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Valerie Jaffee Washburn

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# REGULAR TAKINGS OR REGULATORY TAKINGS?: LAND EXPROPRIATION IN RURAL CHINA

Valerie Jaffee Washburn

*Abstract:* This article takes as its starting point the recent spate of unrest in rural China over government takings of rural, agricultural land. Though the popular and scholarly press has paid a great deal of attention to this issue, few analyses have explored in depth the institutional and legal framework surrounding it. This piece first attempts such an exploration and concludes that the underlying issues have as much to do with China's national land use regulatory system as they do with the behavior of local governments that seize privately-farmed land for other uses. In fact, it is more productive to see this as a regulatory takings issue than an eminent domain issue. With that analysis in mind, the article proceeds to explain why commonly-presented proposals for solving the rural takings problem are inadequate and then offers a novel solution based on the regulatory takings analysis: granting individual farmers transferrable, monetizable land *development* rights that will be separable from the land *use* rights that are the basis of the current rural land ownership regime.

## I. INTRODUCTION

In June of 2006, hundreds of Chinese farmers in the village of Sanzhou, Guangdong Province, armed with clubs and bottles of acid, held government officials and businesspeople hostage inside a newly-constructed apartment building for almost twenty-four hours.<sup>1</sup> Earlier that year, police armed with electric batons clashed with over 1000 farmers wielding pitchforks outside the village of Panlong, also in Guangdong Province.<sup>2</sup> The clash may have been responsible for the death of a thirteen-year-old girl, and as many as sixty people were wounded in the struggle.<sup>3</sup> Just over a month before that, in nearby Dongzhou village, at least three and as many as thirty people were killed when police fired on a group of villagers who had lobbed fireworks and possibly homemade bombs at police. The Dongzhou incident was the deadliest use of force by Chinese security personnel against Chinese citizens since the Tiananmen Square incident in 1989.<sup>4</sup>

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<sup>1</sup> Edward Cody, *One Riot Breaks Ground in China; This Time, Officials Respond to Farmers' Protest With Pledge to Review Land Deal*, WASH. POST, June 28, 2006, at A14.

<sup>2</sup> Hannah Beech, *Inside the Pitchfork Rebellion: Across China's Heartland, Anger at Local Authorities is Growing Violent. Is This the Birth of a Revolution?*, TIME, Mar. 13, 2006, at 28.

<sup>3</sup> *Id.*; Howard W. French, *Police in China Battle Villagers in Land Protest*, N.Y. TIMES, Jan. 17, 2006, at A1.

<sup>4</sup> The official death toll announced by the Chinese state-run media was three, but villagers' reports and the Western media set it much higher. Howard W. French, *Protesters Say Police in China Killed Up to 20*, N.Y. TIMES, Dec. 10, 2005, at A1 [hereinafter *20 Killed*]; Geoffrey York, *Police Commander Arrested After Fatal Protest in China; Amnesty International Issues Call for Independent Probe into Village Attack*, THE GLOBE AND MAIL, Dec. 12, 2005, at A14. *See also* Howard W. French, *Villages Tell of Lethal Attack by Chinese Forces on Protesters*, N.Y. TIMES, Dec. 10, 2005, at A3 [hereinafter *Lethal Attack*].

These incidents are part of a minor epidemic of unrest that has gripped rural China in recent years. What unites them, besides their sensationalism, is the nature of the conflicts that inspired them. In each incident, farmers were protesting decisions by local government officials over the use of village land. “[E]nvironmental, property rights, and land-use issues” have been the single largest source of civil unrest in China in recent years, and disputes involving rural land have, as the above episodes indicate, been especially incendiary.<sup>5</sup> This is not a phenomenon unique to wealthy Guangdong Province; protests also erupted over the use of rural land in Huaxi, Zhejiang Province in 2006;<sup>6</sup> Hanyuan, Sichuan Province in 2004;<sup>7</sup> Jinyuan, Zhejiang Province in 2003;<sup>8</sup> and numerous other locales.

The farmers in Sanzhou were protesting the seizure of 750 acres of agricultural land by the village government. That land had been sold to a developer who built the apartment building where the incident took place; the farmers claimed that the compensation paid for the land taken was inadequate.<sup>9</sup> The protesters in Panlong resented both the seizure of village farmland for lease to a foreign investor and the level of compensation offered.<sup>10</sup> The catalyst for the disturbance in Dongzhou was the construction of a coal-fired power plant. Villagers were upset over the prospect of air pollution and plans to fill in a local body of water. Also, like their counterparts in Sanzhou and Panlong, they were angered by the seizure of farmland for the project and asserted that the compensation offered was too low.<sup>11</sup>

One Western journalist has wondered if the incidents might represent “the birth of a revolution.”<sup>12</sup> This is surely hyperbole, but there remains

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<sup>5</sup> 20 Killed, *supra* note 4 (China’s Ministry of Public Security counted 87,000 incidents of social unrest in China in 2005. This represented an increase of 6% from 2004 and 50% from 2003). Zhu Keliang & Roy Prosterman, *From Land Rights to Economic Boom*, CHINA BUSINESS REVIEW, Jul.-Aug. 2006, available at <http://www.chinabusinessreview.com/public/0607/zhu.html>; see also Pallavi Aiyar, *China: More rights for millionaires*, ASIA TIMES, Mar. 22, 2007, available at <http://www.atimes.com/atimes/China/IC22Ad01.html>. Rural expropriation disputes caused more separate incidents of civil unrest than any other issue in China in 2006. Josephine Ma, *Land Seizure Rows the Main Cause of Unrest in '06*, S. CHINA MORNING POST, Jan. 31, 2007.

<sup>6</sup> Clifford Coonan, *Unrest Grows in China Over Land Grabs*, THE INDEPENDENT, Mar. 7, 2006, available at <http://www.independent.co.uk/news/world/asia/unrest-grows-in-rural-china-over-land-grabs-468893.html>.

<sup>7</sup> Andrew C. Murtha, *The Ubiquity and Fungibility of Property Rights in China*, 16-17 (2006) (unpublished manuscript, on file with author).

<sup>8</sup> *Property Seizure in China: Roundtable Before the Cong.-Exec. Comm’n on China*, 108th Cong. 35 (2004) (prepared statement of Roy L. Prosterman, President, Rural Development Institute).

<sup>9</sup> Cody, *supra* note 1.

<sup>10</sup> Beech, *supra* note 2.

<sup>11</sup> *Lethal Attack*, *supra* note 4.

<sup>12</sup> Beech, *supra* note 2.

little doubt that how to manage rural land is one of the most pressing issues facing the Chinese government today.<sup>13</sup> Opportunities for public debate on this issue have been especially plentiful over the past decade, in part because of the passage of a new comprehensive Property Law, which had been under debate since 2004, by the National People's Congress ("NPC") in March of 2007.<sup>14</sup> It has been suggested that the thorny question of how to deal with rural land was the most important reason why completion and passage of the law took so long.<sup>15</sup>

Media and scholarly attention has generally treated these conflicts as indications of pathologies in China's laws governing takings of rural land and the compensation offered when such takings occur. As will be discussed below, however, that understanding of the problem is incomplete. Below, I first analyze China's legal regime governing rural land ownership, use, and takings; the conceptual implications and practical effects of that system; and the drawbacks of various proposals offered by both Chinese and Western scholars for improving that system. To date, these proposals have tended to revolve conceptually around the ownership of rural land, drawing from theories and policy of eminent domain to approach the problem of what happens when government seizes rural land for a new use and often advocating measures that would strengthen the quasi-ownership rights of Chinese farmers to their land. My interpretation of the pathologies in the current system, however, is that the underlying problem is one of land use rather than ownership. My analysis supports a new focus that treats the Chinese rural land problem as every bit as much a regulatory takings problem as a problem of ordinary takings by eminent domain. This new focus in turn supports my proposal for the introduction of tradable land development rights in rural land as the most promising solution to the social and political ills indicated by catastrophic events like those in Sanzhou, Panlong, and Dongzhou.

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<sup>13</sup> See *Fat of the Land, but only for a select few*, ECONOMIST, Mar. 25, 2006, for an excellent summary of the issues at stake.

<sup>14</sup> Wuquan fa [Property Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), 3 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 291 (2007), available at [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471118.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm) (P.R.C.) [hereinafter "Property Law"]. See generally *Landmark Property Law Adopted*, CHINA DAILY, Mar. 16, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/16/content\\_829330.htm](http://www.chinadaily.com.cn/china/2007-03/16/content_829330.htm); *Caught Between Right and Left, Town and Country*, ECONOMIST, Mar. 8, 2007, at 23, available at <http://www.economist.com/node/8815195>; Jim Yardley, *China Nears Passage of Landmark Property Law*, N.Y. TIMES, Mar. 9, 2007, available at <http://www.nytimes.com/2007/03/09/business/09yuan.html>.

<sup>15</sup> Gregory M. Stein, *Acquiring Land Use Rights in Today's China: A Snapshot From the Ground*, 24 UCLA PAC. BASIN L.J. 1 (2006).

## II. CHINESE LAW OF PROPERTY IN RURAL LAND: AN INTRODUCTION

### A. *Ownership of Rural Land*

Different ownership regimes for urban and rural land were established not long after the Communist government took power in 1949. By the 1960s, the State owned the vast majority of urban land.<sup>16</sup> However, the story went quite differently for rural land. Following the widespread redistribution of land from landlords to farmers in the early years of the Communist republic, the right of farmers to own agricultural land was acknowledged in Article 8 of the 1954 Chinese constitution. However, that same constitutional provision also “encouraged” farmers to join and contribute their land to agricultural cooperatives and stated as a goal the gradual elimination of private ownership of rural land. In reality, most Chinese peasants never experienced a set of rights approximating full ownership of the land they farmed. After the Great Leap Forward of 1958, despite the continuation of the constitutional provision recognizing individual ownership of rural land, actual possession and control of that land was divided between communes, brigades, and production teams. Production teams retained the primary right to organize the cultivation and other use of rural land.<sup>17</sup> Peasant households enjoyed virtually no rights to possess or use discrete parcels of land autonomously.

This reality was finally acknowledged when the Chinese government rewrote the nation’s constitution in 1982. Article 10 of the 1982 constitution provided that all rural and suburban land shall be “collectively owned.”<sup>18</sup> That provision continues in effect today; the current constitution, most recently revised in 2004, provides:

All urban land is owned by the state. Land in rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law;

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<sup>16</sup> See PATRICK A. RANDOLPH, JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 10 (2000); Chengri Ding, *Land Policy Reform in China: Assessment and Prospects*, 20 LAND USE POL’Y 109, 112 (2003). *But see* Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT’L L. & FOREIGN AFF. 227, 241 (2004) (“Some Chinese scholars argue that the land underneath privately owned homes also remained privately owned in law up until [the early 1980s].”).

<sup>17</sup> Jamie Horsley, *Land Ownership in China: A Brief Review of the Documentary Record*, (May 12, 2004) (unpublished manuscript, on file with the China Law Center, Yale Law School).

<sup>18</sup> *Id.*

house sites and private plots of cropland and hilly land are also owned by collectives.<sup>19</sup>

In other words, under the Chinese constitution, land ownership is bifurcated; all land is owned either by the state or by the rural economic organizations known as “collectives.”

The distinction between state and collective ownership is crucial to Article 10 of the constitution and, as will be discussed below, to many of the most severe problems currently plaguing the Chinese system of property in land. Thus, it is somewhat ironic that the distinction is, for many practical purposes, not terribly clear or important. The term “collective” is not defined in the constitution, and there is some uncertainty over what sort of entity should play that role. It is quite common for the village “small group” (*xiaozu*, 小组) or the “natural village” (*ziran cun*, 自然村), an organizational vestige of the production teams that controlled collective agriculture before the reforms of the 1980s, to act as collective owners.<sup>20</sup> However, other entities, including town (*zhen*) governments and administrative villages (*xingzheng cun*, 行政村), also act as collective landowners in a number of rural areas.<sup>21</sup> The village small group’s legal authority is tenuous; it is not a governmental entity or a legal person,<sup>22</sup> and in practice its authority is often subordinated to that of village or town governments.<sup>23</sup>

Several observers have noted that other governmental entities frequently assert control over the land use decisions of collective organizations; in other words, the same entities that are the official owners of state-owned (urban) land have the capacity to interfere with the decisions made by the official owners of collectively-owned (rural) land.<sup>24</sup>

<sup>19</sup> XIAN FA art. 10 (2004) (P.R.C.).

<sup>20</sup> According to one study, around 45% of collectively-owned land is owned by these entities. Yongshun Cai, *Collective Ownership or Cadres’ Ownership?: The Non-agricultural Use of Farmland in China*, 175 THE CHINA QUARTERLY 662, 665 (2003). Another puts the figure at 68%. YE JIANPING et al., eds., ZHONGGUO NONCUN TUDI CHANQUAN ZHIDU YANJIU [RESEARCH ON CHINA’S SYSTEM OF PROPERTY IN RURAL LAND] 68 (2000).

<sup>21</sup> *Property Seizure in China*, *supra* note 8, at 24 (statement of Roy L. Prosterman).

<sup>22</sup> See Cong.-Exec. Comm’n on China, Annual Report, 2006, Part VII, available at <http://www.cecc.gov/pages/annualRpt/annualRpt06/CivilSociety.php> (discussing collectives’ nebulous legal status).

<sup>23</sup> Wen Wei Po, *Rural Land Reform Urgent: Shanghai Analyst*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 3, 2001 (summarizing an interview with Yin Kunhua, director of the Real Estate Research Center at Shanghai University of Finance and Economics).

<sup>24</sup> Yongshun Cai, *supra* note 20, at 665-66; Xiaolin Guo, *The Role of Local Government in Creating Property Rights: A Comparison of Two Townships in Northwest Yunnan*, in ANDREW G. WALDER & JEAN C. OI, PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 71, 77-78 (1999); Stein, *supra* note 15, at 36-

B. *Use of Rural Land: Individual Land Use Rights*

Around the same time that the Chinese constitution clearly established that collectives, and not individuals, owned rural land, individual households were gradually regaining practical control over the use and proceeds of arable land. The “household responsibility system,” instituted in rural areas in the late 1970s and early 1980s, sought to improve agricultural productivity by de-communalizing the agricultural production process. Under this system, contracts between collectives and farming households grant households the right to farm individual parcels of land in exchange for the fulfillment of certain obligations, including payment of taxes and production quotas.<sup>25</sup> Once those obligations are met, the farmers have the right to any residual income earned from farming the land.<sup>26</sup> They also have the right to make all decisions regarding agricultural production on the land.<sup>27</sup> The two major national statutes that currently govern use rights in rural land are the 1998 Land Administration Law (“LAL”) and the 2002 Rural Land Contracting Law (“RLCL”). Some provisions of these statutes are supported or expanded upon by the 2007 Property Law, and by the Decision on Major Issues Concerning the Advancement of Rural Reform and Development (“Decision on Major Issues”) issued by the Central Committee of the Chinese Communist Party in October 2008.<sup>28</sup>

Under the existing statutory framework, rural land use rights (“LURs”) in some ways resemble full economic ownership less than they do a social entitlement contingent on the holder’s place of residence and membership in a rural collective. A collective is permitted to transfer LURs to individuals

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37. *But see* YE JIANPING, *supra* note 20, at 82-84 (arguing that collectives still play an independently meaningful role in rural land management).

<sup>25</sup> Tudi guanli fa [Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999) 4 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 341, at arts. 9, 14 (1998) (P.R.C.) [hereinafter “LAL”]; Nongcun tudi chengbao fa [Rural Land Contracting Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2002, effective Jan. 1, 2003) 5 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 347 (2002) (P.R.C.) [hereinafter “RLCL”]. *See also, e.g.*, Chris Bramall, *Chinese Land Reform in Long-Run Perspective and in the Wider East Asian Context*, 4 J. AGRARIAN CHANGE 107, 108 (2004); Xiaolin Guo, *supra* note 24, at 71; 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); Kari Madrene Larson, *A Lesson in Ingenuity: Chinese Farmers, the State, and the Reclamation of Farmland for Most Any Use*, 7 PAC. RIM L. & POL’Y J. 831, 836-37 (1998); Murtha, *supra* note 7, at 7.

