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# Emerging Real Estate Markets in Urban China

by  
Tung-Pi Chen†

## I. INTRODUCTION

The law governing the ownership of land in China has recently begun another fundamental transformation in urban areas. Where only forty years ago feudalism prevailed, and where a decade ago all land was communally owned, the land reforms now under way are part of the general transformation of the centrally planned economy into a "socialist commodity economy," relying increasingly on market mechanisms for the efficient allocation of resources. In 1987, the Thirteenth National Congress of the Communist Party of China (CPC) called for the establishment of a socialist market system that would include markets for such essential factors of production as funds, labor, and real estate.<sup>1</sup> Indeed, the foundation of a real estate market has begun to develop in urban China, with the introduction of payment for the use of land and the legitimation of trade in land use rights. These reforms, however, are far from complete, and commodity interests in land are still relatively rare in the country as a whole. The reforms are most advanced in the Special Economic Zones (SEZs) and coastal cities where foreign investment is concentrated.<sup>2</sup> Nevertheless, trends clearly point toward their expansion throughout the country.<sup>3</sup>

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1. The report adopted by the Communist Party National Congress declared: "The Socialist market system should include not only a commodity market for consumer goods and for means of production but also markets for other essential factors of production such as funds, labour, technology, information and real estate." Zhao Ziyang, *Advance Along the Road of Socialism With Chinese Characteristics*, BEIJING REV., Nov. 9-15, 1987, at 23, 35.

2. See Ge Di Tudi Shi Yong Quan You Chang Chu Rang, Zhuan Rang Li Fa Qing Kuang [A Survey of Legislation on the Compensated Transfer and Assignment of Land Use Rights] (July 1989) (unpublished paper prepared by the PRC State Land Administration Bureau) [hereinafter *Legislation Survey*] (on file at the offices of the *International Tax & Business Lawyer*).

3. One third of urban areas are experimenting with the reforms. Wang Jiafu & Huang Minchuan, *On the Legal System of Compensatory Transfer of Land Use Rights*, FAXUE YANJIU [Legal Research], 1988, No. 3, at 54, 56.

This paper will review the practical implications of urban land reforms, especially in the SEZs and coastal cities, and clarify Chinese land administration systems for prospective foreign investors. As the new urban land regime comes to increasingly resemble Western systems of regulated private property rights, the Chinese government, which remains officially committed to Marxist principles, must elaborate the ideological justification of its policies. The paper will conclude by examining the emerging market-oriented nature of the new land system and its implications.

### A. Historical Review

Every dynasty and regime that has ruled China has emphasized the importance of land as the key to a strong and prosperous state.<sup>4</sup> The current communist regime is no exception. Current reforms in urban areas are based on reforms first introduced in the countryside. Before the establishment of the People's Republic of China (PRC) in 1949, virtually all rural land was concentrated in the hands of feudal landlords and rich farmers. Most peasants were mere tenant farmers and had no land of their own. Thus, it was by advocating a "land to the tiller" policy that the communist party gained popular support and came to power.<sup>5</sup> As in the Russian Revolution,<sup>6</sup> the Chinese Agrarian [Land] Reform Law [hereinafter Land Reform Law]<sup>7</sup> was among the first pieces of legislation enacted by the new regime.<sup>8</sup> Article 1 of this law declared: "The land ownership system of exploitation by the landlord class shall be abolished and the system of peasant land ownership shall be introduced in order to set free the rural productive forces, develop agricultural production and thus pave the way for New China's industrialization."<sup>9</sup> Specifically, article 30 provided for the recognition of the land then in the hands of peasants and farmers as their private property: "After agrarian reform is completed, the People's Government shall issue title deeds and shall recognize the right of all land owners to manage, buy, sell or rent out land

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4. For an historical review of Chinese land systems before the Communist reforms, see SUN JIAN QING, *ZHONGGUO LIDAI TUDI ZHIDU DE YANJIU* [A Historical Study of China's Land Systems] (2d ed. 1982); WANG WENJIA, *ZHONGGUO TUDI ZHIDU SHI* [The History of Chinese Land Systems] (2d rev'd ed. 1981).

5. They had promulgated a series of laws implementing this policy in the areas they occupied before 1949. See, Chen Shoushan, *The Land Law System*, *ZHONGGUO TUDI* [China Land], 1985, No. 4, at 14, 15.

6. Butler, *Land Reform in the Chinese Soviet Republic*, in *THE LEGAL SYSTEM OF THE CHINESE SOVIET REPUBLIC 1931-1934* 77 (W. Butler ed. 1983).

7. The Agrarian [Land] Reform Law (promulgated June 30, 1950), reprinted in A. BLAUSTEIN, *FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA* 276 (1962) [hereinafter Land Reform Law].

