document, *supra* note 12, para. 17.

¹³⁴ *Cheng zhen guo you tu di shi yong quan chu rang he zhuan rang zan xing tiao li* [Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of State-Owned Land in the Urban Areas] (promulgated by the State Council, May 19, 1990, effective May 19, 1990), art. 12, LAWINFOCHINA (last visited Nov. 3, 2009) (P.R.C.) (providing for the seventy-year land-use term); Property Law, *supra* note 26, art. 149 (providing for automatic renewal).

¹³⁵ 2008 Decision, *supra* note 10, sec. 3, para. 2; 2009 No. 1 Document, *supra* note 12, para. 18.

¹³⁶ See 2008 Decision, *supra* note 10, sec. 3, para. 2.

services, and dispute resolution, etc. for the transferring parties.”¹³⁷ This statement demonstrates the CCP’s wish to build up markets for land-use rights by providing for the supporting institutions to run them.

In the 2008 Decision, the CCP seems to suggest another way to promote the development of markets for land-use rights: removing the limitation on the assignment of use rights contained in RLCL Article 37.¹³⁸ Within the RLCL, Article 32 lists four specific ways by which farmers can transfer their land-use rights: subcontract, lease, exchange, and assignment.¹³⁹ Article 37 limits farmers’ use of assignment by requiring them to obtain consent from the issuer of the land contract before assigning their use rights to a third party.¹⁴⁰ The 2008 Decision lists the same four ways to transfer use rights as contained in RLCL Article 32:

Establish and perfect markets for transferring contractual land management rights, allow farmers to transfer contractual land management rights . . . by means of subcontract, lease, exchange, assignment or entering into a joint-stock cooperative, develop various forms of management on an appropriate scale.¹⁴¹

Although both the 2008 Decision and the RLCL list the same four means of transfer, the language of the 2008 Decision lacks the limitation on assignment.¹⁴² By not including this limitation in the 2008 Decision, the CCP seems to imply that farmers will not be subject to it in the future, and will be able to more freely transfer their use rights to other parties using rural use rights markets. As discussed in Section III.D below, more transfers of use rights to farmland will likely result in the farming of larger plots, which will likely lead to increased efficiency in crop production, higher production levels, and thus an increase in farmers’ incomes and maintenance of grain security.

¹³⁷ 2009 No. 1 Document, *supra* note 12, para. 18.

¹³⁸ See 2008 Decision, *supra* note 10, sec. 3, para. 2.

¹³⁹ Law on Land Contract in Rural Areas, *supra* note 25, art. 32.

¹⁴⁰ *Id.* art. 37. See also Huang, *supra* note 32, at 221.

¹⁴¹ 2008 Decision, *supra* note 10, sec. 3, para. 2.

¹⁴² *Id.*

3. *In an Effort to Halt the Non-Agricultural Use of Farmland, the Policy Documents Mandate Agricultural Use of Farmland*

Non-agricultural use of farmland is a pressing government concern.¹⁴³ The LAL and the RLCL highlight the importance of maintaining the agricultural use of farmland, but they fall short of prohibiting the use of farmland for non-agricultural purposes. The LAL requires each province in China to designate at least eighty percent of cultivated land as basic farmland.¹⁴⁴ Article 19 of the LAL states, “[s]trictly protect the basic farmland and control the occupation of agricultural land for non-agricultural purposes.”¹⁴⁵ Article 22 elaborates, “[t]he amount of land used for urban construction shall conform to the standards prescribed by the State so as to make full use of the existing land for construction purposes, not to occupy or to occupy as little agricultural land as possible.”¹⁴⁶ And Article 38 stipulates that unused land will be given priority development for agricultural purposes.¹⁴⁷ The RLCL also falls short of using mandatory language to protect the agricultural use of land. Similar to the LAL, Article 8 of the RLCL provides that contracted land may not be used for non-agricultural purposes, without approval granted according to law.¹⁴⁸

In contrast, the Policy Documents employ stronger language for the protection of farmland. The 2008 Decision states that conversion of land to non-agricultural use will not be allowed.¹⁴⁹ In Section 19 of the 2009 No. 1 Document, the government directs that “the strictest system for the protection of agricultural land and the strictest system for economizing land use” must be implemented in each village.¹⁵⁰ Specifically, localities must designate basic farmland and establish a uniform system of farmland protection.¹⁵¹ Also, the 2009 No. 1 Document strictly forbids localities from adjusting their land-use plans or modifying the location of basic farmland without government authorization.¹⁵² In addition, the 2009 No. 1 Document calls for localities to examine the responsibilities and goals of local

¹⁴³ See *supra* Part III.B.5.

¹⁴⁴ Land Administration Law, *supra* note 24, art. 34.

¹⁴⁵ *Id.* art. 19, § 1.

¹⁴⁶ *Id.* art. 22.

¹⁴⁷ *Id.* art. 38.

¹⁴⁸ Law on Land Contract in Rural Areas, *supra* note 25, art. 8.

¹⁴⁹ The 2008 Decision dictates that local governments shall “guarantee that the total amount of basic farmland does not decrease, that its use does not change, and that its quality improves.” 2008 Decision, *supra* note 10, sec. 3, para. 2. The 2009 No. 1 Document similarly mandates that “it shall be forbidden to . . . change the land’s use.” 2009 No. 1 Document, *supra* note 12, para. 18.

¹⁵⁰ 2009 No. 1 Document, *supra* note 12, para. 19.

¹⁵¹ *Id.*

¹⁵² *Id.*

governments relating to the protection of agricultural land.¹⁵³ In furtherance of such protection, localities are instructed to implement an audit system calling for the termination of leaders and cadres who do not adhere to the protection of cultivated land.¹⁵⁴ Direct disciplinary action against local government officials charged with management of rural land is a threat not found in the LAL or the RLCL. By insisting that the amount of arable land not diminish,¹⁵⁵ the policy documents seem to strengthen the central government's commitment to prevent urban encroachment and provide for grain supply security.