<sup>26</sup> *See, e.g.*, RLCL, *supra* note 25 at art. 16; Yongshun Cai, *supra* note 20 at 665-66.

<sup>27</sup> RLCL, *supra* note 25, at art. 16. *But see* Xiaolin Guo, *supra* note 24, at 75-77 (describing efforts by government officials in one rural locale to interfere with the crop mix decisions of farmers).

<sup>28</sup> *See* Zhonggong zhongyang guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jue ding [Decision on Major Issues Concerning the Advancement of Rural Reform and Development] (promulgated by the Central Comm. Chinese Communist Party, Oct. 15, 2008), *available at* <http://www.lawinfochina.com/law/display.asp?db=1&id=7542&keyword=> (P.R.C.) [hereinafter Decision on Major Issues].

who are not members of the collective; however, such a transaction may not take place without the approval of both two-thirds of the villagers' representatives and the town government.<sup>29</sup> Farming households who seek to transfer their LURs must give a certain degree of preference to potential transferees who are members of the same collective.<sup>30</sup> Perhaps most tellingly, collectives are required to cancel the LURs of farmers who move to and obtain residence permits in major cities.<sup>31</sup> The personal status of the rights holder is crucial to the very nature of the rights, and a change in that status can lead to the cancellation of those rights.

A recent change in the direction of enhancing farmers' rights in land has been the explicit authorization and encouragement of voluntary, market-based transfer of agricultural LURs among farming households. Such transfers appear to have been rare until the late 1990s, at which point they increased drastically in frequency, at least in some areas of the country.<sup>32</sup> Calls for a clearer legal framework governing such transfers were then answered by the RLCL in 2002 and the Decision on Major Issues in 2008.<sup>33</sup>

<sup>29</sup> LAL, *supra* note 25, at art. 15.

<sup>30</sup> RLCL, *supra* note 25, at art. 33.

<sup>31</sup> RLCL, *supra* note 25, at art. 26. A farming household needs to move to a city that is large enough to be divided into multiple administrative districts (*shequdeshi*, 设区的市) in order to lose its LURs. Households that move to smaller cities (*xiaochengzhen*, 小城镇) must be allowed to retain their rural LURs. *Id.* Interestingly, rural LUR holders who switch from agricultural to non-agricultural living *are* allowed to retain their LURs; it is geographical identity, and not occupation, that determines their rights. RLCL, *supra* note 25 art. 41.

This rule may change in the foreseeable future. Previous drafts of the Property Law reiterated the requirement in the RLCL that LURs be cancelled for rural families that move to large cities. Wuquan fa: cao'an [Draft Property Law] (released for comment by the Nat'l People's Cong., July 1, 2005) 5 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 348 at art. 135 (2005, available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=339451&pdmc=zxbd> (P.R.C.) [hereinafter 2005 Draft Property Law]. The final version of the Property Law, however, omits any mention of this requirement. *See* Property Law, *supra* note 14. While this does not mean that the relevant provision in the RLCL has been invalidated, it does provide more leeway for the NPC to remove it pursuant to future amendments to the RLCL than if such a requirement had also been enshrined in the Property Law. For now, the Property Law refers to the RLCL for law on rural LUR transfers. *See* Property Law, *supra* note 14, at art. 129.

<sup>32</sup> Qian Forrest Zhang et al., *Development of Land Rental Markets in Rural Zhejiang: Growth of Off-farm Jobs and Institution Building* 180 CHINA Q. 1031, 1034 (2004); Qian Forrest Zhang, *Do Rural Land Markets Increase Inequality? Evidence from a Chinese Province 1* (2006) (unpublished manuscript, on file with the author).

<sup>33</sup> RLCL, *supra* note 25, at arts. 10, 32, 33, 36, 37; *China Extends Rural Reform and Development in New Party Document*, PEOPLE'S DAILY ONLINE, Oct. 20, 2008, at <http://english.people.com.cn/90001/90776/90785/6517482.html>. *See also* Property Law, *supra* note 14, at art. 129; *Nongcun tudi chengbaojingyingquan liuzhuan guanli banfa* [Measures for the Administration of Circulation of Rural Land Contracted Management Right] (promulgated by the Ministry of Agriculture, Jan. 19, 2005, effective Mar. 1, 2005), available at [http://www.lawinfochina.com/law/display.asp?db=1&id=3933&keyword=rural land](http://www.lawinfochina.com/law/display.asp?db=1&id=3933&keyword=rural%20land) (P.R.C.). *See generally* CHE YUBIN, *ZHONGGUO NONGDI LIUZHUAN JIZHI YANJIU* (RESEARCH ON THE MECHANISM OF CHINESE RURAL LAND TRANSFER) (2004); *see also* YE JIANPING, *supra* note 20, at 77-82 (describing novel



These documents provide that rural LURs may be circulated through a number of transfer forms, including subcontract, lease, and exchange,<sup>34</sup> for terms not to exceed the remaining life of the underlying contract.<sup>35</sup>

An increase in such transactions would appear to represent a basic expansion of farmers' economic rights in land. Rural land users may now earn income not only from farming land themselves, but also from rent or other fees earned by subcontracting, subleasing, or otherwise transferring the land to other parties. This arguably represents the conversion of rural LURs from "dead capital" to a true form of wealth, fungible and secure, for the farmers who own them.<sup>36</sup>

However, two important restrictions continue to straighten the rights of farming households to monetize use rights in land. The first of these restrictions comes from the fact that the law does not permit holders of rural LURs to mortgage the underlying property.<sup>37</sup> The continuing prohibition against mortgaging rural LURs not only enhances the legal distinction between property in urban and in rural land, but it also helps support a difference in value between them.<sup>38</sup> A second, and more crucial, restriction circumscribing the scope of farmers' rights in land is not actually a restriction on the LURs owned by farming households; it is, instead, a use restriction applicable to the underlying land, by virtue of its status as collectively-owned land. A major condition governing collective ownership is the principle that the default, and in many cases the only permitted, use of collectively-owned land is for agricultural purposes.<sup>39</sup>

Agricultural land may not be converted to other uses without the approval of the relevant county government.<sup>40</sup> National law also restricts the situations in which such approval may be granted. Article 43 of LAL provides that entities or individuals who wish to use or build anything on

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initiatives undertaken by local governments to encourage the use of market or other efficiency-oriented mechanisms to effect the transfer of land between agricultural users).

<sup>34</sup> RLCL, *supra* note 25, at art. 32.

<sup>35</sup> RLCL, *supra* note 25, at art. 33; Decision on Major Issues, *supra* note 28.

<sup>36</sup> Zhu Keliang & Prosterman, *supra* note 5, at 47.

<sup>37</sup> See, e.g., Roy Prosterman et al., *Implementation of 30-Year Land Use Rights for Farmers Under China's 1998 Land Management Law: An Analysis and Recommendations Based on a 17 Province Survey* 22 (Rural Development Institute Reports on Foreign Aid and Development No. 105, 2000).

<sup>38</sup> See *Property Seizure in China*, *supra* note 8, at 29 (testimony of Roy L. Prosterman) (predicting that allowing the mortgage of rural LURs could be "the beginning of a modern rural banking system"); Ho & Lin, *supra* note 25, at 700-703 (describing a dramatic increase in the use of urban LURs as collateral between 1993 and 1998).

<sup>39</sup> Guowuyuan guanyu jiaqiang tudi tiaokong youguan wenti de tongzhi [Circular on Intensifying Land Control] (promulgated by the State Council, Aug. 31, 2006) 30 STATE COUNCIL GAZ. 8 pt. 6 (2006) (P.R.C.) [hereinafter 2006 Land Control Circular]; RLCL, *supra* note 25, at arts. 8, 17; RANDOLPH & JIANBO, *supra* note 16, at 81-82; Ho & Lin, *supra* note 25, at 689.

<sup>40</sup> LAL, *supra* note 25, at art. 44.

land must apply to the state to receive LURs—to state-owned land only—for this purpose. The article also makes an exception to this presumption for several categories of builders: rural collectives that seek to construct facilities for “township-village enterprises” (“TVEs”), which are rural enterprises owned and managed by local governments;<sup>41</sup> farming households that seek to build housing they will occupy themselves;<sup>42</sup> and township or village governments that seek to build public facilities. However, non-agricultural construction on collectively-owned rural land may not take place for any other purpose.<sup>43</sup> Peasant households that hold agricultural LURs may not engage in such construction,<sup>44</sup> and, as a general rule, holders of agricultural LURs to collectively-owned land may not transfer those LURs to other parties for such construction.<sup>45</sup> Some observers<sup>46</sup> have pointed out that the ultimate origins of this proscription lie in Article 10 of the Constitution, which provides that “[a]ll urban land is owned by the state.”<sup>47</sup> If one accepts that all land not used for agriculture, rural government facilities, peasant housing, and TVEs is “urban,” then, indeed, allowing other uses on non-state-owned land is unconstitutional.

In summation, private property rights in rural land are not rights of ownership, which are instead held by the quasi-governmental collective organization. Instead, these private rights are use rights, created by contracts between the user and the collective owner, and dependent in part on the status of the private user as a member of the landowning collective. The rural rights-holder and the collective owner may not convert the land to non-agricultural uses except in a few specified circumstances. The effects of this restriction on daily life, livelihoods, and land use in rural China have been overwhelming.

### C. *Requisition and Use Conversion*

A rather interesting feature of China’s laws limiting the conversion of land from agricultural to other uses is that they do not constitute an *in rem*

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<sup>41</sup> For more details on TVEs, see, e.g., Yingyi Qian, *How Reform Worked in China*, in *IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH* 297, 310-14 (Dani Rodrik, ed., 2003).

<sup>42</sup> Peasant households are not permitted to use more than one parcel for residential construction. LAL, *supra* note 25, at art. 62.

<sup>43</sup> LAL, *supra* note 25, at art. 43.

<sup>44</sup> RLCL, *supra* note 25, at arts. 17, 60.

<sup>45</sup> LAL, *supra* note 25, at arts. 63, 81.

<sup>46</sup> E.g., Zhou Qiren, Professor, Peking University, *Nongdi chanquan yu zhengdi zhidu* [System of Property Rights and Expropriation of Rural Land], Speech at Yale University (Sept. 12, 2003) (transcript available in the China Law Center, Yale University).

<sup>47</sup> XIAN FA art. 10 (2004) (P.R.C.).

restriction, as it were, that attaches to the land itself. Instead, they are more in the nature of an *in personam* restriction: their application depends not on the location or other characteristics of the land, but on how and by whom the land is owned. Article 43 of LAL, for example, does not draw a distinction based on whether or not land is arable. Instead, it stipulates that all new construction shall happen on state-owned land, unless the construction is of TVE facilities, farmers' housing, or public facilities.<sup>48</sup> In other words, it is the fact that land is owned by collectives rather than the state, and not that it is currently arable, that makes it unavailable for construction except for those listed uses.

However, Article 44 requires government approval at the county or higher level for "changes in the use" of "agricultural land," without specifying whether or not that land is owned by the state or by a collective.<sup>49</sup> Indeed, Article 10 of the Constitution *does* provide that rural or suburban land may be owned by the state in exceptional circumstances "in accordance with the law."<sup>50</sup> Thus, it would seem that a party who wanted to develop agricultural land for purposes other than TVE facilities, peasant housing, or public facilities could do so, as long as that land could be moved somehow from the collective ownership system to the state ownership system. Approval by the county government would still be required, but the development would certainly be possible. In fact, this is precisely what is happening, on a massive scale, in rural China today. Article 45 of LAL describes the mechanism by which this may take place: "expropriation" (*zhengshou*, 征收) of collectively-owned land by instrumentalities of the state.<sup>51</sup> This so-called "expropriation" is rural China's version of a taking by eminent domain. However, instead of the government taking ownership rights from private parties, "expropriation" is the government taking ownership rights from another quasi-governmental organization—the collective—and use rights from private parties.

Article 10 of the constitution provides that: "The state may, in the public interest, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned in accordance with the law."<sup>52</sup> Like the Fifth Amendment to the United States Constitution, the

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<sup>48</sup> LAL, *supra* note 25, at art. 43.

<sup>49</sup> LAL, *supra* note 25, at art. 44.

<sup>50</sup> XIAN FA art. 10 (2004) (P.R.C.).

<sup>51</sup> LAL, *supra* note 25, at art. 45.

<sup>52</sup> XIAN FA art. 10 (2004) (P.R.C.). As this language demonstrates, Chinese law uses both of the terms "expropriation" (*zhengshou*, 征收) and "requisition" (*zhengyong*, 征用). Unfortunately, sources are not in agreement as to how to distinguish the two terms. One source claims that "expropriation" refers to the permanent compulsory transfer of land ownership from a collective to the state, while "requisition"

wording of which it evokes, this provision places two major restrictions on its grant of power to the government to expropriate land.

### 1. *Public Interest Requirement*

The first restriction is that the act of expropriation or requisition may take place only “in the public interest.”<sup>53</sup> However, the phrase “in the public interest” is not defined in the major documents governing land requisition or elsewhere in the Constitution. Though this requirement is reiterated in LAL (“[t]he state may expropriate or requisition land in the public interest in accordance with the law . . . .”)<sup>54</sup> and in the Property Law,<sup>55</sup> those statutes also do not provide any guidance on how to determine whether or not an expropriation is in fact in the public interest.

It is clear from recent practice, though, that the phrase “in the public interest” means something broader than “for public use.”<sup>56</sup> Local governments quite routinely expropriate collectively-owned land and then promptly transfer use rights in that land to private developers or joint private-public for-profit ventures. For example, the disturbances in Sanzhou and Panlong, described above in Part I, both erupted over expropriations that resulted in the use of the expropriated land by a private apartment developer,

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refers to the temporary use of land by the state with the residual interest remaining in the hands of the collective. Asian Development Bank, *Capacity Building for Resettlement Risk Management: The Scope of Land Expropriation Rights 1* (PRC Thematic Report No. 1, March 2006), available at <http://www.asiandevbank.org/Resettlement/activities/TA6091REG/PRC-Thematic-Report-1.pdf>. Another source asserts that one refers to the taking of land for use by the government entity that takes it, while the other refers to the government entity’s acquisition of land to be used by a private entity or another government entity. RANDOLPH & LOU, *supra* note 16, at 61 n.6. Many legal documents conflate the two, under the more general term “taking of land” (*zhengdi*, 征地). Guotu ziyuan bu guanyu jiakuai tuijin zhengdi buchang anzhi zhengyi xietiao caijue zhidu de tongzhi [Circular on Accelerating the Establishment of the System for the Settlement of Land Requisition Disputes by Mediation and Ruling] (promulgated by the Ministry of Land and Resources, June 21, 2006), available at [http://www.lawinfochina.com/law/display.asp?db=1&id=5324&keyword=land requisition disputes](http://www.lawinfochina.com/law/display.asp?db=1&id=5324&keyword=land%20requisition%20disputes) (P.R.C.); Guotu ziyuan bu guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian de tongzhi [Circular of Guiding Opinion on Perfecting the System of Compensation and Resettlement for Takings of Land] (promulgated by the Ministry of Land and Resources, Jan. 3, 2004) (P.R.C.) [hereinafter 2004 MLR Circular]. Relevant provisions of the LAL seem to use these terms interchangeably. LAL, *supra* note 25, art. 45 (using first “requisition” and then “expropriation”). Because it does not appear that the legal distinction is clear, if it exists at all, this essay will simply use the term “expropriation” to refer to all takings of collectively-owned land.

<sup>53</sup> The language in Article 10 that is translated as “public interest” (“gonggong liyi,” 公共利益) is, just as it sounds in English, arguably broader than the phrase “public use” found in the U.S. Constitution. U.S. CONST. amend. V. cl. 4.

<sup>54</sup> LAL, *supra* note 25, at art. 2.

<sup>55</sup> Property Law, *supra* note 14, at art. 41.