8. The earliest Chinese land reform legislation however, dated back to December 1928 when the revolutionary regime of the Chinese Soviet Republic adopted a Land Law at Jinggangshan. See Butler, *supra* note 6, at 90.

9. Land Reform Law, *supra* note 7, art. 1.

freely."<sup>10</sup> The peasants' right to own land was subsequently guaranteed in the 1954 Constitution.<sup>11</sup>

The early PRC legislation had abandoned the socialization of land, the cornerstone of Bolshevik land policy, in favor of peasant ownership. However, since private ownership of land was inconsistent with the fundamental Marxist creed of public ownership, the Chinese communists soon began organizing collective farms.<sup>12</sup> Through the co-operative movement, private ownership of rural land was, with the exception of very small private plots around the peasants' houses, completely transformed into collective ownership.<sup>13</sup>

Mao Zedong's Great Leap Forward of 1957 continued the process of collectivizing land. As part of the overall plan to consolidate communism, the agricultural co-operatives were amalgamated into the much larger People's Communes.<sup>14</sup> Private property was largely eliminated as houses, domestic animals and "tools for private economic activities" were turned over to the communes.<sup>15</sup> Private ownership of land was completely eliminated, including the small private plots previously permitted during the co-operative stage.<sup>16</sup>

While rural land was being collectivized, land in urban areas was brought under state ownership.<sup>17</sup> This transformation in land ownership was achieved in two ways. One was the confiscation of land left behind by the previous Kuomintang government.<sup>18</sup> The other was through the policy of socialist transformation begun in 1953.<sup>19</sup> Under the latter method, private enterprises controlling much of the remaining urban land were first forced into joint state-private enterprises. The central government completed nationalizing these joint enterprises by the end of 1956.<sup>20</sup> These two processes simultaneously completed the consolidation of urban land in the hands of the state.

Thus, unlike the Soviet Union where the state has claimed exclusive title to *all* land and allocates its perpetual use to various users,<sup>21</sup> in China, as in

10. Land Reform Law, *supra* note 7, art. 30. It has been estimated that forty to fifty percent of China's arable land was redistributed in this way to the benefit of sixty to seventy percent of the rural population. A. DONNITHORNE, CHINA'S ECONOMIC SYSTEM 37 (1967).

11. PRC Const. of 1954, art. 8, *reprinted in* A. BLAUSTEIN, *supra* note 7, at 8.

12. J. TSAO, CHINA'S DEVELOPMENT STRATEGIES AND FOREIGN TRADE 14 (1987).

13. *Id.*

14. For a discussion of the communes, see M. MARSHALL, ORGANIZATIONS AND GROWTH IN RURAL CHINA 46-47 (1985).

15. *Id.* at 47.

16. *Id.*

17. See V. LIPPIT, THE ECONOMIC DEVELOPMENT OF CHINA 109-10 (1987).

18. *Id.* at 109.

19. *Id.* at 110.

20. *Id.*

21. See The USSR Land Law, arts. 3, 8-9, Chinese translation in the State Planning Commission, State Land Administration, 1 GUOTU FAGUI XUANBIAN [Selections on Land Laws (Foreign Countries)] 398-99, 401 (Peking University ed., 1983).

North Korea,<sup>22</sup> the state has claimed title only to urban and industrial land, leaving rural land with the collectives. The Chinese system resembles the Romanian land system in which the state had similarly retained title to urban and industrial land and transferred ownership of rural areas to the tillers.<sup>23</sup> The current Constitution clearly enunciates the principle of public ownership of land in China: "Land in the cities is owned by the state. Land in the rural and suburban areas is owned by the collectives . . . . No organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways."<sup>24</sup>

### B. Traditional System: Administrative Allocation

Under the prior system of strict public ownership, land was clearly not treated as a commodity; it could not be sold, leased, mortgaged or inherited.<sup>25</sup> Instead, land in urban areas was bureaucratically distributed through a two-step administrative allocation process (*xingzheng huabo*),<sup>26</sup> emulating the standard form of Soviet land utilization.<sup>27</sup> In the first step, the economic planning authorities approved the enterprise,<sup>28</sup> and in the second, the local land administration bureaus appropriated the required land for the users.<sup>29</sup> Through this process, state agencies, social organizations, and public and private enterprises were able to obtain the right to use land free of charge for indefinite periods of time.<sup>30</sup> Thus, except for the fact that these rights were inalienable, it seems that the user received rights of virtual ownership while the state retained only nominal title.

22. See The Land Law of the Democratic Republic of Korea, arts. 10-11, State Planning Commission, State Land Administration, 1 GUOTU FAGUI XUANBIAN [Selections on Land Laws (Foreign Countries)] 422, 424 (Peking University ed. 1983).