D. The Two Major Objectives of These Policy Changes Are Increasing Farmers' Incomes and Maintaining Grain Security

The CCP and the Chinese government anticipate that the above three changes to farmers' land-use rights¹⁵⁶ will achieve two major objectives: 1) increase farmers' incomes and 2) help maintain grain security. The Policy Documents connect each objective to the three changes by describing the changes and repeatedly mentioning the objectives throughout. In addition, each objective reflects concerns that are grounded in China's current reality.

1. The CCP and Chinese Government Hope to Double Farmers' Incomes

Both Policy Documents state the goal of increasing farmers' incomes in various places. Thus, it seems that increasing farmers' incomes motivates the policy measures the Documents describe, including the three changes to farmers' land-use rights. The 2008 Decision mentions "doubling farmers' per-capita net incomes" early on as one of the "basic goals and tasks of rural reform" to achieve by the year 2020.¹⁵⁷ It also states increasing farmers' incomes as a requirement for advancing scientific development,¹⁵⁸ and lists it as a criterion for assessing the performance of county officials.¹⁵⁹ The title of the 2009 No. 1 Document contains the words "Increase Farmers' Incomes."¹⁶⁰ It also states that "wavering of farmers' incomes must be

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 2008 Decision, *supra* note 10, sec. 3, para. 2; 2009 No. 1 Document, *supra* note 12, para. 19.

¹⁵⁶ These changes are: making contractual use-rights terms indefinite, removing restrictions on assignment and providing institutional support for rural use-rights markets, and maintaining the agricultural use of farmland. *See supra* Parts III.C.1, III.C.2 and III.C.3.

¹⁵⁷ 2008 Decision, *supra* note 10, sec. 2, para. 2. Specifically, this section of the document calls for doubling farmers' per capita income by 2020. *Id.*

¹⁵⁸ 2008 Decision, *supra* note 10, sec. 1, para. 4.

¹⁵⁹ *Id.* sec. 6, para.1.

¹⁶⁰ *See* 2009 No. 1 Document, *supra* note 12, title.

resolutely guarded against,”¹⁶¹ and that increasing farmers’ incomes should be a criterion for measuring the performance of local officials.¹⁶² The prominence of increasing farmers’ incomes in the Policy Documents demonstrates that this goal motivates the CCP’s and the government’s policy measures in the documents, which include the three changes to rural land-use rights.

The desire of the CCP to increase farmers’ incomes likely arises from the widening gap in wealth and living standards between rural and urban areas,¹⁶³ as discussed above.¹⁶⁴ In 1964, the average Chinese urban income was 2.2 times the average rural income.¹⁶⁵ By 2006, that difference increased to 3.2.¹⁶⁶ According to the National Bureau of Statistics of China, the real growth rate of average rural incomes overtook the real growth rate of average urban income (as of 2008); even so, the disparity between the absolute annual incomes of rural and urban residents increased by a factor of twelve from 1981 to 2008.¹⁶⁷ In sum, the disparity between urban and rural incomes is a very real problem that causes the CCP and Chinese government great concern, which the Policy Documents reflect.

2. *Maintaining Grain Security is a Central Goal of the CCP and Chinese Government*

In addition to increasing farmers’ incomes, it appears that maintaining grain security also motivates the measures set out in the Policy Documents, since the Chinese government and the CCP repeatedly mention their concerns about grain security at various points in the documents. According to the 2008 Decision, “[S]olving the problem of feeding around one billion people [must be] continually designated as a high priority in running the

¹⁶¹ *Id.* introductory para. 3.

¹⁶² *Id.* concluding para. 1.

¹⁶³ See 2008 Decision, *supra* note 10, sec. 1, para. 5 (stating, “[D]isparities in regional development and incomes of rural and urban residents are expanding, [and] changing the backward face of the countryside becomes urgent”).

¹⁶⁴ See *supra* Part II.C.5.

¹⁶⁵ Fei-Ling Wang, *supra* note 4, at 107 (citing Yicai Zhong, *Cheng xiang er yuan she hui de rong he yu yin nong jin cheng* [The Merging of the Dualistic Urban and Rural Societies and the Drawing of Peasants Into Cities], *SHE HUI KE XUE* [SOC. SCI.] 54, 55 (1995)).

¹⁶⁶ NATIONAL BUREAU OF STATISTICS OF CHINA, *CHINA STATISTICAL YEARBOOK 10-2* (2007), available at <http://www.stats.gov.cn/tjsj/ndsj/2007/indexeh.htm>. The authors of this comment calculated this number by dividing the 2006 per capita annual disposable income of urban households by the per capita net income of rural households.

¹⁶⁷ 2008 nian san ji du jing ji shu ping: suo xiao cheng xiang shou ru cha ju ying dui guo ji jin rong wei ji [2008 Three-Quarter Economic Review: Narrowing the Rural-Urban Income Gap to Respond to the Global Financial Crisis] *ZHONGGUO XIN XI BAO* [CHINA INFORMATION TIMES], Nov. 7, 2008, http://www.stats.gov.cn/tjfx/ztfx/2005sbnjjs/t20081107_402515209.htm (last visited Nov. 20, 2009).

country well and maintaining peace.”¹⁶⁸ Also, as with increasing farmers’ incomes, the 2008 Decision lists maintaining grain security as a requirement of scientific development.¹⁶⁹ The 2009 No. 1 Document states that “[w]ith the high base quotas resulting from five years of continuous increases in agricultural production, the task of maintaining grain security and development has become ever more onerous”¹⁷⁰ In the same paragraph, the document states that “decreases in grain production must be resolutely guarded against.”¹⁷¹ Thus, it is apparent that the Policy Documents connect the CCP’s and government’s worries about grain security to the policy measures that the Documents enumerate, which include the three changes to farmers’ land-use rights.