<sup>56</sup> See *Property Seizure in China*, *supra* note 8, at 19 (testimony of Jacques DeLisle, Professor, University of Pennsylvania Law School).

in the former case, and a foreign investor, in the latter.<sup>57</sup> It is more or less taken for granted in China today that takings of rural land frequently occur for the ultimate purpose of for-profit development, in which the government entity handling the taking may or may not hold an equity stake.<sup>58</sup>

An effective distinction between public and private use may be much more difficult to draw in the Chinese context than in other contexts. Chinese local governments tend to obtain revenues for their operations in part through acting as business entities in their own right. TVEs, discussed above, are a clear example of this tendency. Increasingly, local governments that expropriate land will act developers of that land themselves before transferring use rights to a private entity at a profit.<sup>59</sup>

## 2. *Compensation Requirement*

The second constitutional limitation on state takings of land—that “just compensation” be paid “in accordance with the law”—is, in contrast, amply fleshed out in related statutes. The basic requirements come from LAL. Article 47 requires that three kinds of payments be made when rural land is expropriated: basic “compensation” payments for the land itself (*buchang fei*, 补偿费), “resettlement assistance” payments for those individuals occupying the land (*anzhi buzhu fei*, 安置补助费), and compensation payments for personal property attached to the land and for standing crops (*dishang fuzhuowu he qingmiao de buchang fei*, 地上附着物和青苗的补偿费).

Precise standards for the amount of each form of compensation are to be determined by provincial and municipal governments. However, LAL provides basic guidelines for the first two forms. Basic compensation payments should be between six and ten times the average value of the agricultural output of the expropriated land for the three years prior to expropriation. Resettlement assistance payments are to be determined by first dividing the quantity of land taken by the figure for per-capita land

<sup>57</sup> See *supra* notes 1 and 2.

<sup>58</sup> See, e.g., *Property Seizure in China*, *supra* note 8, at 44 (prepared statement of Brian Schwarzwald et al.) (describing limited survey evidence indicating that around half of rural land takings are for private commercial purposes); Che Yubin, *supra* note 33, at 82-83 (asserting that, though takings of rural land for use by public entities are more frequent than those for use by private entities, the latter remain common and tend to be of much larger parcels of land); Lin Yan, *Nongdi zhengyong dijia buchang de zhidu genyuan yu xiaolu sunshi* [The Origins of and Harm to Efficiency Caused by the System of Low Compensation for Requisition of Agricultural Land], 2 *NONGCUN JINGJI* 27, 28 (2004) (P.R.C.) (noting that, in 1992, 74% of the 200 largest takings of land were for use by private, for-profit entities).

<sup>59</sup> Liu Zuoxiang, *Chengshihua, nongdi zhengyong yu shidi nongmin liyi buchang* [Urbanization, Farmland Requisition and Compensation to the Farmers], 13:1 *CHENGSHI FAZHAN YANJIU* 88, 90 (2006).

allocation in that particular collective; this yields the number of individuals who require relocation assistance. For example, if twenty hectares are taken from a collective that has 120 peasant members and owns forty hectares of land, then it will be assumed that sixty individuals require assistance, even if the actual number is larger or smaller. Payment for each individual assumed to require assistance should be four to six times the three-year average annual output of the land taken. The sum of basic compensation and resettlement assistance payments is capped at thirty times annual average output.<sup>60</sup>

It is telling that the value of the land that is taken is determined with reference to its value for its pre-expropriation (agricultural) use. This formula implies that rural collectives and peasant households, who are generally not permitted to use rural land for any but agricultural purposes, do not have a right to the economic value of potential non-agricultural uses of that land.

### III. THE SPECIAL PROBLEM OF TAKINGS IN RURAL CHINA

Part II's introduction to China's system of property in rural land is intended to provide essential background for understanding the unrest described in Part I. Specifically, it ought to demonstrate that the problem giving rise to the unrest is more complex than the bare phrase "dissatisfaction with the exercise of eminent domain" would suggest, particularly to the reader most familiar with the implications of that phrase in the American context.

Government takings of property are never unproblematic. In some ways, the intense dissatisfaction observed in China seems less explicable than protests against the exercise of eminent domain in the United States. Expropriation of rural land in China involves not the transfer of ownership rights from a private party to a government entity but, instead, the transfer of ownership rights from one form of government entity to another. The individuals whose dissatisfaction caused the incidents discussed in Part I had lost not fee simple ownership rights but, instead, rights to use land for a limited time and a limited purpose. These rights are connected to some extent with these individuals' status as residents of particular villages and members of certain collectives and have until quite recently been subject to alteration and amendment on a somewhat regular basis. Most of these individuals have no experience purchasing or selling these rights on an open

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<sup>60</sup> *Id.*

market and thus probably have a difficult time valuing them so as to derive a figure against which to evaluate the compensation offered by the government.

At the same time, there are a number of reasons why the grievances of Chinese farmers affected by land takings far overwhelm those of an American citizen who loses a home or business to eminent domain. The immediately following discussion analyzes in depth the particular characteristics and effects of Chinese takings that make them the incendiary phenomenon that they are.

#### A. *The Expropriation Surplus*

Immediately above, I named a number of factors that distinguish the expropriation of rural land in China from otherwise similar phenomena elsewhere. More important than all of these factors, however, is the fact that rural takings in China are not merely a means of affecting a transfer of ownership. They are also *the only means* of affecting a *change in use*.

As discussed in Part II.B., collectively-owned land cannot be used for purposes other than agriculture, peasant housing, public facilities, or TVE facilities, without first being converted to state-owned land. Once land is converted, the array of uses to which it may be put becomes much greater. In addition, LURs in state-owned land are more completely “commoditized” than rural LURs under current law:<sup>61</sup> the former may be transferred with less consideration of the identity of the transferee and may be mortgaged. Thus, it is only reasonable to expect that the value of LURs in two otherwise identical parcels of land will be significantly higher in a parcel that is state-owned than in one that is collectively-owned. I will refer to this difference in value as the “expropriation surplus.” In essence, the expropriation surplus is the product of two separate phenomena: first, the substantial difference between the price of land designated for agricultural uses and the price of land on which private commercial construction is permitted (this difference will be referred to in this article as the “urbanization surplus”); second, a land use regime that requires expropriation for conversion from the former to the latter use.

Numerous observers have identified the expropriation surplus, though not by this precise name, as a major source of tension in the Chinese rural

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<sup>61</sup> Donald C. Clarke, *Incentives and the Bottom-Up Approach to Land Use Regulation in China*, Jan. 31, 2000, at 2-3 (unpublished manuscript, on file with the author).

takings system.<sup>62</sup> The expropriation surplus in rural China results from the fact that the very process of expropriation of rural land by the state augments the land with additional development rights (the right to develop the land for non-agricultural commercial purposes),<sup>63</sup> and additional transfer rights (the right to mortgage the land).

Evidence supports the theory just described; the value of LURs in new state-owned land is much higher than the “value,” as evidenced by the statutory compensation system, of that same land when it is collectively owned. Total compensation payments are generally only a fraction of the amount of money that the expropriating government receives when it sells LURs in the expropriated land to new private users.<sup>64</sup> In one incident, LURs to expropriated land in Yunnan Province were sold for 150,000 *yuan* per *mu* (approximately one-sixth of an acre), but compensation to the collective was only 28,000 *yuan* per *mu*, which would indicate that the expropriation surplus was equal to roughly four hundred thirty-five percent of the compensation payment.<sup>65</sup> A study in one county in wealthier Zhejiang Province found that, in one suburban district, agricultural land that was expropriated for a compensation fee of around fifty thousand *yuan* per *mu* yielded urban LUR fees of around one 1,500,000 *yuan* per *mu*.<sup>66</sup> A more ambitious study estimates that only one-twentieth of the price of urban LUR fees paid for all formerly agricultural land converted since 1979 was paid as compensation to farmers.<sup>67</sup>

Of course, one can argue that the expropriation surplus is not entirely the result of underlying differences in value between urban and rural land. Instead, it could merely be the result of the fact that the compensation

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<sup>62</sup> Chengri Ding, *supra* note 16, at 116; Clarke, *supra* note 61, at 2-3; Qiren Zhou, *supra* note 46, at 5-6.

<sup>63</sup> Several commentators have focused on the concept of development rights in their analysis of this problem. Dai Zhongliang & Yang Jingqiu, *Nongcun jiti tudi fazhanquan de eryuan zhuti ji qi maodun* [The Dual Owners of Rural Collective Land Development Rights and the Contradiction Between Them], 5 NANJING CAIJING DAXUE XUEBAO 24 (2004) (P.R.C.); Liu Zuoxiang, *supra* note 59, at 91-92. Their arguments are discussed in more detail *infra*.

<sup>64</sup> The fees generated by the sale of LURs in urban land are split between the relevant local government and the central government; 70% of the proceeds go to the former, and 30% to the latter. LAL, *supra* note 25, at art. 55; Yue Zhenghua, *Wo guo nongdi zhengyong buchang zhidu de fumian xiaoying fenxi* [An Analysis of the Negative Effects of the Chinese System of Compensation for Expropriation of Agricultural Land], 2005:9 NONGCUN JINGJI 30, 32;. One little-discussed and potentially positive effect of widespread expropriation is the extensive contribution it makes to certain local government coffers.

<sup>65</sup> *Id.* at 51. In this particular case, only 9,000-10,000 *yuan* per *mu* of the total compensation was actually distributed to farmers who had lost their LURs.

<sup>66</sup> Lin Yan, *supra* note 58, at 28. Of the 50,000 *yuan* paid in compensation to the collective, only 20,000-30,000 *yuan* was distributed to farmers.

<sup>67</sup> Hou Huali & Du Juan, *Tudi fazhanquan yu nongmin quanyi de weihi* [Land Development Rights and the Protection of Farmers' Interests], 11 NONGCUN JINGJI 78, 79 (2005) (P.R.C.).



figures are hardly trustworthy proxies for the actual value of collectively-owned land; after all, they are set unilaterally by the party seeking to acquire that land. The unilateral nature of “transactions” by eminent domain means that they are a very poor indicator of the market value of property that changes hands through them. It is undeniable that a government entity that both expropriates land and sets the compensation has a strong motivation to keep the compensation low.

However, I will argue that this factor is not the sole source of the expropriation surplus. First, the method for determining compensation for rural land in China is arguably less open to manipulation than the methods used in other regimes—it is based on one factor (recent average annual agricultural income) that is relatively verifiable. Second, articles and research describing the unrest arising from rural takings virtually always compare the compensation distributed to farmers to the sums paid to the expropriating government by the new user, *not* to the average annual agricultural income on which compensation is supposed to be based.<sup>68</sup> If local officials were in fact manipulating the statutory formula in order to depress compensation, one would expect that protesting farmers, who know how much agricultural income they have earned from their land in recent years, would point to the difference between the figures yielded by the statutory formula and the actual compensation paid. All in all, circumstantial evidence indicates that the expropriation surplus is not entirely created by arbitrary actions of local officials seeking to depress compensation in violation of the statutory formula.

One could still argue, though, that the statutory compensation formula underestimates even the true value of LURs in land that is limited to agricultural use, and that this underestimation contributes more to the expropriation surplus than any inherent difference in the value of land used for agriculture and land usable for other purposes. However, very rough calculations show that, though the statutory formula probably is set too low, this fact by itself does not explain the full extent of the expropriation surplus. One can assume, for example, that the truly fair value of thirty-year use rights in agricultural land is the discounted value of the income foreseeable from that land over thirty years. For convenience’s sake, that figure can simply be set at thirty times the average annual agricultural output of the

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<sup>68</sup> *E.g.*, Beech, *supra* note 2 (“[C]ompensation per mu . . . would amount to about \$100 a year, even though the factor was paying \$3,300 per mu [for rights to the expropriated land]”); Cody, *supra* note 1 (“[T]he complaint voiced most often by farmers [is that] local officials pocket the difference between low compensation paid to farmers and the high market price charged to developers.”); sources cited *supra* notes 64 and 65.

past three years; this assumes, generously, that the annual rate of growth of the output value will suffice to cancel out whatever the appropriate discount rate is, and that the thirty-year term of the present LUR holder has just begun. In keeping with the statements of a prominent Western commentator on the subject, one can also assume that the value of thirty-year LURs constitutes around eighty-five percent of the value of fee simple ownership of collective land limited to agricultural use.<sup>69</sup> Thus, it would seem that the full fair value of a parcel of land that is restricted to agricultural use is roughly thirty-five times the average annual income it generates.<sup>70</sup>

The statutory compensation formula provides for six to ten times the average annual agricultural income to be paid as basic compensation, and for a maximum of fifteen times the average annual income to be paid for resettlement assistance. The sum of these two payments is capped at thirty times annual output. From this latter fact, it is clear that compensation payments will always fall short, sometimes far short, of the fair value of the agricultural land as estimated above. It is fair to assume, for example, that total payments are frequently as low as twenty (eight for basic compensation payment, twelve for resettlement assistance) times the average annual output—less than sixty percent of the estimated fair value. Even so, this discrepancy—between statutory compensation and compensation that more closely approximates fair market value—pales in comparison to the discrepancy frequently observed between compensation paid and the resale value of LURs in the land once it is urbanized. In the examples given above, which are by no means atypical, the latter discrepancy was a factor of four, in one case, and a factor of close to thirty, in the other. Even if the statutory compensation formula yields a figure that is less than sixty percent the fair market value of the land when it is used for agriculture, it is still clear that the land is worth significantly more to those who would and can use it for non-agricultural purposes than to those who can expect nothing more from it than the value of its agricultural output.

This analysis is, as mentioned above, based on very rough estimates and a good deal of guesswork. Nonetheless, it demonstrates that the expropriation surplus is created by several factors: the motivation and ability of local officials to keep compensation on the low end of the statutory

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<sup>69</sup> *Property Seizure in China*, *supra* note 8, at 22 (testimony of Roy L. Prosterman).

<sup>70</sup> Obviously, the comparisons done here would be much more meaningful if the fair value of a parcel of agricultural land were determined using the actual amount paid for rural LURs that are circulated through market transactions, as described *supra*, Part II.B. Unfortunately, to the best of this author's knowledge, no data is available comparing the value of rural LURs exchanged through market transactions with either the amount of compensation later paid for those same LURs or the selling price of urban LURs in the same land post-expropriation.

formula; the difference between the values yielded by the statutory compensation formula and likely estimates of the value of rural land based on its agricultural yield; *and* the difference between the value of rural land devoted to agricultural use, and the value of the same land devoted to another commercial use. The first two factors are a function of the fact that expropriation is an involuntary transfer of property rights to the government, and of the legal system surrounding such transfers. The third factor, which is at least as substantial, is not the direct result of the fact that expropriation involves an involuntary transfer of property rights. It is, instead, a result of a change in the land use regime applicable to the land in question.

### *B. Effects of the Current Expropriation System*

The anecdotes in Part I constitute circumstantial evidence that something is wrong with the Chinese legal regime surrounding the expropriation of rural land. This Section will expand on that hypothesis by attempting to describe the mechanisms through which the system goes wrong. Scholars and other observers have tended to emphasize five major destructive effects of the regime; this Part will review each of these in turn and evaluate the relative role each may play in rendering the regime dysfunctional. Throughout this discussion, the concept of the expropriation surplus will provide a useful analytical framework.

#### *1. Waste or Inefficient Use of Land*

Canonical analyses of American takings jurisprudence have identified the pursuit of “efficiency” as one primary goal of compensation for government expropriation of private property.<sup>71</sup> Some efficiency analyses of compensation systems focus on those systems’ influences on the behavior of private actors,<sup>72</sup> but the majority focus on their influence on the behavior of governmental actors. One kind of inefficiency that results from a non-optimal compensation system is described thusly: “[i]f the government were

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<sup>71</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 64 (Aspen 5<sup>th</sup> ed. 1998); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998; Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 750 (1994); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

<sup>72</sup> For example, it has been suggested that the failure to compensate for physical takings distorts the market behavior of individuals who are risk-averse and have no way to insure against the risk of losing their property, without compensation, to the government. Lawrence Blume & Daniel J. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 584-89 (1984).

free to take resources without paying [or without paying enough] for them, it would not feel incentives, created by the price system, to use those resources efficiently.”<sup>73</sup>

Indeed, at first glance the American efficiency analysis seems readily applicable to the takings problem in rural China. Critics of the Chinese expropriation system do frequently assert that it enables the devotion of expropriated land to uses other than its highest and best use.<sup>74</sup> By arranging for the expropriation and use conversion of agricultural land, local governments essentially get money for nothing. The difference between the total price paid by a private developer for LURs in newly-urbanized land and the portion of that price that is designated as compensation represents almost pure profit for an expropriating government; only the (presumably low) administrative costs of arranging the transaction prevent the amount of profit from equaling the full expropriation surplus. Local governments therefore can afford to be less demanding about the prices they charge for LURs in newly-urbanized land. This in turn means that developers may obtain these LURs at bargain prices that allow inefficient uses of the land.