23. J. HAZARD, COMMUNISTS AND THEIR LAW 157 (1969).

24. PRC Const. art. 10 (December 4, 1982), reprinted in 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 4-500. Article 80(3) of the General Principles of Civil Law, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 19-150, contained provisions virtually identical to those of the Constitution. Moreover, before its recent amendment, article 2 of the Law of the People's Republic of China on Land Management also was very similar to the Constitution in this regard. Zhonghua Renmin Gongheguo Guowuyuan Gongbao [State Council Gazette], July 10, 1986, No. 17, at 531, translated in 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 14-715, translated, as amended, in Foreign Broadcast Information Service, Daily Report—China (FBIS-CHI), No. 89-021, Feb. 2, 1989, at 39 [hereinafter Land Administration Law].

25. PRC Const. art. 10, reprinted in 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 4-500.

26. The administrative land allocation process is codified in the Provisional Rules Regarding the Approval Process of State Land Use Development (promulgated on Nov. 22, 1988 by the State Land Administration), ZHONGGUO TUDI, 1989, No. 3, at 4.

27. For Soviet land use method, see J. HAZARD, *supra* note 23, at 155.

28. Wu Gaosheng, *On Some Important Points in The Land Management Law*, ZHONGGUO FAXUE [Legal Science in China], 1986, No. 6, at 56, 59.

29. *Id.*

30. Wu Gaosheng, *supra* note 28; Chen Shoushan & Pan Mingcai, Guan Yu Wo Guo Cheng Shi Tudi Shi Chang Wen Ti de Si Kao [Some Thoughts on Our Country's Land Market] 3 (March 1988) (unpublished paper in Chinese) (on file at the offices of the International Tax & Business Lawyer).

This system of urban land allocation, modeled after the Soviet system, suffered from the shortcomings typical of a non-market allocation process. Gratuitous and perpetual land use, with its lack of cost discipline, tended to foster waste, inefficiency, and rigidity.<sup>31</sup> Because users could obtain land free of cost, they demanded, and were frequently granted, far more land than they needed.<sup>32</sup> In order to satisfy the needs of these land users, municipal governments requisitioned large amounts of land from rural collectives.<sup>33</sup> Although the user was required to pay a nominal fee to the state for the requisitioning of the land, this money was allocated back to the user by the state as part of the approval and establishment of the construction project. At any rate, because most state enterprises "ate from the same big pot" of state funds, especially before the introduction of the urban economic structural reforms in 1984,<sup>34</sup> the enterprises remained indifferent to the costs of land use.<sup>35</sup> Consequently, China, which has much less than the average arable land per capita in the world,<sup>36</sup> lost one million hectares of agricultural land in 1985.<sup>37</sup> As land could be obtained for free, it was not only requisitioned from rural and suburban areas in excessive quantities,<sup>38</sup> but it was also frequently underutilized, or even left idle.<sup>39</sup>

General economic inefficiency seemed to be exacerbated by the prohibition against land transfers: misallocated land could not efficiently be reallocated to more productive employment. In actuality, however, transfers did take place through certain legal loopholes,<sup>40</sup> and enterprises that urgently

31. For a general discussion on the flaws of the existing system, see Chen Shoushan & Pan Mingcai, *supra* note 30, at 2-5.

32. *Id.*

33. See Ma Xiangcong, *On Land Law*, in ZHENGZHI YU FALU [Law & Politics], 1987, No. 3, at 44, 46. The Land Administration Law, *supra* note 24, arts. 2, 21-36, discusses the process and fees for requisitioning. See *infra* note 70 and accompanying text.

34. For the introduction of the urban economic structural reforms in 1984, see "Decisions of the Central Committee of the Communist Party of China on Reform of the Economic Structure," adopted by the Twelfth Central Committee of the CPC at its Third Plenary Session on Oct. 20, 1984, reprinted in BEIJING REV., Oct. 29, 1984, Documents.

35. See Chen Shoushan & Pan Mingcai, *supra* note 30, at 2.

36. The State Land Administration estimates that agricultural land in China has only ninety-three million hectares of cultivatable land. It makes up just about 10% of the total land mass and amounts to 0.093 hectares per person. This is less than half the 1952 figure and much lower than the world average of 0.33 hectares per person. See Huang Guodong & Ma Lixin, *Quota System Planned to Limit Use of Farmland*, China Daily, Oct. 21, 1988, at 1, reprinted in FBIS-CHI, No. 88-204, Oct. 4, 1988, at 27.

37. *Id.* It is estimated that fifteen million hectares have been lost in the last thirty years. *Id.*

38. According to the State Land Administration, land requisitioned by the state for the expansion of industry and urban areas totalled more than 857,000 hectares during the 1981-85 period. FBIS-CHI, No. 89-132, July 12, 1989, at 41.