Statistical data confirm the Chinese government’s concerns about grain security.¹⁷² Between 1984 and 2002, the level of security in China’s supply of grain products consistently decreased.¹⁷³ In particular, from 1997 to 2002, consumption of grain in the form of animal feed contributed in large part to an increase in demand and decrease in supply of grain in China, resulting in a grain shortage.¹⁷⁴ However, increased demand for animal feed is not the only cause of China’s shrinking grain supply; the continually decreasing amount of farmland in China is also diminishing its grain reserves.¹⁷⁵ Among the many factors that influence a country’s food production and supply, the amount of available farmland is one of the most crucial.¹⁷⁶ In the case of China, many experts agree that loss of farmland is undermining China’s food production capacity.¹⁷⁷ This information demonstrates that the CCP’s and government’s goal of maintaining grain security is not only connected to the three changes to use rights mentioned above, but it is also grounded in the reality of low grain production levels in China.

¹⁶⁸ 2008 Decision, *supra* note 10, sec. 2, para. 4.

¹⁶⁹ *Id.* sec. 1, para. 4.

¹⁷⁰ 2009 No. 1 Document, *supra* note 12, introductory para. 3.

¹⁷¹ *Id.*

¹⁷² See Peng Li et al., *Cong shi wu bao zhang zhuang kuang kan Zhongguo dang qian liang shi an quan* [Viewing China’s Current Grain Security through the Situation of Food Security], 6 ZHONGGUO NONG CUN JING JI [CHINESE RURAL ECON.] 4, 8-10 (2005).

¹⁷³ See *id.* at 8.

¹⁷⁴ See *id.*

¹⁷⁵ Baiming Chen, *The Existing State: Future Change Trends in Land-Use and Food Production Capacities in China*, 28 AMBIO 682, 682 (1999).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

E. *The Three Use Rights Changes Will Contribute to Achieving the CCP's and Government's Goals in the Policy Documents*

Providing farmers with use rights of an indefinite term, maintaining the agricultural use of farmland, and facilitating trade in land-use rights will contribute to achieving the CCP's and government's goals of increasing farmers' incomes and maintaining grain security. The three changes promote these goals by increasing farmers' rates of long-term investment in their contract land, boosting agricultural production, and limiting the amount of farmland converted to non-agricultural land. As such, the changes will probably play an important, perhaps even essential, role in achieving the CCP's and Chinese government's goals.

1. *Indefinite Terms for Rural Land-Use Rights Will Further the CCP and Government's Policy Goals*

Making farmers' use rights indefinite will provide farmers with greater assurance that they will profit from their investments. Indefinite use-rights terms allow for long-term, land-saving investments; enable farmers to avoid negotiations for a new use-rights contract; and increase farmers' confidence that their heirs will profit from investments they make. With greater assurance that they will reap a profit from long-term investments, farmers will actually make these investments, which will aid in achieving the CCP's and Chinese government's policy goals of increasing incomes and maintaining grain security.

Various studies have documented the connection between indefinite use rights terms and Chinese farmers' increased investment in their land. One study conducted in 1994 in Hebei Province concluded that the longer the time a farmer knows he or she can farm a plot, the more likely he or she is to make long-term, land-saving investments.¹⁷⁸ Another report from RDI, based on 1994 fieldwork in Anhui and Shandong, stated that most farmers interviewed "would make significant incremental improvements [to their] land under a policy of perpetual use rights."¹⁷⁹ Hence, empirical evidence suggests that farmers in China take the length of their use rights term into account when deciding whether to invest in their farmland. Currently,

¹⁷⁸ See Scott Rozelle et al., *Tenure, Land Rights, and Farmer Investment Incentives in China*, 19 AGRIC. ECON. 63, 68-69 (1998). These investments include the use of organic manure and phosphate fertilizer. See *id.* at 68. They also include repairs to irrigation facilities, land leveling, employment of advanced farming technology, or diversification into value-added crops. Zhu et al., *supra* note 3, at 808.

¹⁷⁹ ROY PROSTERMAN ET AL., RURAL DEV. INST., REFORMING CHINA'S RURAL LAND SYSTEM: A FIELD REPORT 28 (1994).

farmers have contractual terms of thirty years in which to realize their investments.¹⁸⁰ This may seem like a considerable amount of time. However, the studies indicate that granting farmers an indefinite term for their use rights will motivate them to make even more long-term investments than they do now.¹⁸¹

In addition, indefinite use terms allow farmers to avoid having to bear the burden of negotiating a renewal of their contracts with local officials, resulting in use rights that are more stable than the ones farmers currently possess. Presently, a farmland contractor (i.e. a farming household) “may continue the contract according to the relevant national rules” after the contract’s thirty-year term has ended.¹⁸² It seems logical, though, that a contract with an indefinite term would be more stable than the current limited-term contracts, in spite of farmers’ ability to renew the limited-term contracts. Under a limited-term contract, the contractor must affirmatively negotiate a renewal with the collective, which might require him or her to go through bureaucratic hassles and make concessions to obtain a new contract. Under a contract with an indefinite term, the contractor must only bear such a burden if the collective moves to terminate the contract.¹⁸³

Finally, indefinite terms for land-use rights enable farmers to better ensure that their children can keep this important income source within their families. In the current use rights system, a farmer’s use rights contract can be inherited.¹⁸⁴ Although the children can negotiate for a new contract when

¹⁸⁰ Land Administration Law, *supra* note 24, art. 14.

¹⁸¹ See PROSTERMAN ET AL., *supra* note 179, at 29 (stating that even when farmers have been clearly told that they have fifteen-year ownership rights, they do not make long-term investments, and that farmers will not feel secure in their use rights unless they are granted perpetual use rights with the right of inheritance).

¹⁸² Property Law, *supra* note 26, art. 126. It is not clear to which “relevant provisions” the Property Law alludes to here. James, *supra* note 20, at 474.