A contrasting but related possibility created by the expropriation surplus is that local governments might expropriate land without an eventual transferee in mind. If compensation is low enough and the potential expropriation surplus is high enough, a government may determine that it is well worth its while to expropriate land even in the face of the risk that no buyer of LURs to that land will appear. For example, if there is only a twenty-five percent chance that a buyer will be found who is willing to pay five times the amount of compensation—by no means an unrealistic figure in these sorts of transactions—then a local government’s expected return on its “investment” (the amount of compensation) is still one hundred percent.

The most pernicious variation on this phenomenon would be the total non-use of expropriated land. Private transferees may find it expedient to

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<sup>73</sup> Heller & Krier, *supra* note 71, at 999. American efficiency analysis of takings law has been criticized for sometimes facily and inaccurately equating local governments with market actors and ignoring the fact that the incentives of those governments are more closely related to voter support and political demands than to monetary revenues and outflows. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 417 (2000); see also Blume & Rubinfeld, *supra* note 72, at 621 (“[T]he argument for compensation cannot possibly correct any ‘across the board’ fiscal illusion problems.”). In the Chinese context, though, the equation of government actors with profit-oriented private actors seems more defensible: local governments are not directly elected and tend to prioritize fiscal concerns. *E.g.*, Stein, *supra* note 15, at 59 (identifying the conflict between the central government’s concern with social stability and local governments’ focus on generating revenues as a major source of tension in rural land policy).

<sup>74</sup> Yongshun Cai, *supra* note 20, at 670-71; Liu Zuoxiang, *supra* note 59, at 91; Zhou Qiren, *supra* note 46, at 12.

leave land purchased at bargain prices temporarily idle; this state of affairs is said to have been quite common in the early 1990s, in the wake of extensive conversion of agricultural land.<sup>75</sup> Local governments may be unable to find purchasers for expropriated land. This phenomenon is widespread enough that a phrase (*zhengerbuyong*, 征而不用) that plays on a word for expropriation (*zhengyong*, 征用) has been coined to describe it.<sup>76</sup>

There is a very convincing logic to the argument just made. Unfortunately, that argument is based largely on hypotheticals; there is only limited empirical evidence demonstrating that the expropriation system leads to projects that utilize land inefficiently. The coining of a phrase to describe the phenomenon of expropriated land lying unused seems reasonably reliable evidence that this does occur with some frequency, but quantitative proof of that phenomenon's prevalence is hard to obtain. In fact, there is an argument that the very *existence* of the expropriation surplus indicates that most expropriations cannot be *that* inefficient. If land is worth significantly more under an urban use regime, then there must be a net social benefit stemming from its transfer, even if that transfer does not result in the optimally efficient use. Moreover, the observation above that Chinese local governments behave more like market actors than do American local governments would seem to *reduce* the likelihood that Chinese local governments will dedicate land to less efficient uses. Since Chinese local governments are, on the whole, more likely to be single-mindedly concerned with revenues than an American governmental actor (who may be interested in political donations or voter support), they are likely to grant LURs in newly expropriated land to the highest bidder, who in turn should presumably be the most profitable user.

These concerns all point to the conclusion that *the actual event of expropriation is less of a source of inefficiency than the underlying land use regime that makes it profitable*—that is, the regulatory division between agricultural and non-agricultural use. In fact, there is evidence that the current demand for state-owned, developable land far exceeds supply, and that the opposite is true for collective, rural land available for transfer for agricultural uses.<sup>77</sup>

In other words, the efficiency analysis of takings compensation, when applied to the system of expropriation of Chinese rural land, leads only to ambiguous conclusions. There is a powerful theoretical argument that the

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<sup>75</sup> Yongshun Cai, *supra* note 20, at 670-71.

<sup>76</sup> Liu Zuoxiang, *supra* note 59, at 91.

<sup>77</sup> Che Yubin, *supra* note 33, at 95-98.

incentives of local governments are skewed by the expropriation surplus in the direction of excessive, inefficient expropriation. However, there is also an argument that, if anything, too little expropriation takes place, despite the incentives created by the expropriation surplus—that expropriation is, in essence, an efficient response to inefficient regulatory restrictions on the use of collective land. In the absence of extensive empirical evidence, it is all but impossible to choose between these two arguments. This failure of a classical “efficiency” analysis to yield a clear evaluation of China’s expropriation system only highlights the importance of the effects of that system that are discussed immediately below.

## 2. *Demoralization Costs and Civil Unrest*

The “efficiency” analysis of takings compensation, described above, is concerned only with whether governments are forced to pay sufficiently for land, not with whether the individuals from whom land is taken are sufficiently compensated. Michael Heller and James Krier distinguish between the “distribution” and “deterrence” functions of compensation for takings: while the “deterrence” function merely requires that the government pay for what it takes, so that it will have incentives to make efficient use of it, the “distribution” function is dependent on payment actually being made to parties who lose property.<sup>78</sup> The expropriation surplus is the difference between the money paid and the money received by local governments in the process of land expropriation; it has nothing to do with the portion of the money paid to evicted farmers. In fact, the expropriation surplus could be eliminated without increasing payments to evicted farmers at all.

This most definitely does not mean that the amounts actually paid to dispossessed farmers are unimportant, though. Perhaps the single most obvious effect of the current compensation system, and the effect which needs the least proof or explanation, is the serious damage to social stability that the system has done in recent years. All of the instances of civil unrest described in Part I are illustrative. In those instances, and a good many others like them, the main complaint of the aggrieved farmers who participated in the unrest was not the fact that their land had been taken at all, but was instead that the compensation offered them was too low.<sup>79</sup>

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<sup>78</sup> Heller & Krier, *supra* note 71, at 999-1001.

<sup>79</sup> See *supra* notes 9-11 and accompanying text; Ho & Lin, *supra* note 25, at 706.

The frequency with which rural land expropriation leads to violent expressions of dissatisfaction by villagers indicates that the compensation system has failed to achieve another major goal for such systems: “justice” or “fairness.”<sup>80</sup> While efficiency concerns respond mainly to the variable of how much is paid for expropriated property, the justice of a taking depends just as much on the party to whom those amounts are paid.

However, the line between the justice failings of China’s compensation system and its efficiency effects is not particularly clear or impermeable. Simply put, the justice failings can aggravate any potential efficiency failings. A groundbreaking article by Frank Michelman, which inspires Heller and Krier’s justice and efficiency analysis, proposes that justice—or “fairness,” in Michelman’s terminology—failings in a takings regime are a source of concern in part because they produce “demoralization costs.” Michelman defines demoralization costs:

the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers . . .<sup>81</sup>

In other words, the failure to compensate parties sufficiently leads to inefficiencies unrelated to the specific takings transaction for which compensation might be due. These inefficiencies are likely to have nothing to do with the level of efficiency with which the property at issue will be used; instead, they will redound to the broader social and economic context. They may result from the fact that the undercompensated parties and those who sympathize with them feel less secure in their tenure in their own property,<sup>82</sup> or they may be the direct result of the resentment felt by the undercompensated parties, which may be expressed in destructive “social unrest.” This second hypothetical is, of course, especially relevant to the Chinese context. One scholar, who theorizes that the current takings system may actually be economically efficient insofar as it eliminates the negotiation costs that would be required for developers to acquire land by

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<sup>80</sup> WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 216-17 (Harvard University Press 1995); Heller & Krier, *supra* note 71, at 999; Michelman, *supra* note 71; Stephen R. Munzer, *Compensation and Government Takings of Private Property*, 33 *NOMOS* 195, 199-200 (1991).

<sup>81</sup> Michelman, *supra* note 71, at 1214.

<sup>82</sup> *Id.* at 1211-12, 1214.

other means, eventually concludes that these added efficiencies are outweighed by the long-term detrimental effects on China's economy that result from takings-related social unrest.<sup>83</sup>

Seen from this perspective, the analysis in the first paragraph of this Part seems specious: the failure to compensate individuals *does* produce efficiency effects. These are related to demoralization costs and, while more diffuse and more difficult to measure, may also be more broadly and lastingly destructive than, say, the systematic under-use of land. Unlike the inefficiencies that might be expected to result from underpayment by governments and developers, the destructive social unrest that results from underpayment to Chinese farmers is empirically observable.

Several related analyses that focus on the inefficiency of unfairness point to a new way of understanding the effects of the expropriation surplus. Mark Roe has proposed that economic systems that maximize total wealth in the short-term, but distribute that wealth in a radically and visibly unequal way, may eventually give rise to "wealth-decreasing political instability" that could render the systems themselves unsustainable and certainly do render them inefficient in the long run.<sup>84</sup> Another case study suggests that perceived inequity in transactional terms can delay and increase the costs of completing even transactions that would otherwise produce "large ex post aggregate gains."<sup>85</sup> These analyses support the demoralization costs approach insofar as they share the assumption that social dissatisfaction and unrest can be wealth-decreasing.

However, they also point to the role of *inequalities*, as opposed to simple under-compensation, in creating demoralization costs. The expropriation surplus represents a very visible inequality: farmers receive compensation for their land at one value and then see local governments resell the land at another. In other words, the problem with the expropriation surplus may not simply be that it induces governments to expropriate, thereby resulting in the demoralization costs that result from low compensation. Instead, the expropriation surplus may also *directly* increase demoralization costs, by creating an appearance of inequality.<sup>86</sup> This

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<sup>83</sup> Xiaobo Zhang, *Asymmetric Property Rights in China's Economic Growth* 17-18 (2005) (unpublished manuscript, on file with author).

<sup>84</sup> Mark J. Roe, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998).

<sup>85</sup> Gary D. Libecap, *Chinatown: Owens Valley and Western Water Reallocation: Getting the Record Straight and What it Means for Water Markets*, 83 TEX. L. REV. 2055, 2088-89 (2005).

<sup>86</sup> See Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 948 (2003) ("The very fact that the [United States] Constitution allocates 100% of [the] condemnation surplus to the condemnor, or the private beneficiary of the condemnation as the case may be, may itself be demoralizing for a property owner.").



observation is related to the observation that “givings” by governments to select parties can generate just as much demoralization among those *not* selected for “givings” as takings can.<sup>87</sup>

Another approach, compatible with, but different from, the demoralization costs approach, provides another reason to worry about the perceived unfairness of the current compensation system. Henry Smith and Thomas Merrill have argued that utilitarian law-and-economics approaches to property rights, such as the “efficiency” analysis of takings discussed in Part III.B.1. above, are unsatisfactory because they ignore the extent to which ethical imperatives structure the law and social expectations of private property.<sup>88</sup> Moral assumptions, according to Smith and Merrill, help to coordinate the behavior of individuals so that property systems can function: “[p]roperty can function as property only if the vast preponderance of persons recognize that property is a moral right.”<sup>89</sup> In the absence of a system of widely-recognized moral assumptions surrounding property, violation of property rights will be rampant, for the simple reason that legal and self-help enforcement of these rights will always be insufficient to protect an *in rem* right that must be defended against an unlimited number of potential violators.<sup>90</sup> In China, where a functional system of private property is still in its formative stages, wide recognition of property as a moral right could be especially valuable in this coordinating role. Yet, to the extent that individuals perceive under-compensated takings of agricultural land as a violation of a farmer’s moral rights to land she possesses and farms, such takings are likely to weaken this recognition. To the extent that the internalization of a property right’s consciousness will help to increase overall prosperity in China, such takings are therefore likely to represent a drag on total wealth.<sup>91</sup>

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<sup>87</sup> Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L. J. 547, 579 (2001).

<sup>88</sup> Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

<sup>89</sup> *Id.* at 1850.

<sup>90</sup> *Id.* at 1854-55.

<sup>91</sup> This analysis of takings is different from Merrill and Smith’s understanding of the moral assumptions governing the use of eminent domain in the American context. Merrill and Smith focus on how the exercise of eminent domain for certain purposes offends these moral assumptions even when full and fair compensation is paid. *Id.* at 1879-1884. However, as will be discussed *infra* Part IV.A., American moral and legal assumptions about the various purposes for which the eminent domain power may be invoked are not exactly applicable to the situation in China. Moreover, Merrill and Smith offer those assumptions as an example of the influence ethical imperatives have on property law and norms and do not suggest that they are the only valid assumptions around which a functioning property consciousness may be built.

### 3. *Loss of Agricultural Land*

Expropriation of rural land represents a change not only in ownership of land but also in its use; therefore, China's land use regime is as crucial a factor in these transactions as are those aspects of its legal system that deal specifically with expropriation. A common criticism of the interaction of these two systems is that the expropriation regime undermines the goals of the land use regime.

As discussed in Part II.B., above, Article 43 of the LAL forbids the use of collectively-owned land for any but a few limited purposes. Multiple other articles of the LAL emphasize a commitment to controlling the pace of conversion of agricultural land to non-agricultural uses. For example, Article 31 provides that there should be no net loss of agricultural land—any agricultural land that is developed must be offset by the reclamation of an equal amount of new land for agricultural use, either by the developer or by local governments.<sup>92</sup> The Property Law reiterates this concern as well.<sup>93</sup> A 2004 Circular from the State Council focuses specifically on measures to protect the supply of arable land,<sup>94</sup> and a 2006 Circular from the State Council reiterates the government's concern about the too-rapid development of farmland.<sup>95</sup> For most observers, the Chinese government's interest in “halt[ing] or at least retard[ing] the conversion of arable land to non-agricultural uses”<sup>96</sup> and in “protect[ing] environmental and agricultural lands” is a given.<sup>97</sup>

This policy appears to originate at least in part with environmental and land-use planning principles. According to one scholar, ensuring security of the food supply is a major goal of the policy.<sup>98</sup> Ironically, the major concern motivating the government in recent years may be worry about the social side effects of displacing farmers from their land. This concern is integrally tied to a fairly paternalistic view of Chinese farmers as subject to exploitation in market transactions. If agricultural land could be freely traded for other uses, the reasoning goes, unscrupulous speculators

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<sup>92</sup> LAL, *supra* note 25, at art. 31. *See also* LAL, *supra* note 25, at arts. 4, 18, 32-42.

<sup>93</sup> Property Law, *supra* note 14, at art. 42.

<sup>94</sup> Guowuyuan guanyu jiang bufen tudi churangjin yongyu nongye tudi kaifa youguan wenti de tongzhi [Circular on Relevant Issues Concerning Using Part of the Land Transfer Fees for the Expansion of Cultivated Land] (promulgated by the State Council, Mar. 22, 2004), *available at* <http://www.lawinfochina.com/law/display.asp?db=1&id=3484&keyword=> (P.R.C.).

<sup>95</sup> 2006 Land Control Circular, *supra* note 39, at preamble.

<sup>96</sup> Clarke, *supra* note 61, at 1.

<sup>97</sup> Chengri Ding, *supra* note 16, at 113. *See also* Decision on Major Issues, *supra* note 28.

<sup>98</sup> Stein, *supra* note 15, at 32-33.

and developers could persuade farmers to sell at prices that would be unfair to the farmers.<sup>99</sup> That reasoning is certainly at odds with the market orientation that has guided most reforms of the Chinese rural land regime over the past several decades, but it may be the inevitable result of the current political calculus in that country, by which, for example, leftist commentators were partially responsible for delaying the passage of the new Property Law.<sup>100</sup>

Prohibiting most development of collectively-owned land at first glance might seem like a reasonable strategy in light of these concerns. However, the fact that expropriation rescinds this prohibition for any given piece of land, coupled with the existence of the expropriation surplus, dooms the strategy to failure. Not only do local governments have the *means* to lift this prohibition on land within their jurisdiction, they have a substantial financial motivation to do so. The act of expropriation both transfers a piece of property into the government's hands *and* raises the value of that property, by opening it up to a wider array of uses. By restricting the potential uses of collectively-owned land, the national government sets the stage for that rise in value and provides incentives for local governments to engage in expropriation. The end result—conversion of agricultural land to other uses, and the displacement of farmers, often resulting in social unrest—is precisely what the rural land use restrictions were originally intended to avoid, hence the irony noted above.

A number of scholars have already identified the problem just described.<sup>101</sup> Several scholars have also used the term “monopoly” to describe the position held by local governments in this process. The idea is that local governments are the only parties that can engage in the value-creating activity of changing the permitted use of a piece of land.<sup>102</sup> While the analogy of local governments to monopoly sellers may be useful, it may

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<sup>99</sup> *Id.* See also Pranab Bardhan, *Land Acquisition Must Be Humane*, FIN. TIMES, Feb. 6, 2007, at 11 (“History is replete with instances of uninformed, cash-strapped peasants induced to sell their land at nominal prices. . . . In the bargaining process, thousands of small, uncoordinated (sic) farmers are no match for large corporate buyers.”).

<sup>100</sup> See, e.g., Richard McGregor, *Property Reform Ignores Chinese Farmers*, FIN. TIMES, Mar. 8, 2007 (“The value of the [new Property L]aw can also be judged by the opposition it created among the old-style leftists . . . . [Because of leftist influence, t]he bill also explicitly rejects any change to the system of ‘collective’ ownership of rural land, where farmer occupiers have only usage rights over limited contract periods . . . .”).

<sup>101</sup> Yongshun Cai, *supra* note 20, at 670-71; Yue Zhenghua, *supra* note 64, at 32; Clarke, *supra* note 61, at 2-3; Zhou Qiren, *supra* note 46, at 5-6.

<sup>102</sup> Lin Yan, *supra* note 58, at 28; Zhou Qiren, *supra* note 46, at 9. See also Nelson Chan, *Land-Use Rights in Mainland China: Problems and Recommendations for Improvement*, 7 J. REAL EST. LIT. 53, 54 (1999); Wilhelm, *supra* note 16, at 289 (both using the term “monopoly” to describe urban local government's position as first seller of LURs).

overstate the extent to which the Chinese land use regime is unique in this regard. Land use restrictions, after all, are always created by, and can only be changed or relaxed by, governments. Nor is the fact that local governments have strong financial motivations to allow certain use changes unique to the Chinese context. U.S. local governments, for example, frequently engage in varieties of “fiscal zoning,” which subordinates stated land use goals to the pursuit of the government’s own financial health.<sup>103</sup> Of course, in the case of the United States, the government’s fiscal motives are much more attenuated, based as they are on the projected (but never entirely certain) effects of a given land use decision on property tax revenues. In China, by contrast, a substantial portion of the vast differences between the value of a parcel of land under agricultural restrictions and the value of that same parcel after those restrictions are removed goes directly and immediately into the pockets of local governments. Nonetheless, this comparison is a useful reminder that the expropriation problem in rural China is as much a problem of land use controls as an eminent domain problem.

The power of the expropriation surplus is such that the array of government measures to halt or retard the conversion and net loss of farmland have been largely ineffective. Between 1986 and 1995, China lost more than 1.9 million hectares of farmland to construction and urban expansion, and by 1995 per capita farmland was down to 1167 square meters, well below the world average of 2333 square meters.<sup>104</sup> One study estimates that the supply of arable land is decreasing at a rate of one percent a year.<sup>105</sup> These statistics indicate that Article 31 of the LAL, requiring that all converted agricultural land be replaced, is an ineffective counterweight to the expropriation surplus, perhaps because it is poorly enforced or compliance is impossible in many instances.

In summation, the expropriation surplus is the product of the interaction of the country’s system of laws pertaining to land use and its laws pertaining directly to expropriation. That interaction ends up undermining the key goal of the former set of laws—ensuring the preservation of agricultural land—and, in turn, aggravating the problems—displacement of farmers and rural unrest—that are part of the inspiration for

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<sup>103</sup> E.g., Edwin S. Mills & Wallace E. Oates, *FISCAL ZONING AND LAND USE CONTROLS* (1975); Audrey G. McFarlane, *Redevelopment and the Four Dimensions of Class in Land Use*, 22 *J. L. & POL’Y* 33, 39-40 (2006) (“‘fiscal zoning’ means that the structure of land use regulations are not based on the physical impact of uses on each other, but rather the impact . . . of uses on [taxable] property values”).

<sup>104</sup> Chengri Ding, *supra* note 16, at 112-13.

<sup>105</sup> See *Property Seizure in China*, *supra* note 8, at 27 (question by David Dorman, Deputy Staff Director, Cong.-Exec. Comm’n on China).

that goal in the first place. The empirical question of how much agricultural land China needs from a land use perspective does not need to be answered in order to determine that the loss of such land is a problem to the extent that rural unrest produces the demoralization costs described in Part III.B.2. above.

#### 4. *Insecurity of Tenure and Underinvestment in Agricultural Land*

A number of Western scholars, most of whom are affiliated with the Seattle, Washington-based Rural Development Institute (“RDI”), have dwelt on one particular negative effect of the current expropriation system: that it undermines the perceived security of Chinese farmers’ tenure in the land that they farm, thereby discouraging investment in that land and hindering agricultural productivity growth.<sup>106</sup> This effect constitutes a subset of the demoralization costs described in Part III.B.2.—a clear example of Michelman’s “impaired incentives.”<sup>107</sup>

Two separate causal mechanisms would seem to link expropriations to reduced agricultural investment. First, the mere fact that expropriation is fairly common reduces farmers’ incentives to invest. A second, and closely related, factor is that the statutory compensation formula is unlikely to take into account the effects of recent investments, particularly more long-term investments, on the future output of agricultural land.<sup>108</sup>

These two mechanisms in turn point to different features of the expropriation system as sources of the problem. The first mechanism is intimately related to the expropriation surplus, insofar as that surplus creates incentives for local governments to engage in frequent expropriations. It is also dependent on the second mechanism—if compensation were sufficient to reimburse farmers for all investments in agricultural productivity, then expropriation would not reduce the incentives for such investments.

The second mechanism is not so closely related to the expropriation surplus but instead is related to the absolute amount of compensation paid to individual farmers. This amount is likely to fall short for any investments that do not constitute fixtures on the land (and hence not covered by the fixtures and standing crops payments) and that are either quite recent or for

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<sup>106</sup> *Property Seizure in China*, *supra* note 8, at 13; Zhu Keliang & Prosterman, *supra* note 5. *But see* Hanan R. Jacoby, Guo Li & Scott Rozelle, *Hazards of Expropriation: Tenure Insecurity and Investment in Rural China*, 92 AM. ECON. REV. 1420, 1444 (2002) (empirical study finding that tenure insecurity in China does not have a substantial effect on forms of investment in land that matter greatly to overall agricultural productivity).

<sup>107</sup> Michelman, *supra* note 71, at 1214.

<sup>108</sup> *Property Seizure in China*, *supra* note 8, at 13.

other reasons were expected to yield benefits in the years following the expropriation that are not reflected in agricultural productivity in the three years immediately prior to the expropriation.

### 5. *Violations of Related Laws*

Illegal land uses and transactions are widespread throughout both rural and urban areas; “legal transactions constitute only a part, albeit a majority, of all land use transactions.”<sup>109</sup> One very common subcategory of these violations of law is the “illegal use of collectively owned land by rural commercial users.”<sup>110</sup> The prevalence of such illegal use, I will argue, constitutes both an index and a destructive effect of the rural land expropriation system’s failures.

As discussed in Part II.C., expropriation is required for the conversion of agricultural land to most other uses, and the use of collectively-owned land for most commercial purposes is illegal. Yet it takes place with striking frequency<sup>111</sup> and is especially common at the fringes of large, growing cities.<sup>112</sup> The participants in this sort of illegal land use are most likely to be urban commercial users, and the collective landowners who transact with them to allow the illegal use. For example, a rural collective might pay peasant households to relinquish their LURs in cultivated land and then contract with a commercial user who will pay the collective for the right to develop the land.<sup>113</sup> In other cases, a collective might pay peasant households to relinquish their LURs and then enter into a joint venture with a commercial user to develop the land, claiming an equity stake in the project rather than rent from the commercial user.<sup>114</sup>

In other cases, collectives do not even bother partnering with an urban commercial user but instead simply develop land they have reclaimed from peasant users, at a price, on their own and retain all the profits.<sup>115</sup> It appears that, in at least some situations of this sort, the collective passes the lion’s share of the profits on to its peasant members, who may enjoy a very good

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<sup>109</sup> Ho & Lin, *supra* note 25, at 696.

<sup>110</sup> *Id.* at 696.

<sup>111</sup> See Lin Yan, *supra* note 58, at 29; *Property Seizure in China*, *supra* note 8; Che Yubin, *supra* note 33.

<sup>112</sup> Che Yubin, *supra* note 33, at 86.

<sup>113</sup> Che Yubin, *supra* note 33, at 86; Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 26.

<sup>114</sup> Che Yubin, *supra* note 33, at 86.

<sup>115</sup> Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 26.

living from these proceeds.<sup>116</sup> In still other cases, the party transacting with the urban commercial user might be a township-village enterprise (“TVE”). As discussed above, TVEs are the only parties permitted to use collectively-owned land for commercial purposes.<sup>117</sup> A TVE might find it more profitable, however, to subcontract or otherwise transfer its LURs in collectively-owned land to a non-TVE commercial entity at a relatively high price, and evidence suggests that numerous TVE managers succumb to this temptation.<sup>118</sup>

What all the illegal transactions just described have in common is that they allow non-state land users to bypass the expropriation system, and, in so doing, to *obtain a portion or all of the expropriation surplus* that is usually retained by the state in use conversion-expropriation transactions. For example, in the first form of transaction, all parties may be willing to participate, despite the transaction’s illegality and attendant risks, because each gets to enjoy a portion of the expropriation surplus that would otherwise be claimed by the state. Unfortunately, though understandably, no empirical evidence exists to demonstrate how parties to such transactions share the pilfered expropriation surplus among themselves. It is entirely possible, for example, that peasant users actually receive very little or none of the surplus through the sums paid by the collective for cancellation of their LURs, because they either are unaware of or lack the means to enforce their statutory rights to retain those LURs for the duration of their thirty-year term.<sup>119</sup>

Like many black markets, the prevalence of illegal transactions suggests that the underlying system of rules is not wealth-maximizing. Parties find it more profitable, it seems, to allocate rights among themselves outside of the legal channels for doing so.<sup>120</sup> All this demonstrates once

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<sup>116</sup> One ethnographer has identified a fascinating and perhaps unusual phenomenon in certain large cities in southeastern China: as cities spread to encompass formerly agricultural land, that land is retained in the hands of collectives, who develop commercial housing on it, a flagrant and large-scale violation of the LAL. The proceeds of this development are sufficient to support the former farmers who are members of the collective at a very comfortable standard of living. Helen Siu, Address at Harvard Law School: Remaking the Rural-Urban Divide in Post-Reform South China: Modernity and Marginality (November 5-6, 2005) (unpublished manuscript, on file with the author). See also Stein, *supra* note 15, at 128.

<sup>117</sup> See *supra* notes 41 and 43 and accompanying text.

<sup>118</sup> Che Yubin, *supra* note 33, at 86.

<sup>119</sup> But see Che Yubin, *supra* note 33, at 86; Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 26 (both suggesting that peasant users do generally get premium prices for their cancelled LURs in these circumstances).

<sup>120</sup> What is perhaps most telling about all these transactions is the fact that local governments allow them to continue, not in spite of the fact that they are illegal, but in spite of the fact that they divide the expropriation surplus that would normally be enjoyed mostly by local governments between different parties (collectives, commercial users, farmers). The fact that local governments do not always step in to expropriate the land and preserve the surplus for themselves when this occurs is puzzling. It may, however,

again the importance of the expropriation surplus in the current legal regime, and the extent to which the expropriation surplus is created by the land use regulations governing collectively-owned land—after all, the laws being violated above do not pertain specifically to the expropriation process but instead to the permitted uses of collective land. The efficiency problem indicated by this illegal behavior here is a land use problem, not an eminent domain problem.

This illegal behavior exacerbates drawbacks of the current system even as it serves as an index of them. First, the presence of a black market in land hinders the development of transparent, efficient markets in, and pricing mechanisms for, land.<sup>121</sup> Second, the fact that rural collectives, commercial users, and farmers may reap profits, extensive in some cases, by violating existing laws can only contribute to the demoralization costs described in Part III.B.2. If scholars are able to identify instances of illegal commercial use of collective land, then surely residents of neighboring villages and an array of commercial developers are aware of this phenomenon as well. If a peasant loses his land via expropriation and receives only statutory compensation, knowing that others in a comparable position have received compensation that is closer to the value of the land for commercial uses, his demoralization is likely to be greater than it would have been absent this knowledge.

#### IV. OTHER PROPOSALS FOR REFORM

Part III.B. identified five major potential negative effects of the current system surrounding the expropriation of rural land. The conclusion that emerges from that discussion is that the system is economically destructive, but not perhaps in the way that a facile application of many efficiency-oriented American takings analyses would suggest. The problem is not that the ability to expropriate land at currently prevailing levels of compensation necessarily leads to expropriation for inefficient purposes. Instead, the inefficiencies of the underlying land use regime lead to frequent expropriation, and low levels of compensation in turn lead to wealth-destroying social unrest, to insufficient investment in agricultural land, to illegal activity that possibly heightens general dissatisfaction, and perhaps to

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represent subtle support for the demoralization costs argument made in Part III.B.2, above. Demoralization, and the likelihood of social unrest, is likely to increase with the value of the entitlement that is taken away. Local governments may recognize a greater likelihood of social unrest when they take not just agricultural rights in land but rights to a share in the expropriation surplus, and may tread with caution as a result.

<sup>121</sup> Dai Zhongliang & Yang Jingqiu, *supra* note **Error! Bookmark not defined.**63, at 27.



the retardation of the process of building a functional property rights consciousness in China.

The expropriation surplus, discussed in Part III.A., therefore comes to seem like something of a double-edged sword. On the one hand, it induces what may be the fundamentally efficient act of transforming less valuable collective land into more valuable state-owned urban land. However, to the extent that that transformation's fundamental efficiency is overwhelmed by the destructive effects just named, the expropriation surplus is problematic.

Part V will argue that the most direct way to mitigate these destructive effects is to eliminate the expropriation surplus by separating the economic consequences of urbanization from the administrative process of changing the ownership and use status of rural land. First, however, this Part will consider several other frequently-proffered solutions and will show that these solutions are unlikely to be effective on their own.

#### A. *Strengthening the "Public Interest" Requirement*

Some observers have urged the Chinese government to improve the expropriation system by strengthening or further enforcing the "public interest" requirement found in Article 10 of the constitution.<sup>122</sup> These observers generally propose that the government should have the right to expropriate land through non-negotiated transactions, without the consent of current owners or users, but only when the land is being taken for a legitimate public use,<sup>123</sup> and that current owners or users should have the right to challenge acts of expropriation on the grounds that they are not in fact in the public interest.<sup>124</sup> This would represent a major, indeed revolutionary, change to the current system; as was discussed above, the public use requirement is not currently defined or elaborated upon anywhere in Chinese statutory law, and the reality is that expropriation of land for profit-bearing development by private entities is extremely common.<sup>125</sup>

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<sup>122</sup> XIAN FA art. 10 (2004) (P.R.C.).

<sup>123</sup> Larson, *supra* note 25, at 854; Lin Yan, *supra* note 58, at 29; *Property Seizure in China*, *supra* note 8, at 14 (testimony of Roy L. Prosterman). See also Wilhelm, *supra* note 16, at 293-94 (proposing such a requirement for the requisition of urban state-owned land from current private users). One pair of scholars, however, have proposed that expropriation for non-public purposes be retained as a possibility but that additional compensation be required in such instances. Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 27.

<sup>124</sup> Larson, *supra* note 25 at 854.

<sup>125</sup> See *supra* notes 54-58 and accompanying text; see also Theresa Wang, Comment, *Trading the People's Homes for the People's Olympics: The Property Regime in China*, 15 PACIFIC RIM L. & POL'Y J. 599, 616 (2006) (pointing out that terms like "public purposes" or "public necessity" are necessarily ambiguous in an officially Communist country).