¹⁸³ Of course, the stability of contractual land-use rights under indefinite land-use contracts would also depend on the types and variety of reasons that collectives could invoke to terminate those contracts. However, since current laws do not allow for the creation of indefinite land-use contracts, they also do not specify reasons that collectives could invoke to terminate such contracts. See generally Land Administration Law, *supra* note 24; Law on Land Contract in Rural Areas, *supra* note 25; and Property Law, *supra* note 26. Thus, because these reasons are not specified, the authors cannot make any definite assertions about the effect that reasons for termination would have on the stability of land-use rights under such contracts.

The comparative stability that indefinite use terms provide is also conditioned on how well local governments implement the restriction on readjustments in the RLCL. See *supra* Part II.C.5. There is recent evidence that problems in implementing this provision still exist. According to RDI’s 2005 seventeen province survey, 30.3% of villages that had contracted with farmers to give them thirty-year rights nevertheless readjusted land allocations after those contracts were formed. Zhu et al., *supra* note 3, at 794.

¹⁸⁴ According to the RLCL, “The benefits derived from the contract which are due to contractor shall be inherited in accordance with the provisions of the Succession Law.” Law on Land Contract in Rural Areas, *supra* note 25, art. 31.

the inherited contract ends, if the contract they inherit has an indefinite term, they do not have to negotiate and will more likely continue making long-term investments in the land.

In sum, indefinite use rights terms will prove to be more stable than the current limited use rights terms, boosting farmers' confidence that they (and their children) will realize a return on their investments. More stable use rights will motivate them to make longer-term, land-saving investments in their contracted land. Such investments will increase agricultural production levels,¹⁸⁵ thereby contributing to increasing farmers' incomes and to maintaining grain security.

2. *Prohibitions on Conversion of Agricultural Land Will Also Further the CCP and Chinese Government's Policy Goals*

By helping to slow the conversion of farmland to non-agricultural land, prohibitions against such conversion will also boost farmers' confidence in the profitability of their investments, thereby aiding in the achievement of the CCP's and Chinese government's two main policy goals. In the two decades before 2003, village officials and cities converted a large amount of rural land to non-agricultural uses, and much of the converted land was farmland.¹⁸⁶ Once a farmer's contracted land is used for a non-agricultural purpose, he or she cannot continue to farm the land and realize a profit from any investment he or she has made in the land. If rules are instituted that prohibit and deter these conversions, farmers will gain more confidence that enough time is available for their investments in the land to pay off.¹⁸⁷ Consequently, they will invest more in their contracted land, with the effect of increasing agricultural production.¹⁸⁸ Increases in production will in turn help achieve the government and the CCP's two main policy goals, especially the goal of maintaining grain security. Such prohibitions against conversion to non-agricultural use will help maintain a specific amount of land available for grain production. As stated above, the

¹⁸⁵ See Zhu et al., *supra* note 3, at 808 (stating that mid- to long-term investments will likely lead to significant increases in volume, productivity, and value of agricultural and other land-based production). See also PROSTERMAN ET AL., *supra* note 179, at 11 (stating that farmers interviewed in 1994 made few long-term investments to their land despite their awareness that doing so would increase their productivity).

¹⁸⁶ See Ho & Lin, *supra* note 50, at 693.

¹⁸⁷ See Zhu et al., *supra* note 3, at 808 (“[S]ecure, long-term land rights confirmed in right-specifying documents have been considered a necessary condition for farmers making mid- to long-term investments on land when they are reasonably certain that they will be able to recoup the full value of the investments.”). See also *id.* at 770-71 (“Farmers will not make mid- to long-term investments on a land parcel which they may not possess the next year or year after . . .”).

¹⁸⁸ See *id.* at 808.

decreasing amount of agricultural land in China is threatening its grain supply.¹⁸⁹ But if prohibitions are in force that limit the speed at which farmland is converted to non-agricultural uses, China can maintain enough of its land for grain production, and avert the looming threat of a grain shortage due to an insufficient amount of farmland available for grain production.

3. *Building up Markets to Promote Trade in Land-Use Rights Will Likewise Further the Policy Goals of the CCP and the Chinese Government*

Lastly, facilitating trade in land-use rights will result in more efficient farming. In addition, markets will increase the value of farmland, providing farmers with a large source of wealth with which to make investments in their land. More efficient farming and an added impetus to increase investments in farmland will increase production levels, thereby helping to achieve the policy goals of increasing farmers' incomes and maintaining grain security described above.

Thriving markets for rural land-use rights would facilitate consolidation of those rights, resulting in more efficient farming and increased production levels. Research indicates, however, that rural markets in land-use rights are still in developing stages.¹⁹⁰ Specifically, the unstable nature of farmers' land-use rights constrains these markets, since transferees in such markets cannot be sure that they will possess the use rights sold to them in the long-term.¹⁹¹ It has been argued that facilitating the growth of rural markets in land-use rights will "allow for 'voluntary, gradual reallocation' of land rights to the most efficient users [of the farmland], either farmer households or even large-scale agribusiness[es]."¹⁹² Since farmers and agribusinesses can work larger plots of land more efficiently, and increased efficiency logically results in increased production, they can increase agricultural production levels if they can consolidate their holdings of land-use rights.

¹⁸⁹ See *supra* Part II.C.5.

¹⁹⁰ Zhu et al., *supra* note 3, at 785.

¹⁹¹ *Id.* at 784.

¹⁹² Gregory T. Chin, *Securing a Rural Land Market: Political-Economic Determinants of Institutional Change in China's Agriculture Sector*, 29.4 ASIAN PERSP. 209, 233 (2005).

Thriving markets for rural land-use rights would also increase the value of those use rights.¹⁹³ With value added to their land-use rights, farmers could make more long-term investments in their land.¹⁹⁴ More investments in farmland would in turn increase production.¹⁹⁵ Hence, like the increase in efficiency described above, the added value to land-use rights would also enhance agricultural productivity.