Under these proposals, which are favored by affiliates of the U.S.-based RDI,<sup>126</sup> the state would be forced to purchase collective land at a mutually agreed-upon price if it planned to use the land for purposes other than the public interest. The most difficult question is, of course, how “public interest” should be defined. The best option would almost certainly be a detailed statutory definition of the phrase. RDI proposes limiting the use of land in “the public interest” to the construction of infrastructure projects with clear public benefits, such as power plants, government buildings, and highways, and to projects with broader “economic development” benefits, but only with the approval of the State Council.<sup>127</sup> The major problem with this proposal is that it grants the State Council substantial definitional discretion. The national government is entitled to a portion of the expropriation surplus (thirty percent of the fees generated by transferring LURs to private parties) in all expropriation transactions.<sup>128</sup> The State Council therefore would have an incentive to deem projects to be in the public interest so as to reduce the amount of compensation paid, assuming that the statutory formula will yield a lower figure than negotiation. All in all, though this proposal would eliminate the potential for the worst local abuses, it could mean that the number of expropriation transactions at the current compensation levels, and the resulting demoralization costs and reduced incentives for farmers, might not be substantially reduced from the present state of affairs.<sup>129</sup>

A variation on the RDI proposal, in which economic development projects could *not* be deemed in the public interest with State Council approval, and only public infrastructure projects could be designated as such, would eliminate this potential conflict. However, it is telling that the RDI did not choose to propose such a restrictive definition of “the public interest.” American commentators, including the RDI affiliates and the author of this Article, may have little moral authority to propose such a definition. After all, American courts have ruled that even the narrower-sounding phrase “public use” can include vague public goods like economic development and

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<sup>126</sup> *Property Seizure in China*, *supra* note 8, at 46, 52 (prepared statement of Brian Schwarzwald et al.).

<sup>127</sup> *Property Seizure in China*, *supra* note 8, at 46 (prepared statement of Brian Schwarzwald et al.).

<sup>128</sup> LAL, *supra* note 25, at art. 55; Yue Zhenghua, *supra* note 64, at 32.

<sup>129</sup> The RDI proposal also involves raising the statutory formula for compensation for projects deemed to be in the public interest. *Id.* at 52. However, that portion of the proposal, as will be discussed *infra* Part IV, seems unlikely to eliminate the expropriation surplus to the extent necessary to substantially mitigate the current system’s problems.

beautification,<sup>130</sup> and can encompass projects that generate substantial benefit for private parties.<sup>131</sup> Indeed, the American interpretation of “public use” even encompasses the generation of increased tax revenues for local governments.<sup>132</sup> It is difficult to argue that this principle does not extend to the potential conclusion that the expropriation surplus is itself in the public interest, as it enriches the coffers of state entities that exist ostensibly to serve that interest.

Finally, one more point that should not be overlooked is that proposals to strengthen the public use requirement might not sufficiently address the demoralization costs and impaired incentives that result from too little compensation being paid to peasant land users. After all, the especially deadly incident of civil unrest in Dongzhou resulted from the expropriation of land for a public works project (a power plant).<sup>133</sup>

## B. *Increased Compensation*

It would seem that the most direct way to reduce both the expropriation surplus and demoralization costs from takings is to increase the amount of compensation paid to collectives and farmers in fulfillment. However, most proposals for doing so to date are either of dubious effectiveness or liable to create as many problems as they solve.

### 1. *Fair Market Value Compensation*

An interesting contrast emerges when one studies the different proposals for reforming the compensation system offered by Western and Chinese observers. Almost uniformly, Western scholars advocate the replacement of the current statutory compensation formula with a requirement that farmers receive the *fair market value* of their rights in

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<sup>130</sup> *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (upholding the exercise of eminent domain for “economic rejuvenation”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (upholding the exercise of eminent domain for a program of slum clearance and aesthetic improvement). *But see* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786-87 (Mich. 2004) (holding that incidental economic benefit resulting from private business development is not a valid public use under state constitutional law). *See also* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006) (arguing that a public use requirement on eminent domain without compensation makes governments more likely to abridge property rights through regulatory means); Joseph L. Sax, *Kelo: A Case Rightly Decided*, 28 U. HAW. L. REV. 365, 369 (2006) (arguing that distinguishing between public and private uses is increasingly difficult even in the American context).

<sup>131</sup> *Kelo*, 545 U.S. at 485-87; *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243-44 (1984).

<sup>132</sup> *E.g.*, *Kelo*, 545 U.S. at 483 (citing “new jobs and increased tax revenue” as “benefits to the community”).

<sup>133</sup> *See Lethal Attack*, *supra* note 4 and accompanying text.

expropriated land.<sup>134</sup> Chinese observers also commonly recommend that fair market value be taken into consideration in any new standard<sup>135</sup> but are, in general, more likely to recommend that the compensation also be designed with an eye toward maintaining farmers' current standards of living.<sup>136</sup> One or both of these two concerns inform most proposals for compensation reform; unfortunately, both of these concerns can be somewhat unproductive.

Advocates for a fair market value compensation system proceed quite reasonably from the assumption that such a standard will bring compensation as close as possible to duplicating the effects of a voluntary transaction. Additionally, "fair market value" seems, particularly from an American perspective, an accessible, tried-and-true standard, which has been used, to non-disastrous results, to compensate for takings both in the United States and under several international systems for years.<sup>137</sup>

However, fair market value compensation is unlikely to solve the expropriation problems in rural China. First, that standard will probably not come close to eliminating the expropriation surplus. The prototypical fair market value proposal seems to assume that the market value will be determined only with reference to the uses currently permitted on the land by applicable law.<sup>138</sup> That is, at any rate, how the standard is applied in the

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<sup>134</sup> See, e.g., *Property Seizure in China*, *supra* note 8, at 52-53 (prepared statement of Brian Schwarzwald et al.). This proposal, made by affiliates of RDI, asserts that fair market value should be the baseline compensation standard but that a higher multiple of annual average agricultural output may be used instead if the market value of land cannot be discerned. In addition, as this proposal would require negotiated prices for all transfers of collective land to the state for non-public purposes, the fair market value compensation standard would apply only where land was taken for public purposes. *Id.* at 46. See also Wilhelm, *supra* note 16, at 294 (advocating that "fair market value" be the compensation standard for takings of urban land use rights).

<sup>135</sup> Guo Dexiang, *Lun wo guo nongdi zhengyong buchang zhidu cunzai de went* [Discussion of the Problems with China's Current System of Compensation for Expropriation of Agricultural Land], 185 JIGUAN JINGJI YANJIU 98, 98 (2005); Wang Youqiang & Dong Hong, *Wo guo nongdi zhengyong buchang zhidu wenti tantao* [Exploration of Problems with the Chinese System of Compensation for Expropriation of Agricultural Land], 2 SHAANXI NONGYE KEXUE 117, 118 (2005); Zhou Qiren, *supra* note 46, at 24.

<sup>136</sup> Guo Dexiang, *supra* note 136, at 98; Lin Yan, *supra* note 58, at 29; Liu Zuoxiang, *supra* note 59, at 91; Wang Youqiang & Dong Hong, *supra* note 136, at 118.

<sup>137</sup> See Thomas Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L. J. 110 (2002) (discussing the export of the fair market value standard used in American federal constitutional jurisprudence to the North American Free Trade Association's takings law).

<sup>138</sup> *Property Seizure in China*, *supra* note 8, at 52 (prepared statement of Brian Schwarzwald et al.). But see, e.g., Yin Shibo & Yu Dan, *Jianli fuhe shichang jingji guize de zhengdi buchang anzhi xin zhidu* [Establishing a New System for Expropriation Compensation and Resettlement that Conforms to Market Principles], SHANGCHANG XIANDAIHUA, Oct. 2005 (proposing that compensation be at fair market value of the land if all commercial development uses were considered). Yin Shibo and Yu Dan's article and similar proposals will be discussed *infra*, Part IV.B.

United States<sup>139</sup> and for takings in urban China.<sup>140</sup> Yet a sizable portion of the expropriation surplus is contributed by the difference between the land's value under the use restrictions associated with collective ownership, and its value once those restrictions are removed. Therefore, incentives for local governments to expropriate will remain.<sup>141</sup> If fair market value compensation leads to higher compensation, some of the demoralization costs of the current system might subside; but, to the extent that those costs arise from the perceivable inequity between the prices paid and received by local governments, these costs will remain.

Second, critiques of fair market value compensation standards in non-Chinese contexts resonate with the problems currently present in the Chinese system, and suggest that fair market value compensation will fail to reduce demoralization costs substantially. It has been noted that fair market value in a takings context is essentially a "fiction": the officials who set compensation have no way of knowing what price the owner of a given piece of property might actually have demanded in a voluntary transaction.<sup>142</sup> Fair market value is defined as the price that a willing seller and willing buyer would have reached through negotiation; but, like fair market value itself, the price demanded by a willing seller is an uncertain variable.<sup>143</sup> Fair market value compensation, at least as applied in the United States, ignores all individualized value property may have for its owner, including lost future profits, business goodwill, subjective or sentimental value, and costs of relocating.<sup>144</sup>

A third, and perhaps the least debatable, objection to the fair market value standard is that it is most likely impossible to apply effectively in the

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<sup>139</sup> *E.g.*, *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973); *United States v. Reynolds*, 397 U.S. 14, 16-17, 21 (1970); *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 639 (1961); *United States v. Miller*, 317 U.S. 369, 376-77 (1943).

<sup>140</sup> *See* Wilhlem, *supra* note 16, at 265-66.

<sup>141</sup> In all fairness, the RDI proposal does attempt to answer this objection by allowing involuntary takings only for public purposes, perhaps on the theory that this restriction will eliminate the expropriation surplus. *Supra* note 134. However, for reasons discussed *supra*, Part III.B.2., this measure is unlikely to remove the expropriation surplus effectively or entirely.

<sup>142</sup> Merrill, *supra* note 138, at 116.

<sup>143</sup> Nathan Burdsal, Note, *Just Compensation and the Seller's Paradox*, 20 B.Y.U. J. PUB. L. 79, 91-93 (2005).

<sup>144</sup> Merrill, *supra* note 138, at 118-19. *See also* MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 35-71 (University of Chicago Press 1993); Garnett, *supra* note 86, at 947 (on the "uncompensated subjective loss" from takings); Ann E. Gergan, *Why Fair Market Value Fails as Just Compensation*, 14 *HAMLIN J. PUB. L. & POL'Y* 181, 201 (1993). *But see* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *MICH. L. REV.* 101, 104 (suggesting that American scholars have tended to "overstate the undercompensation problem" and that relocation assistance requirements may outweigh any undercompensation resulting from the failure to include subjective value in fair market value calculations in the United States).

current Chinese context. While a market in agricultural LURs has been developing since the 1990s, that market remains relatively immature.<sup>145</sup> It is not clear when or whether market data will exist sufficient to allow reliable, objective determinations of fair market value for agricultural land. Moreover, fair market value is a vaguer standard than the standard currently used and, as such, is more subject to discretion and abuse by decision-making officials.

## 2. *Social Safety Nets*

Standing in rather sharp contrast to the fair market value proposals is the emphasis, frequently seen in Chinese articles on the subject, on ensuring that compensation guarantees farmers a standard of living equivalent to that which they enjoyed before expropriation.<sup>146</sup> Fair market value proposals are, at least ostensibly, geared toward duplicating the effects of market transactions, whereas standard of living proposals treat land use rights not as a market commodity, but as a social safety net. Related to this standard of living emphasis are proposals that stress that farmers should not be given the compensation they are due as a one-time cash payment but should instead receive annuities from special funds or even in-kind forms of compensation like shares or jobs, which are presumably more likely to constitute a long-term, non-squanderable form of social security.<sup>147</sup>

Much more than the fair market value emphasis, the standard of living emphasis has been tentatively welcomed by the Chinese government. As was discussed above, both the Property Law and a 2004 Ministry of Land Resources circular reiterated a commitment to the maintenance of farmers' standard of living, as did the Decision on Major Issues.<sup>148</sup> However, this emphasis can only go so far toward curing the system's present pathologies. First, as was the case with fair market value proposals, these proposals will not do much to eliminate the expropriation surplus and, hence, demoralization costs that derive directly from the perception of inequity that it causes. Farmers' standard of living is, after all, based on agricultural

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<sup>145</sup> Stein, *supra* note 15, at 43; *see also supra* notes 31-34 and accompanying text.

<sup>146</sup> Guo Dexiang, *supra* note 136, at 98; Lin Yan, *supra* note 58, at 29; Wang Youqiang & Dong Hong, *supra* note 136, at 119.

<sup>147</sup> Fu Shiming & Wang Yong, *Zhengdi buchang biao zhun de shiwu qiquan fenxi* [An Options Analysis of Expropriation Compensation Standards], 11 *DANGDAI CAIJING* 5, 9 (2005) (P.R.C.); Lin Yan, *supra* note 58, at 29; Yin Shibo & Yu Dan, *supra* note 139. For a discussion of the issues and dynamics associated with stream-of-payment rewards in lieu of lump sums in the American tort law context, see Henry E. Smith, *Structured Settlements as Structures of Rights*, 88 *VA. L. REV.* 1953 (2002).

<sup>148</sup> 2004 MLR Circular, *supra* note 52; Decision on Major Issues, *supra* note 28.

income, which is dramatically lower in absolute terms than returns earned on industrial or commercial enterprises. It is estimated that current compensation levels are generally sufficient to support displaced farmers for seven to ten years following an expropriation.<sup>149</sup> Even if compensation were multiplied by a factor of five, so as to provide thirty-five to fifty years of support at a pre-expropriation level, they would still fall far short of the sums to be earned by converting land to commercial use.<sup>150</sup>

Second, it is also quite likely that merely providing enough compensation to duplicate farmers' previous income levels will not ensure their economic support once they have lost their land. What the impressive size of the expropriation surplus illustrates so vividly is the massive economic gap between urban and rural China. Once land moves from the rural to the urban economy, its value increases drastically because returns from non-agricultural pursuits far outstrip those from agricultural pursuits. Accordingly, average urban income is over three times the average rural income in China.<sup>151</sup> Therefore, even compensation that successfully duplicates entirely the income from expropriated agricultural land is not likely to support a particularly comfortable life for farmers who decide or are forced to move to an urban area after losing their land, or who might lose their land as part of a process by which their village is incorporated into the urban economy of a nearby city.<sup>152</sup>

Chinese law does, in fact, recognize the impossibility of converting a rural social safety net into a decent urban livelihood. It is perhaps for this reason that governments have been urged to provide occupational training, non-agricultural jobs, or urban residence permits (which carry with them a wide array of social services, among them educational and health entitlements, not available to rural residents) in lieu of cash as resettlement assistance. The idea behind these measures is to provide displaced farmers not with the (rural) standard of living they enjoyed before expropriation but, perhaps, with a standard of living that is roughly analogous to their former standard in an urban context. However, a recent survey has shown that farmers increasingly prefer cash to jobs or urban residence permits as compensation.<sup>153</sup> It is not difficult to guess why: promised salaries are often

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<sup>149</sup> Guo Dexiang, *supra* note 136, at 98 (estimating seven years); Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 26 (estimating ten years).

<sup>150</sup> See *supra* notes 64-66 and accompanying text.

<sup>151</sup> *Property Seizure in China*, *supra* note 8, at 12 (statement of Roy L. Prosterman).

<sup>152</sup> This point has been made by Liu Zuoxiang, *supra* note **Error! Bookmark not defined.** 59, at 91.

<sup>153</sup> Yongshun Cai, *supra* note 20, at 666, 676.

diverted, and favoritism or corruption sometimes interferes with the provision of job opportunities or other in-kind assistance.<sup>154</sup>

All this points to a third reason why the “former standard of living” approach to compensation may be ultimately unproductive and may in fact cause as many problems as it solves. Attempts to guarantee a certain standard of living indefinitely, and particularly attempts to do so through mechanisms other than one-time cash payments, put farmers at the mercy of notoriously corrupt local governments and hamper the development of free markets in rural land and labor. Taken too literally, this standard threatens to enhance the role of the state in the rural economy and hearkens back to rural China’s history of more intensive economic planning.<sup>155</sup> These effects, in turn, might both increase opportunities for corruption and resulting social unrest, and decrease the likely efficiency of land use and economic ventures in rural areas. They also run counter to the prevailing trend in rural land reform in the last few years, which has emphasized the strengthening of economic incentives and market factors in rural economies and lifestyles.<sup>156</sup>

V. ELIMINATING THE EXPROPRIATION SURPLUS, PRESERVING THE URBANIZATION SURPLUS: TRANSFERABLE LAND DEVELOPMENT RIGHTS

This Part will present an alternative proposal for reform. This proposal, which is inspired by, but more elaborate than, suggestions offered by several Chinese scholars, is not merely a proposal for raising compensation. Instead, it is a proposal for creating and monetizing land development rights. As such, it recognizes that the current “takings” problem in rural China is as much a land use problem as an eminent domain problem; and it seeks to fulfill the two potentially, but not necessarily, conflicting goals of enhancing economic efficiency and distributive justice in the rural land economy.