By calling for the build-up of markets for rural land-use rights as well as the maintenance of farmland for agricultural use and indefinite use rights terms, the CCP and the Chinese government hope to increase farmers' incomes and maintain the nation's grain security. It appears likely that the three changes in the current system of land-use rights will contribute significantly to achieving those goals. However, the question remains whether additional measures are necessary to do so.

IV. THE THREE CHANGES MENTIONED IN THE POLICY DOCUMENTS REQUIRE SEVERAL ACCOMPANYING MEASURES TO BE SUCCESSFUL

The Policy Documents introduce many positive measures. The three policy changes fall short, however, of representing a "breakthrough" in rural reform. In order for the policy to be successful, the Chinese government and the CCP must specify which organization has authority to exercise collective ownership rights, create a registration system for land-use rights to farmland, and educate farmers about those rights.

A. *The Chinese Government Should Designate the Natural Village/Villagers' Group as the Rural Organization That Exercises Collective Ownership Rights*

While the reforms to land-use rights in the Policy Documents ensure a greater degree of land tenure security for farmers, they fail to specify exactly who represents rural collectives and exercises ownership rights to collectively-owned agricultural land. For instance, the 2009 No. 1 Document states the goal of "plac[ing] ownership rights in the hands of the collective organization that is the legally-determined [entity] to exercise ownership rights,"¹⁹⁶ but does not specify which organization is meant. This

¹⁹³ KELIANG ZHU & ROY PROSTERMAN, CATO INST. CENTER FOR GLOBAL LIBERTY AND PROSPERITY, SECURING LAND RIGHTS FOR CHINESE FARMERS: A LEAP FORWARD FOR STABILITY AND GROWTH, 10 (2007), available at <http://www.cato.org/pubs/dpa/DPA3.pdf>.

¹⁹⁴ *Id.*

¹⁹⁵ See Zhu et al., *supra* note 3, at 808.

¹⁹⁶ 2009 No. 1 document, *supra* note 12, para. 17.

lack of an identifiable collective owner is nothing new to the Chinese legal system; the LAL and the RLCL only refer to the “collective” as the legal owner of collectively owned land without specifying who this “collective” is,¹⁹⁷ and the 2007 Property Law likewise falls short of resolving this ambiguity.¹⁹⁸ In fact, this ambiguity has allowed local rural governments in China to implement a structure in which higher-level and not lower-level organizations in the rural collective hierarchy exercise ownership rights.¹⁹⁹ The ambiguity has also made it easier for township and village cadres to illegally convert collective farmland to commercial use by negotiating deals without consulting the farmers with use rights to that land.²⁰⁰ To remedy these problems, the CCP and the Chinese government should designate the villagers’ group, which villagers form out of a democratically elected body,²⁰¹ as the single rural organization with authority to act as the owner of collective farmland. Otherwise, the urbanization process and haste to develop real-estate and industry in China will continue to threaten farmers’ land-use rights, regardless of the term length of these rights.

The nonexistence of a legally designated holder of collective ownership rights to rural land has been a problem since the dismantling of the commune system in the late 1970s and early 1980s. The communes contained three levels: the commune, the production brigade, and the production team.²⁰² In 1962, the production team was identified as the owner of agricultural lands.²⁰³ After this system was dismantled and the

¹⁹⁷ See, e.g., Land Administration Law, *supra* note 24, art. 2 (naming the State and the collectives as the owners of land, and specifying the State Council as the body that exercises ownership rights to State-owned land); see, e.g., Land Administration Law, *supra* note 24, art. 8 (stating that farmers collectively own rural and suburban lands, but not naming a specific organization); Land Administration Law, *supra* note 24, art. 10 (naming collective economic organizations or villagers’ committees as the managers and administrators of collectively owned land, but only mentioning the “collectives” as the owners); see also Law on Land Contract in Rural Areas, *supra* note 25, art. 12 (referring to situations where peasants in a village own land collectively, but failing to specify the organization that represents the peasant landowners).

¹⁹⁸ See Property Law, *supra* note 26, art. 60 (“The exercise of the ownership of the collectively-owned lands . . . shall be in accordance with provisions as follows: (i) As to those owned collectively by peasants of a village, the village’s collective economic organization or villagers’ committee shall, on behalf of the collective, exercise the ownership . . .” But the law does not define the “collective” or clearly designating villagers’ committees as the holder of the ownership rights).

¹⁹⁹ See Peter Ho, *Who Owns China’s Land? Policies, Property Rights and Deliberate Institutional Ambiguity*, 166 CHINA Q. 394, 408 (2001).

²⁰⁰ See Ho & Lin, *supra* note 50, at 690, fig. 3; Ho, *supra* note 199, at 409-10.

²⁰¹ *Cun Min Wei Yuan Hui Zu Zhi Fa* [Organic Law of Villagers’ Committees] (promulgated by Standing Comm. Nat’l People’s Cong., Nov. 4, 1998, effective Nov. 4, 1998), arts. 10, 11, <http://www.mca.gov.cn/article/zwgk/fvfg/jczqhsqjs/200709/20070900001715.shtml> (last visited Nov. 3, 2009) (P.R.C.) [hereinafter Organic Law of Villagers’ Committees].

²⁰² Ho, *supra* note 199, at 404.

²⁰³ *Id.* at 405.