A. *Decoupling the Urbanization Surplus from Expropriation*

Reducing or eliminating the expropriation surplus might seem the logical foundation of a proposal to fulfill those goals. After all, eliminating the expropriation surplus would eliminate the incentive of local governments

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<sup>154</sup> *Id.* at 666, 669-70.

<sup>155</sup> Guo Dexiang, *supra* note 136, at 98.

<sup>156</sup> See *supra* Part II.B.



to expropriate and the demoralizing impression of inequality among condemnees. However, as was hinted at in Part III.B.1., the very existence of the surplus probably indicates that there is a shortage of buildable land and an excess of land designated for agricultural use in China today. To the extent that the surplus induces parties to move rural land to a more profitable use, it serves a positive function.

A more productive approach stems from recognition of the fact, touched upon in Part III.A., that the expropriation surplus is actually the product of two phenomena: the existence of an urbanization surplus (that is, an increase in the value of land that results from its conversion from rural to urban uses), and a land use regime that does a very poor job of meeting its ostensible goals of controlling the pace of urbanization and preserving agricultural land. On its own, the urbanization surplus is a positive factor: it represents the value generated by economic development.<sup>157</sup> At present, the restrictions on the use of collective land mean the urbanization surplus can only be enjoyed as a result of the expropriation process. If the urbanization surplus can be detached from the expropriation process, the expropriation surplus will diminish.

#### *B. Recognizing Current Land Use Restrictions as a Regulatory Taking*

Recognizing the potential value of separating the urbanization surplus from the expropriation process, several scholars have proposed that the difference between the land use restrictions applicable to state-owned and collective land simply be eliminated. In theory, this would require a constitutional amendment (to Article 10) and would allow collectives and farmers to enjoy the urbanization surplus by transferring LURs freely to commercial users. It would also validate a plethora of illegal practices which, at this point, are quite common.<sup>158</sup> Several scholars have proposed this fairly radical solution,<sup>159</sup> with one noting that it will break a pernicious “monopoly” by local governments on the land conversion process.<sup>160</sup> Also, quite surprisingly and apparently in defiance of Article 10, in 2005 the provincial government of Guangdong adopted a pilot program that essentially allows the circulation of collectively-owned land for a wider array of private construction uses, so long as that construction complies with

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<sup>157</sup> See Liu Zuoxiang, *supra* note 59, at 88.

<sup>158</sup> See *supra* Part III.B.5.

<sup>159</sup> Lin Yan, *supra* note 58, at 29; Zhou Qiren, *supra* note 46, at 25.

<sup>160</sup> Zhou Qiren, *supra* note 46, at 24.

other relevant land use laws.<sup>161</sup> The city of Shanghai is reported to have launched a similar program for collective land within its boundaries as well.<sup>162</sup>

The problem with this approach, as discussed above,<sup>163</sup> is that it ignores the fact that all alterable land use regulation represents a government monopoly over a potentially lucrative process, and that the benefits of this monopoly, in a healthy land use regime, are generally seen as outweighing its costs. In this case, the Chinese national government has evinced a genuine concern with restricting the conversion of agricultural land to other uses. Questioning the validity of that concern is not within the mission of this analysis, and in fact few scholars appear to have ventured such questioning. The collective/state ownership dichotomy has become its major tool for accomplishing this goal. Eliminating the restrictions on collective land would require the drafting of a new system of land use controls, *and any new system would inevitably disadvantage the economic rights of farmers*, just as the current one does. This is the case because of a fundamental fact about land use regulation: where governments seek to preserve or compel a certain less-profitable use of land (and most land use

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<sup>161</sup> Guangdong sheng jiti jianshedi shiyongquan liuzhuan guanli banfa [Administrative Measures of Guangdong Province for the Circulation of Use Rights to Collectively-Owned Construction Land] art. 4 (promulgated by the People's Government of Guangdong Province, June 23, 2005, effective Oct. 1, 2005), available at <http://www.lawinfochina.com/law/display.asp?db=1&id=4436&keyword=> (P.R.C.). As potentially revolutionary as the Guangdong Measures are, they fall short of a comprehensive solution of the expropriation problem for several reasons. First, the Measures specifically do not allow the development of collectively-owned land for commercial housing, one of the more lucrative potential uses. *Id.* art. 5. Second, and most damningly, the Measures note that collectively-owned construction land will remain subject to expropriation by the state but do not address the question of how compensation should be determined in these cases. *Id.* art. 9. Presumably the current statutory model, based on agricultural output, would be irrelevant and unworkable. If compensation were calculated through a formula analogous to that currently used for agricultural land—that is, based on average income from construction uses for the three years preceding the expropriation—ample potential for under-compensation would exist, as many new development projects would likely take much longer than three years to reach a level of profitability sufficient to justify initial investment. Finally, it is not clear that these Measures would allow individual farming households to enjoy any profits from the increased range of permissible uses; the Measures appear to envision a situation in which farmers' LURs are still contractually limited to agricultural uses, and only collective owners are permitted to extract higher rents from commercial users. The Measures require that half of the proceeds from selling construction LURs in collective land shall be deposited in an account designated for the provision of social security benefits for collective members, which of course raises the question of what collective leaders are likely to do with the other half. *Id.* art. 25.

<sup>162</sup> See Stein, *supra* note 15, at 44-46. Certain language in the Decision on Major Issues suggests an interest on the part of the Chinese Communist Party in permitting commercial development on rural land (expressing support for “approving non-public-use building projects on collectively-owned agricultural land” and for “gradually establishing unified markets for urban and rural land”). Yet that document also expresses a commitment to maintaining the amount of agricultural land at current levels, and to “not changing the collectively-owned nature or the current use” of agricultural land subject to market transactions in land-use rights. Decision on Major Issues, *supra* note 28.

<sup>163</sup> *Supra* Part III.A.

regulation seeks to do precisely this), they are bound to impose outsized burdens on the owners of land currently designated for such use. In this way, Chinese farmers and collectives are no different from the unlucky owners of undeveloped open space in American jurisdictions that have made a priority of preserving that particular land use.<sup>164</sup>

This comparison suggests another way of thinking about the expropriation problem: the harm to farmers of the current system does not actually originate with the expropriation process but is instead at least partially a result of the burdens that the current land use regulation system imposes on them in order to provide benefits to the rest of Chinese society. The recognition of these burdens clearly inspires proposals to revamp the current land use regulation system altogether; but those proposals ignore the benefits that these land use regulations seek to provide.<sup>165</sup> The best solution, therefore, may not be to eliminate the system entirely but instead to seek to mitigate its effects. For these ends, the doctrine of *regulatory takings* can prove extremely useful.

The import of my reference to the doctrine of regulatory takings should not be misunderstood. Under American constitutional law, it is a *mandatory requirement* that officials compensate citizens for regulations that completely or unfairly diminish the value of their property.<sup>166</sup> No such requirement exists in Chinese law. My application of regulatory takings theory here is not a legal analysis. Rather, it is a policy analysis. As such, it takes its cue from analyses of American regulatory takings doctrine that justify that doctrine as much with reference to universally desirable functions such as “efficiency” and “justice” as with reference to American constitutional law. My conclusion is not that compensation for a regulatory taking is currently *necessary* under Chinese law; instead, it is that such compensation is desirable from a prudential standpoint.

Both Frank Michelman’s canonical analysis of takings jurisprudence and Heller and Krier’s expansion on that analysis received attention in Part III.B., above. These scholars’ perspectives were used in part to understand the negative effects of the current expropriation compensation system. In fact, though, neither analysis originated as an attempt to understand the optimal compensation due when property is taken by eminent domain.

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<sup>164</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

<sup>165</sup> It is true that the benefits of those regulations are dampened somewhat by the ongoing process of expropriation and urbanization of rural land. However, to the extent that the proposal in Part V of this Article reduces the expropriation surplus, that proposal furthers the preservation of agricultural land and the maintenance of farmers’ livelihoods that are the ostensible goals of those regulations.

<sup>166</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978).

Instead, both analyses are focused more on the questions that are integral to the doctrine of regulatory takings—the question of how much compensation is due is secondary to the question of whether a taking has occurred, and whether any compensation is due at all.<sup>167</sup>

The purpose of the regulatory takings doctrine, according to Heller and Krier, is to ensure both efficiency and justice in the administration of government programs that burden particular individuals. It was established above that the current system of compensation for expropriation of rural land—comparable to takings by eminent domain—falls short in the justice area. This is due in substantial part to the expropriation surplus, which is in turn created by the land use regulations applicable to rural land. The key question now is whether those regulations also fail to serve those same goals and hence constitute a regulatory taking.

Heller and Krier present the efficiency of any government policy as a threshold question for determining whether or not the entity promulgating the policy should be required to compensate those constituents who bear its costs. The idea is that a compensation requirement will serve a deterrence function with respect to governments, ensuring that they will institute such costly measures only when the benefits of doing so truly outweigh the costs.<sup>168</sup> For reasons discussed above, this Article will not take the position that the urban/rural divide with respect to land policy is an inefficient measure that should be discouraged by a payment requirement imposed upon the Chinese national government, which is responsible for that divide. For one thing, evaluating the relative benefits and costs of that policy is well beyond the purview of this piece. For another, the policy certainly seems a reasonable response to a concern for the preservation of agricultural land (even though the expropriation system undermines the value of that response), and once that concern becomes a policy goal, it is unavoidable that any implementing measure would disadvantage the users and occupiers of the land that is sought to be preserved.

The fairness of the urban/rural distinction, however, is readily susceptible to analysis here. In American jurisprudence on regulatory takings, a concern with fairness or justice usually manifests itself as a focus on two issues: first, the extent to which a regulation diminishes the value of private property;<sup>169</sup> second, the way in which a regulation distributes the burdens and benefits of a particular government policy among different

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<sup>167</sup> Heller & Krier, *supra* note 71; Michelman, *supra* note 71, at 1165.

<sup>168</sup> *Id.* at 999.

<sup>169</sup> *E.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978).

citizens or interest groups.<sup>170</sup> The first issue is of little interest here: the Chinese policy does not render collectively-owned land completely valueless, nor does it actually *reduce* the value of agricultural land from a previous higher level. Instead, it merely prevents a certain degree of appreciation of value, at least while that land is in the hands of its current owners. However, the second issue strikes precisely at the heart of what renders these restrictions so troublesome.

The distinction between state-owned and collectively-owned land is starkly unfair in its distribution of burdens and benefits among various members of Chinese society. First, the basic benefits of preserving agricultural land—environmental impacts and security of the food supply—accrue to the entirety of society, but only rural citizens bear the burdens. The expropriation surplus created by this distinction only enhances this imbalance, because expropriation generally results in an additional windfall for private developers—presumably non-farmers—who purchase rights to newly expropriated land at bargain prices. One could question this analysis by pointing to the way in which, in recent years, Chinese commentators have cited preserving the livelihood and well-being of farmers and other rural residents as an argument *for* preserving farmland through these restrictions.<sup>171</sup> However, as discussed above,<sup>172</sup> that argument looks quite weak given the ability of local governments to expropriate. Picking up on other themes raised above, the most productive way of viewing this situation, given the expropriation possibility, might be to treat local governments as constituents of the central government just as individual land users are. The current land use regulations coupled with the law of expropriation essentially give local governments an option on the urbanization surplus. This represents a clear benefit to these entities, and that benefit is simultaneously a burden on collectives and the farmers they represent.

Second, the current regulations restrict the potential use of land based not on its current use, as many land use restrictions do, but on the basis of *who owns it*. Even non-agricultural land may only be developed by a limited range of parties or for a limited range of purposes if it is owned by collectives rather than the state. Finally, the restrictions burden a class of citizens—farmers and other rural residents—whose incomes and access to

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<sup>170</sup> *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>171</sup> *See supra* note 97 and accompanying text.

<sup>172</sup> *Supra* Part III.B.1.

social entitlements are, despite their numbers, markedly less than those of urban residents.<sup>173</sup>

Can a regulatory regime whose main fault is an unfair distribution of burdens and benefits constitute a regulatory taking? American regulatory takings jurisprudence would likely answer that question in the negative,<sup>174</sup> but American constitutional doctrine should not be the touchstone here. According to the policy-based analysis of Heller and Krier, a significant failing of American regulatory takings jurisprudence is that it has failed to “uncouple” efficiency concerns from justice concerns in determining when a taking has occurred.<sup>175</sup> Compensation for takings serves a dual purpose. On the one hand, forcing governments to pay for certain regulations discourages inefficient government action. On the other, assigning payment to aggrieved citizens ensures fairness in the distribution of the burdens and benefits of regulation. *Yet, there is no reason why a given regulation must require both payment by the government and payment to burdened citizens.* According to Heller and Krier, situations may occur in which payment by the government is necessary to ensure efficiency, but distribution of those payments to citizens would entail more administrative costs than it might be worth. Conversely, in other situations, efficiency concerns that would justify payment by the government may not exist, but aggrieved citizens may still be entitled to compensation.<sup>176</sup>

This analysis is uniquely applicable to the distinction in Chinese land use law that creates the expropriation surplus. This policy is unfair but does not lend itself to an efficiency analysis. It is hard to find a compelling reason why this policy, instead of many others, should require payment by the government. It does, however, create unfair distinctions among Chinese

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<sup>173</sup> In the United States, the size of the affected group is often treated as an index of its political power and thus as inversely related to its vulnerability to regulatory takings. However, in a non-voting-based political system like China's, that assumption is not valid. *E.g.*, Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 305-06 (1990).

<sup>174</sup> The American rule is that regulations that physically invade an owner's land or render that land valueless are regulatory takings. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Lucas*, 505 U.S. at 1019. Regulations that do neither may still be takings based on a more ambiguous balancing test that, however, does not emphasize distribution of burdens and benefits and instead focuses on the character of the government action and its economic impact on the landowner. *Penn Central Trans. Co.*, 438 U.S. at 123-29.

<sup>175</sup> Heller & Krier, *supra* note 71, at 997.

<sup>176</sup> *Id.* at 999-1005. Heller and Krier divide all regulations into four categories, two of which are not currently recognized by American courts. The two which *are* recognized by American courts are those that do not constitute a taking and for which no compensation is due, and those that do constitute a taking and for which compensation is due. The two remaining categories, which Heller and Krier urge courts to recognize, are takings for which no compensation is due, and non-takings for which compensation is due. *Id.*

citizens for which some compensation ought to be paid. This policy is a regulatory taking insofar as compensation is owed *to* citizens, but it is not a taking for which compensation *by* the government is owed. This is a novel category, to be sure, and one that does not properly exist in American takings jurisprudence, though there is some evidence that this category is recognized by German courts.<sup>177</sup>

How can Chinese farmers be compensated for the use restrictions on collective land without payment *by* the Chinese government? In Part V.C., below, I propose that compensation for farmers who bear this land use burden should consist of *transferable development rights* that, at least up front, will not cost governments anything to provide.

### C. *Compensation for Regulatory Takings*

The discussions above point to two major goals for pre-expropriation (regulatory takings) compensation for Chinese farmers. First, because a deterrence analysis based on efficiency does not yield a clear verdict on the Chinese land use system, one cannot assert that governments should have to supply the compensation that is due. Second, that compensation should be designed so that, when actual takings—expropriation of collective land—do occur, the urbanization surplus should not fall entirely or mostly into the hands of local governments; instead, some of it should end up instead in the hands of farmers. The regulatory takings analysis in Part V.B. answers the vexing question of why farmers deserve a portion of the expropriation/urbanization surplus: although they do not generate the economic development that produces the surplus, they generate value in other (involuntary) ways, through compliance with economically onerous land use restrictions.