HRS was instituted, the township/town (乡/镇) replaced the commune, the administrative village (行政村) replaced the brigade, and the natural village/villagers' group (自然村/村民小组)²⁰⁴ replaced the production team.²⁰⁵ The natural village/villagers' group is the basic unit of this rural collective hierarchy.²⁰⁶ According to the PRC Organic Law of Villagers' Committees, the villagers' group is a subset of the villagers' committee,²⁰⁷ which is a body that a village's inhabitants democratically elect every three years.²⁰⁸

Although the natural village/villagers' group should have logically replaced the production team as the designated owner of collectively held rural land,²⁰⁹ the Chinese government has yet to designate such an owner. The revised Land Administration Law and the interpretation issued by the NPC Legal Committee fail to specify the organization that is the legal holder of collective ownership.²¹⁰ This law only states, "The land owned by the farmers' collective is by law owned by the farmers' collective of the village."²¹¹ The 2007 Property Law also does not specify a single organization in the rural collective hierarchy (township/town, administrative village, natural village/villagers' group) to exercise collective ownership rights. It states that either the village's collective economic organization or the villagers' committee shall exercise ownership rights to collectively held lands,²¹² but leaves the ambiguity in place by not choosing a single organization to exercise ownership rights and not defining the "collective economic organization."²¹³

As a consequence of this ambiguity, local rural governments can implement a structure of land ownership rights that prevents the natural village/villagers' group from claiming ownership to collectively held rural

²⁰⁴ The natural village and the villager's group both refer to the same entity. See Margo Rosato-Stevens, *Peasant Land Tenure Security in China's Transitional Economy*, 26 B.U. INT'L L.J. 97, 124-25 (2008).

²⁰⁵ Ho, *supra* note 199, at 405.

²⁰⁶ See Rosato-Stevens, *supra* note 204, at 125.

²⁰⁷ Organic Law of Villagers' Committees, *supra* note 201, art. 10.

²⁰⁸ *Id.* art. 11.

²⁰⁹ See Ho, *supra* note 199, at 405, 408.

²¹⁰ *Id.* at 405-06.

²¹¹ *Id.* at 405.

²¹² Property Law, *supra* note 26, art. 60. ("The exercise of the ownership of the collectively-owned lands . . . shall be in accordance with provisions as follows: (i) As to those owned collectively by peasants of a village, the village's collective economic organization or villagers' committee shall, on behalf of the collective, exercise the ownership . . .").

²¹³ See *id.* According to Margo Rosato-Stevens, the Property Law "simply includes the ability to exercise ownership rights in the bundle of management rights that had already existed under Articles 8 and 10 of the Revised Land Administration Law for each of the tiers (village, administrative village, and township)." Rosato-Stevens, *supra* note 204, at 125.

land.²¹⁴ In practice, the administrative village, under supervision of the township, usually acts as the formal party issuing a land contract in the name of the collective—not the natural village/villagers' group.²¹⁵ A Chinese government official was quoted as saying, "It is like the ownership rights to land have been silently stolen from the natural village and vested in a level higher."²¹⁶ Thus, as long as no legally designated owner of collective rural land exists, localities are free to implement a system in which higher-level collective organizations exercise ownership rights to rural land instead of the natural village/villagers' group.

In addition to preventing the most basic level of the collective hierarchy from exercising ownership rights to collectively owned land, the current legal ambiguity also facilitates township or village cadres' illegal conversion of collective land to commercial use. The conversion of collectively owned agricultural land to land that can be used for commercial purposes normally requires a transfer of ownership title from the collective organization to the state.²¹⁷ In spite of this requirement, sometimes township or village cadres approve the construction of commercial developments on collectively owned agricultural land without transferring title from the collective to the state, and often do so in their personal capacity.²¹⁸ It seems that if Chinese laws designated the natural village/villagers' group as the organization to exercise collective ownership rights, the natural village would have more power to stop township and village cadres from effectively representing the collective in these development deals. Thus, the CCP and the Chinese government should grant the authority to exercise collective ownership rights to the natural village/villagers' group, because it is formed from a democratically elected body,²¹⁹ and would provide farmers with stronger representation of their interests in the face of the push for development.

B. The Policy Documents Include Proposals for a Land-Use Rights Registration System, but These Proposals Are Not Comprehensive

In China there is currently no land registration system in rural areas.²²⁰ A land registration system is necessary for a fully developed market

²¹⁴ See Ho, *supra* note 199, at 409.

²¹⁵ See *id.* at 408. Because Professor Ho's article was published in 2001, some of this information is potentially outdated. However, the problem of the legal ambiguity remains.

²¹⁶ *Id.* at 408.

²¹⁷ See Ho & Lin, *supra* note 50, at 690, fig. 3.

²¹⁸ See Ho, *supra* note 199, at 409-10.

²¹⁹ See Organic Law of Villagers' Committees, *supra* note 201, arts. 10, 11.

²²⁰ See ZHU & PROSTERMAN, *supra* note 193, at 13.

economy because it gives land users security to make investments in their land, increasing productivity and boosting incomes.²²¹ Therefore, without secure land-use tenure, land is rendered what the Peruvian economist Hernando de Soto has dubbed “dead capital.”²²² The 2007 Property Law calls for the creation of a unified, national registration system for real properties, which includes land and houses.²²³ The law fails to specify, however, how such a system should be created, which government agency will be in charge, or how a new rural land registration system should be merged with the urban one.²²⁴ The Policy Documents indicate, nevertheless, that the government and the CCP are aware that registration is a crucial component to providing stability to the countryside. Like the Property Law, the 2009 No. 1 Document reiterates that a rural land contracting system should be established, but it also does not instruct local governments on how to implement such a system.²²⁵ The Chinese government will fail to provide farmers with more secure contractual land-use rights if land-use rights are not registered, farmers do not have a record of their land rights, no record of those rights is filed and maintained with the local government, and farmers are not educated about the terms of their use rights.

1. The Chinese Government Must Create a Registration System for Rural Land

The lack of a registration system for rural land creates uncertainty and hampers the formation of land markets.²²⁶ According to Tim Hanstad, CEO of the Rural Development Institute, “Land is a fundamental resource that is most effectively used and exchanged when the rights to land are registered.”²²⁷ Although Hanstad discusses registration systems in terms of ownership of or title to the land, his argument can be extended to use rights

²²¹ See generally Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AM. U. INT’L L. REV. 647 (1998).

²²² HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE*, 6 (2000). The term “dead capital” is premised on the idea that where land, one of the greatest assets for the world’s poor, cannot be freely transferred or sold in the market, its value is greatly diminished. Understanding the potential value of land can play a key role in the overall process of a country’s economic development as well as political stability. Zhu et al., *supra* note 3, at 784; see also Zhu et al., *supra* note 3 at 808.

²²³ Property Law, *supra* note 26, art. 10.

²²⁴ ZHU & PROSTERMAN, *supra* note 193, at 13. There is currently an urban land registration system in place.

²²⁵ 2009 No. 1 Document, *supra* note 12, para. 17 (“[C]omplete the work of verification of, registration of, and issuing certificates for, collective ownership rights . . .”).

²²⁶ ZHU & PROSTERMAN, *supra* note 193, at 14.

²²⁷ Hanstad, *supra* note 221, at 652.

or tenure in the land. Land tenure security encourages farmers to invest in their land, which increases agricultural productivity.²²⁸ A working registration system also allows for the formation of a land market.²²⁹ Registration systems facilitate this process by removing obstacles to market formation such as procedural difficulties in transferring land, lack of necessary information, and unclear delimitation of individual and group rights, among others.²³⁰ Further, written documentation of contractual land rights leads to improved transparency, predictability, and reduces land-use disputes.²³¹

2. *Additionally, the Chinese Government Must Issue Land Contracts and Certificates to All Farmers*

China has required written documentation of rural land rights contracts through regulations since 1997,²³² and by law since the LAL was revised in 1998.²³³ Enhanced security of land-use rights through written contract has been demonstrated to increase the likelihood that farmers will invest in their land. For instance, RDI's 2005 survey provides evidence that farmers who possess formal documentation of land-use rights are more likely to invest in their land than farmers who do not possess this documentation.²³⁴ Also, farmers who possess certificates or contracts that comply with the requirements of the RLCL are more likely to invest in their land than those who possess non-compliant contracts or certificates.²³⁵ Increased investment rates will likely result in substantially higher production levels,²³⁶ which will in turn increase rural incomes and help ensure grain security.

The 2005 RDI study further shows that enforcement of this requirement has been lackluster. Just forty-five percent of polled farmers had been issued a written land-use contract to their land.²³⁷ Certificates were issued about half the time (fifty-three percent).²³⁸ Approximately sixty-three

²²⁸ *Id.* at 653-54.

²²⁹ *Id.* at 661 (also discussed *supra* Part III.E.3).

²³⁰ Hanstad, *supra* note 221, at 652.

²³¹ Zhu et al., *supra* note 3, at 787.

²³² *Id.* at 788.

²³³ Land Administration Law, *supra* note 24, art. 11.

²³⁴ Zhu et al., *supra* note 3, at 811.

²³⁵ *Id.* at 815.

²³⁶ *Id.* at 808.

²³⁷ *Id.* at 788.

²³⁸ *Id.* There are two types of documentation in China: the rural-land-use-right contract and the rural-land-contracting-and-use certificate. A contract is designed at any level of the government, and it is completed at the village level. Contracts are signed and sealed by both the collective and the contracting

percent of farm households had been issued a contract, a certificate, or both.²³⁹ The majority of the contracts were issued during the three-year period after the enactment of the LAL in 1998, with the rate declining after 2000.²⁴⁰

Compliance with the substance of the RLCL is another issue. After the RLCL was enacted in 2002, China did not experience a similar peak in the issuance of contracts and certificates.²⁴¹ The content of contracts and certificates was set forth in that law.²⁴² The contracts and certificates examined by RDI, troublingly, were compliant only 6.7% and 8.3% of the time, respectively.²⁴³ Without higher numbers achieved through effective implementation of the contracting laws already in place, creation of an effective registration system seems unlikely. Likewise, if China institutes a registration system for agricultural land-use rights, such a system must not only enhance security of possession of legal land-use rights, but must also strengthen farmers' ability to exercise those rights. Therefore, the Chinese government must not only ensure that an effective registration system is in place, it must also educate farmers about those use rights.

C. *Rural Farmers Must Be Educated about Their Land-use Rights for the Three Changes to Have their Intended Effect*

In order to ensure the effectiveness of enhanced rural land-use rights, the CCP should also commit to better education about land-use rights for land contractors. It should not just generally commit to supporting rural legal education, as it does in the 2008 Decision.²⁴⁴ Without a specific commitment to educate farmers about the changes to their use rights in the Policy Documents, farmers will likely stand defenseless against local officials who illegally readjust or convert the use of their contractual farmland. Also, education about land-use rights is necessary to increase

household, and their content varies by region. A certificate is designed by the provincial government and is uniform in its content and format. Certificates do not require farmer signatures to be valid. *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴² Law on Land Contract in Rural Areas, *supra* note 25, art. 21. Article 21 sets forth the particular information that every land-use contract should "in general" contain, including: 1) the names of the party giving out the contract and the contractor, and the names and domiciles of the responsible person of the party giving out the contract and the representative of the contractor; 2) the name, location, area, and quality grade of the contracted land; 3) the term of the contract and the dates of beginning and end; 4) the purpose of use of the contracted land; 5) the rights and obligations of the party giving out the contract and the contractor; and 6) liability for breach of contract. *Id.*

²⁴³ Zhu et al., *supra* note 3, at 789.

²⁴⁴ See 2008 Decision, *supra* note 10, sec. 3, para. 5.

farmers' investments in their contractual land,²⁴⁵ and to potentially increase agricultural productivity.²⁴⁶

The 2005 RDI study demonstrated that large percentages of Chinese farmers lacked valuable information about various aspects of the land-use rights system.²⁴⁷ For instance, 43.4% did not know that farmers may transfer or lease their contracted land (not including assignment of use rights) without the collective's consent, and 49.3% of farmers did not know that when someone in their household dies, his or her contracted land need not be returned to the collective.²⁴⁸

Admittedly, farmers might have become more educated about their land-use rights in the past four years, but even such a change would not demonstrate a firm commitment of the government and the CCP to educate farmers about the enhanced land-use rights in the Policy Documents. The 2008 Decision only makes a general commitment to "[s]trengthen information distribution and education about the legal system in the countryside . . . [and] increase farmers' consciousness of the law,"²⁴⁹ not a specific commitment to educate farmers about the land-use rights listed in the Decision. Thus, even if these improved rights are codified into law, it is unclear from the Decision's statement to what extent the CCP plans to educate farmers about those rights.