A crucial remaining question, though, is how much of the urbanization surplus should go to each of farmers, collectives, local governments, and developers. Were it not for the dual ownership system, and the requirement that the state intervene by expropriating land whenever land is to be converted from rural to urban uses, farmers, collectives, and developers might arrange for that division themselves, through market transactions. An ideal system would be one that allowed, to the greatest extent possible, simulation of the results of market transactions. The following proposal may accomplish just that.

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<sup>177</sup> *Id.* at 1012 n. 63.

1. *Create, By Statute, Transferable Rural Land Development Rights*<sup>178</sup>

Rural land development Rights (“RLDRs”) do not represent the current right to develop land. Instead, they represent the right to develop the land *if* it is converted to state ownership and, consequently, becomes subject to the less restrictive land use regime.

The RLDRs will attach only to collectively-owned land that is currently being used for any purpose, either by the collective owner or pursuant to rural LURs. They will also attach to formerly unused collectively-owned land as soon as it is converted to some sort of use.

2. *Assign RLDRs, by Contracts Similar to Those Used for Rural LURs, to the Current Users of Collective Land*

Collectives will receive RLDRs for every parcel of land they are currently using for public facilities or TVE facilities. Meanwhile, farming households will receive RLDRs to accompany each piece of land to which they hold use rights for either agricultural use or their own housing.

It is only rational that land users (farmers) rather than owners (collectives) receive RLDRs. RLDRs are essentially a form of use rights—the right to use newly-expropriated land for the sorts of purposes reserved to state-owned land. Moreover, farmers and not collectives, which are not even legal persons under Chinese law, are the parties directly harmed by national law’s distinctions between the permissible uses of collective land and the permissible uses of state-owned land. RLDRs represent an appropriate form of compensation for the regulatory taking that is imposed upon rural citizens by that distinction—appropriate in part because they move the system away from one of *ad hominem* land use regulation. With RLDRs, collective agricultural land will be unavailable for development by virtue of the fact that it is currently used for agriculture, as is the case today; however, it will not be the case that its current (agricultural) users are denied

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<sup>178</sup> This proposal is by no means entirely original. Several Chinese scholars have in recent years offered proposals for reform that are based around the granting of rural land development rights to farmers. None of these proposals are as detailed as this one, however, nor are any identical to it. Dai Zhongliang & Yang Jingqiu, *supra* note 63, at 27 (proposing that LDRs be granted only to non-agricultural collective land, and that upon expropriation LDRs be included in the compensation formula rather than purchased by new commercial users); Hou Huali & Du Juan, *supra* note 67, at 78-79 (offering a less detailed proposal very much like this one, but excluding the possibility of market sales of RLDRs outside of the expropriation context); Liu Zuoxiang, *supra* note 59, at 92 (arguing that farmers should be given LDRs to the land that they currently use but proposing no detailed mechanism for doing so).



any share in the potential surplus that will be generated if the land *is* converted to urban uses.

3. *Establish, Through Amendment of the LAL, the RLCL, and the Property Law, for the Sale and Possibly the Mortgage of RLDRs*

Provisions for the market circulation of RLDRs should resemble those for rural LURs. All transactions must be reported to local governments, and the price paid must be included in the reports.

While the introduction of a transferable abstract right in land into a relatively unsophisticated rural economy may sound a bit cumbersome, in fact such a process is likely to be easier and smoother in rural China than elsewhere. After all, transferable LURs have been a feature of the Chinese rural economy for years now, and recent data shows that market transactions in these rights have been increasing in number in recent years, thus indicating an increasingly widespread understanding of these rights.<sup>179</sup>

The hope is that this reform will lead to a market in RLDRs to collective land that is not certain or even expected to be expropriated in the near future. For instance, the purchase of RLDRs to land in a village that is not far from an expanding major city may strike speculators or developers as a potentially lucrative gamble. These speculators or developers might then bargain with farmers or collectives who would prefer to earn cash in the near term. Then the speculators or developers could turn a profit if the land were expropriated in the future, and would likely sustain a loss if the land were never expropriated. This would allow farmers to monetize their RLDRs even if their land remains in the collective system indefinitely.

4. *RLDRs Required for Development*

It should be established, through amendment of the LAL, the RLCL, and the Property Law, that land that is currently collectively-owned may not be developed for commercial purposes, including for TVEs, rural housing, and public facilities, unless the developer holds RLDRs in that land. This will mean, for example, that a collective seeking to build a TVE or public facility may not reclaim agricultural land from a farmer who holds LURs in that land without first purchasing the farmer's RLDRs. While collective reclamation of land for these purposes ought not to be a major problem at present, given that collectives are forbidden by law from violating LUR

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<sup>179</sup> See *supra* notes 31-35 and accompanying text.

contracts except in special circumstances,<sup>180</sup> this provision will still provide an extra line of defense for farmers against unscrupulous or abusive collectives.

#### 5. *Endurance of RLDRs Despite Expropriation*

It should be established, through amendment of the LAL, the RLCL, the Property Law, and possibly an amendment to Article 10, that RLDRs may not be expropriated by the state except in cases in which the land to which they attach is simultaneously expropriated for public, non-profit purposes,<sup>181</sup> and that, unlike rural LURs, RLDRs are not extinguished when collective land is expropriated.

#### 6. *Expropriation for Non-Public or Profit-Bearing Purposes*

Local governments may still expropriate land for profit-bearing purposes, as there will still be no other legal means of changing the use regime applicable to that land. However, the rights expropriated, or extinguished by expropriation, will not include RLDRs. Local governments must compensate farmers and collectives according to the statutory formula and may then sell LURs to commercial users. However, these same commercial users must also purchase RLDRs from their holders before they will be permitted to develop the land.<sup>182</sup> Similarly, if local governments expropriate collective land for commercial development in which they will

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<sup>180</sup> RLCL, *supra* note 25, at arts. 14(1), 27. Contracts may be altered only if the land is damaged by a natural disaster, and even in these cases alterations must be approved by two-thirds of villagers' representatives and by both the township and county government. *Id.* at art. 27. See also Property Law, *supra* note 14, at arts. 131-132; LAL, *supra* note 25, at art. 14; *Land Contract Law Aims to Protect Farmers Interests*, PEOPLE'S DAILY, June 27, 2001, available at [http://english.people.com.cn/english/200106/27/eng20010627\\_73603.html](http://english.people.com.cn/english/200106/27/eng20010627_73603.html).

<sup>181</sup> Even in such cases, compensation for the expropriated RLDRs will be required, as is discussed below.

<sup>182</sup> One potential concern here is that these transactions may occur against a backdrop of unequal information between farmers and developers. For example, developers may persuade local governments to agree to expropriate land but not to publicize their plans to do so until after the developers have purchased all the RLDRs they need. This may allow the developers to obtain the RLDRs at a lower price than farmers would have accepted had they known that the expropriation of LURs was certain to occur and thus that the developers needed, and were not simply speculating on, the RLDRs. This is a legitimate concern. But it is one that is hard to answer without measures that will limit farmers' rights to sell and bargain for their RLDRs as they choose. Moreover, if information about markets in RLDRs spreads relatively easily, there is a good chance that the overall effects of this phenomenon will be neutral for both farmers and developers/speculators, as farmers will begin to demand higher prices for RLDRs whether expropriation plans have been made public or not, and the price of RLDRs in situations where no expropriation plan exists and the purchase is purely speculative will rise.

be a main participant (either by developing the land themselves or by acting as a joint venture partner), they will be required to negotiate a price for the RLDRs with their current holders.

This portion of the proposal serves several goals at once. First, it assures that the elimination of the expropriation surplus will not completely deprive local governments of what has been a particularly valuable source of income for their operations. Local governments are still free to earn a profit off of expropriation, by charging new users a higher price for urban LURs than what they were expected to pay under the statutory compensation formula.

At the same time, though, this process should ensure that the expropriation surplus will be reduced. New users of newly-urbanized land will need to buy RLDRs from their current holder before they will be able to develop their land. This decreases the expropriation surplus, which will presumably make local governments less likely to expropriate, reduce the rate of peasant displacement (in keeping with the stated goals of the dual land ownership regime), and possibly, to the extent that local governments *do* expropriate more frequently than is efficient or optimal at present, bring more market discipline into the process.<sup>183</sup>

Moreover, in a sense, this process allows the market to determine the amount by which the expropriation surplus will, and should, be reduced. Private commercial developers will need to pay two prices—one to gain basic rights to a parcel of land, the other to gain the right to develop that parcel for a particular use. Public or semi-public (public-private joint ventures) developers will need to pay the second price only (on top of the statutory compensation due to collectives upon expropriation). The relative prices that commercial developers will be willing to pay for LURs and RLDRs will provide potentially useful information to governments and market participants about the fundamentals underlying land prices in China today.

#### 7. *Expropriation for Non-Profit Public Purposes*

Local governments would still be permitted to expropriate collective land for any of an enumerated list of non-profit public purposes, including

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<sup>183</sup> If in fact the rate of expropriation does go down, or if the prices developers are willing to pay for newly urbanized land decrease due to the requirement that they separately purchase RLDRs, then it is likely that a key source of local government revenue will be reduced. On the other hand, there is also a chance that local governments will be able to make up some of the difference by charging higher prices to developers. In any event, the reduction of this revenue stream is a side effect of any proposal to shift some of the expropriation surplus to farmers or to reduce the pace of rural expropriation.

construction of government buildings, power plants, highways, and state-run schools. Compensation for the lost ownership rights of collectives, and the lost agricultural LURs of farmers, would be required based on the existing statutory formula.

However, in addition, compensation will also be required to compensate land users for their temporarily unexercisable RLDRs. Ideally, this compensation should consist of a new set of RLDRs, in a parcel of comparable size to that expropriated, located in the same village, if possible, or the same county, if not. This option may not be available, however, as RLDRs to all comparable land may already be assigned to other users. Thus, barring the availability of this option, compensation should be the *fair market value* of the RLDRs. In the absence of extensive market data, fair market value determinations will be by no means easy to make in the first few years of the system's operation, or perhaps for a long time after. Clear statutory guidelines should therefore be provided. These should establish that the market value of RLDRs will be derived by finding the average price per *mu* paid in market sales of RLDRs in the geographical area where this expropriation is occurring. This average price should be based on at least ten such transactions, and the transactions from which the average should be derived must have taken place in the jurisdictions of comparable size nearest to the current transaction.

8. *Provide, Through Amendment of the LAL, the RLCL, and the Property Law, for "Optional Expropriation" of Non-Agricultural Collective Land*

Collectives will be given an option by statute to force local governments to "expropriate," without compensation, non-agricultural land to which they hold RLDRs, so long as two-thirds of the collectives' members agree. Farmers may also exercise this option, with the permission of their collectives, for non-agricultural land to which they hold RLDRs, i.e., land they are currently using for their own housing. Collectives would lose ownership rights, and farmers would use their use rights, to the expropriated land if this option is exercised. However, collectives or farmers would then be able to sell the RLDRs in that land to a commercial user who wished to purchase urban LURs to that land from the state and develop it for other purposes.

This provision recognizes that the value of the dual ownership system and related use restrictions is rather limited with regards to collectively-

owned land that is already developed for non-agricultural purposes. Allowing collectives and farmers to transfer this land to the state ownership system at their own discretion allows these parties to share in the profits from urbanization. In practice, though, given the fact that compensation will not be required, it seems unlikely that many collectives or farmers will exercise this option, unless the profits to be gained from selling RLDRs to commercial users were likely to be quite extraordinary. Thus, this provision is unlikely to lead to a massive exodus of land out of the collective system and is instead likely to be relevant only in areas of extremely rapid urbanization and rapid increases in property values.

In summation, the RLDR scheme just described will solve multiple vexing problems with the current system. It will reduce the expropriation surplus by ensuring that local governments do not enjoy the entirety of the urbanization surplus, and thereby reduce the demoralization costs resulting from the size of the expropriation surplus. It will ensure that some of the urbanization surplus accrues to farmers, settling some of the justice concerns that plague the current expropriation system. Also, it will alleviate some of the unfairness of the land use regulation system, which precedes and is independent of any actual acts of land expropriation. RLDRs are a means of ensuring that farmers are compensated for the initial, crucial unfairness that results from Chinese land use law, without requiring governments to pay to enforce a policy in pursuit of somewhat nebulous concepts of efficient regulation. While a transfer of wealth from local governments and developers to farmers will occur under this proposal, it will occur through a mechanism that is complex and flexible enough to be an appropriate solution to a problem whose own complexity goes well beyond the relatively simple concept of a taking by eminent domain.

This proposal comes at what is perhaps an inopportune moment. It has only been a few short years since China passed its comprehensive Property Law and, in doing so, affirmed the broad parameters of the current system governing ownership, use, and expropriation of rural land. That does not mean, however, that opportunities for reform do not exist in the short term. In recent years, provincial and other local governments have taken the lead in proposing and implementing changes to the current system.<sup>184</sup> The RLDR proposal could be implemented on that level. Particularly in a province like Guangdong that has relatively well-developed markets in rural land already, such implementation might actually be more effective than the unlikely event of national reform along these lines in the near future.

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<sup>184</sup> See, e.g., *supra* note 160 and accompanying text.

The unusually protracted and inflammatory debate over the Property Law is not irrelevant to the import of this article's analysis. One of the more heated debates about that statute involved a proposal to allow farmers to mortgage their LURs.<sup>185</sup> Both the proponents and the opponents of that proposal were motivated largely by concern for the standard of living of Chinese farmers and social stability in China. The proponents emphasized that the ability to monetize LURs could be a potentially powerful tool of wealth generation for farmers; but the eventually successful opponents, generally leftists, were concerned with the possibility of farmers losing their land in even greater numbers than at present. This concern resonates both with an ideological interest in preserving the remnants of leftist agrarianism in the Chinese system and with very justifiable worries about social stability. Also, this concern informs, directly or indirectly, some of the unfortunate characteristics of the current rural land regime, including the inability of farmers to sell their LURs to parties who are not other farmers.

RLDRs, much more than most proposals offered by Western scholars in this area, represent an accommodation to that concern, in the context of both the mortgage question and the land use question. RLDRs will afford farmers some ability to monetize their land rights, but without running the risk of losing those rights entirely to foreclosure. Similarly, they will allow farmers to share in the urbanization surplus but will not eliminate the legal ability of the state to limit the pace of urbanization if it begins to perceive landless farmers as too large a threat to social stability. RLDRs also represent a means of expanding farmers' access to the market value of their land without abridging the social security function of the compensation they receive when their land is taken, discussed in Part III.C.2. above. In all of these contexts, RLDRs represent a compromise solution that moderates between several different and possibly conflicting goals, and between opposing political forces.

## VI. CONCLUSION

The discussion above is intended to suggest a broad new approach to the Chinese rural land problem. Much discussion of this problem by American scholars to date, as shown in Part IV. of this article, has tended to conclude that the standards of American eminent domain law—fair market value compensation, public use requirements—are the most likely source of

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<sup>185</sup> See Zhu Keliang and Prosterman, *supra* note 5; 2005 Draft Property Law, *supra* note 31; Property Law, *supra* note 14.

solutions to this problem. This article, in contrast, takes a different approach, one that is intended to be more sensitive to the Chinese legal background, political context, and system of land ownership.

My analysis of the background legal regime has shown that expropriation of land by the state cannot be treated as an extraordinary event, given the underlying land use and ownership system, but must instead be accepted as the necessary (barring constitutional change) legal vehicle for urbanization. However, that does not mean that the surplus value to be gained from urbanization must be entirely allocated to the parties doing the expropriating. The fact that the urbanization surplus has become an expropriation surplus under the current system has led to severe negative consequences. A fiscal analysis that treats governments as financially motivated actors fails to illuminate those consequences, in part because the act of expropriation by local governments may well be efficient. However, it is clear that the expropriation process as it currently exists produces profound demoralization costs that are expressed in social unrest; these costs may well be the result not just of absolutely low sums given as compensation but of the existence of the expropriation surplus. Moreover, the unfairness of the current policy is a product as much of underlying land use entitlements as of the occurrence of expropriation. The analogy to a regulatory taking helps to illuminate this reasoning, and supports a proposal that gives Chinese farmers compensatory development rights that predate and are, to some extent, independent of the actual act of expropriation. RLDRs can be monetized even if no expropriation takes place; they represent a means by which farmers can share in both the realized and the unrealized urbanization surplus.