Granting farmers perpetual use rights and a more complete ability to trade their use rights will not benefit them if they lack knowledge of the content of the rights and how to exercise them in the first place. A farmer who is unaware of his rights will not assert a claim against an official who violates them. Education about land-use rights is also important because of the link between knowledge about rights and increases in farmers' investment in their land,²⁵⁰ which in turn can potentially increase farmers' production levels²⁵¹ and incomes.²⁵²

Finally, more rights education for farmers could potentially add to their use of the legal system to voice their grievances. While the Chinese judiciary and the CCP are presumably not fond of an increase in litigation against local officials, litigation might help to curb the tendencies of local

²⁴⁵ Zhu et al., *supra* note 3, at 791.

²⁴⁶ *Id.* at 808.

²⁴⁷ *Id.* at 791-92.

²⁴⁸ *Id.*

²⁴⁹ 2008 Decision, *supra* note 10, sec. 3, para. 5.

²⁵⁰ Zhu et al., *supra* note 3, at 792.

²⁵¹ *Id.* at 808.

²⁵² *Id.* at 807-08.

officials to transfer land-use rights out of farmers' hands for monetary gain.²⁵³

In sum, the three changes in rural land-use rights have potential to achieve the CCP and government's goals for the Chinese countryside, but will prove ineffective unless certain other measures accompany the changes. To ensure that farmers can strongly represent their interests as collective owners of rural agricultural land, Chinese law should clearly designate the natural village/villagers' group as the single entity that exercises ownership rights to such land. In addition, the CCP and the Chinese government should create a registration system for rural land that issues land contracts and certificates to all farmers in order to increase farmers' tenure security and remove procedural obstacles to trading use rights on rural markets. Lastly, the CCP and government should take steps to thoroughly educate farmers about their land-use rights. Doing so will ensure that more farmers assert their rights in the face of local officials who wish to ignore them, and will likewise promote investment in land and trade in use rights on rural markets.

V. CONCLUSION

With the issuance of the 2008 Decision and the 2009 No. 1 Document, the CCP and the Chinese government acknowledge that insecure land-use rights are a major problem facing Chinese farmers and indeed the whole of China today. Based on the documents themselves, it is apparent that the CCP and the government are especially concerned about the growing rural-urban income gap as well as maintaining grain security amidst the drive to convert agricultural land into construction land. These are problems that the current legal structure governing rural land-use rights cannot adequately address.

The Policy Documents propose remedies to these rural issues by making already existing land-use rights more meaningful. According to the documents, this goal will specifically involve: (1) granting farmers indefinite terms for their contractual land-use rights; (2) creating markets for rural land-use rights by removing the current limitation on assignment of contractual terms; and (3) strongly restricting actions that decrease the total amount of agricultural land nationwide, including disciplinary action against local officials who fail to comply with the standards.

These specific measures are good steps toward enhancing the meaningful land-use rights, and indirectly towards increasing farmers'

²⁵³ See Ho & Lin, *supra* note 50, at 704.

incomes and maintaining grain security. Halting the conversion of cultivated land to non-agricultural uses and granting farmers unlimited contractual terms will increase farmers' confidence in their ability to obtain returns on investments in their land. Increased investments in agricultural land will in turn boost production levels and help narrow the rural-urban income gap as well as strengthen grain security. Facilitating a thriving market in land-use rights will also give farmers an enhanced sense of control over the use of their land. It will likewise boost production by making it easier for farmers to form large-scale agricultural operations, thus contributing to increasing farmers' incomes and maintaining grain supply.

However, the Policy Documents leave several major problems unaddressed, or do not address them in adequate detail. First, the Documents signal no intention to specify a particular rural organization as the holder of collective ownership, let alone an organization that could democratically represent farmers in decisions about the collectively owned land that they use. Second, unlimited contractual terms and the ability to transfer land-use rights will prove useless without a fully functioning registration system for use rights, in which issuance of contracts, compliance of issued contracts with legal requirements, and recording of contracts are all ensured and enforced. Lacking adequate documentation as well as a centrally-protected record of their land-use rights, farmers will continue to be unable to defend their interests in disputes over use rights or against local officials who violate their rights, let alone transfer their rights on a market. Finally, the CCP only mentions general measures to educate farmers about the legal system. Unless the Chinese government commits to specifically educating farmers about their land-use rights, many of them will continue to be unable to defend their interests and confidently invest in their land, even if an adequate registration system is in place.

In short, current Chinese policy regarding rural land-use rights does not represent a "breakthrough" in rural reform. Farmers do not view government efforts as having many real effects on them, and for good reason; as it is currently structured, government policy adds little new changes to existing law, and it does not contain all of the necessary measures to strengthen land tenure security. Providing farmers with temporary assurances and small reforms might pacify them into silence about their grievances, but in the long run, farmers will only respond to stronger measures that will truly empower them and improve their standard of living. Furthermore, the benefits of such measures will probably not be limited to Chinese farmers. Rather, by increasing farmers' spending capacity and

maintaining the grain supply, such measures will provide more stability to China as a whole. In the words of the 2009 No. 1 Document,

Completion of work [for] agriculture and the countryside in 2009 has special and important meaning. The greatest potential for expanding internal demand [exists] in the countryside; the foundation for realizing stable and relatively speedy economic development [lies] in agriculture; [and] farmers are both the key and the obstacle to guaranteeing and improving the livelihoods of the people.²⁵⁴

²⁵⁴ 2009 No. 1 Document, *supra* note 12, introductory para. 4.