39. See Ma Xiangcong, *supra* note 33.

40. Two loopholes, the transferring of land through the transfer or lease of buildings and the exchange of land use rights for joint venture shares, have become quite popular. See, e.g., Zhou Niannian & Huang Weilin, *The Existing Land Use System Must Be Reformed—A Report on the Conference on the Compensated Use of Urban Land*, JINGJI GUANLI [Economic Management], 1989, No. 1, at 28-30, translated in FBIS-CHI, No. 89-066, Apr. 7, 1989, at 40, 42; The Law of the PRC on Joint Ventures Using Chinese and Foreign Investment, art. 5, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 6-500 [hereinafter Joint Ventures Law].

needed land often illegally leased or purchased it at high black market prices.<sup>41</sup> As a result, those enterprises given desirable land were blessed with windfall profits, while others were placed at a competitive disadvantage. The poor economic productivity caused by these market distortions was naturally reflected in the overall low level of profits.<sup>42</sup>

The low state enterprise earnings indirectly affected government revenues. The system of gratuitous allocation of land also funneled government funds directly into urban infrastructure development. By the end of 1986, for example, the government of Shenzhen SEZ had allocated eighty-two square kilometers of land, charging between one and twenty-one yuan per square meter.<sup>43</sup> The cost of developing this land was 13.5 billion yuan,<sup>44</sup> 6.7 billion of which had to be borrowed from banks.<sup>45</sup>

Moreover, the rigid inalienability of the traditional system of land use rights did little to facilitate foreign investment. Currently, the usual way for a foreign investor to acquire land in China is through a Chinese partner who agrees to contribute the land use rights as its share in the joint venture.<sup>46</sup> But since the Chinese partner cannot mortgage or otherwise transfer its land, such contributions cannot be used as security for financing. Thus, it is predominantly the foreign investor's capital contribution that is at risk in case of default. Moreover, in the absence of a real estate market, the valuation of the land rights the Chinese partner contributes are arbitrary at best, to the chagrin of the foreign negotiators.<sup>47</sup>

## II. FIRST PHASE OF REFORM: PAYMENT FOR LAND USE

Recognizing the defects of the traditional economic system, the PRC initiated broad rural and urban reforms, beginning with improvements in land management. In addition, learning from the success of the "rural household production responsibility contract system"<sup>48</sup> introduced in 1979,

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41. See Wei Qixiu, *The Compensated Land Use System Should Also Be Applied to Urban Land Already Administratively Allocated by the State*, ZHONGGUO TUDI, 1989, No. 7, at 29.

42. Between twenty and twenty-five percent of state enterprises are reported to be losing money. See Zheng, *Bankruptcy Laws of the People's Republic of China*, 19 VAND. J. TRANS-NAT'L L. 683, 685 (1986).

43. See Chen Shoushan & Pan Mingcai, *supra* note 30, at 3-4.

44. The Chinese basic currency unit equals US\$0.21 at official rates and about US\$0.17 on the black market.

45. See Chen Shoushan & Pan Mingcai, *supra* note 30, at 4.

46. A Chinese joint venturer's investment "may include the right to the use of a site provided for the joint venture during the period of its operation." Joint Ventures Law, *supra* note 40, art. 5.

47. See Gelatt, *Legal and Extra-legal Issues in Joint Venture Negotiations*, 1 J. CHINESE L. 217, 233 (1987); Surrey, Fishburne & Chaudhri, *Joint Ventures in China: the First Water Stop*, 21 TEX. INT'L L.J. 221, 248-49 (1986).

48. See Yan Ruizhen, *On China's Agricultural Responsibility System*, JINGJI LILUN YU JINGJI GUANLI [Economic Theory and Business Management], 1984, No. 3, at 34, translated in Joint Publication Research Services (JPRS), CAG-84-026, at 11, 13.

whereby farmers paid for the use of land under a contract with the collectives, China adopted the intermediate system of "payment for land use allocation" (*tudi piyong*) in urban areas.<sup>49</sup> This system was first introduced in the foreign investment sector nationwide, and then in the SEZs and the economic and technological development zones of other coastal cities.<sup>50</sup> It has since been extended to many other urban areas.<sup>51</sup>

The first pieces of legislation that incorporated the intermediate system requiring payment for the use of urban land were the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment [hereinafter Joint Ventures Law]<sup>52</sup> and its subsequent implementing regulations.<sup>53</sup> These regulations establish another two-step land allocation process. The first step is an administrative process like that found in the traditional system, whereby joint venture enterprises apply to the local land management authorities for land allocation.<sup>54</sup> In the second step, the authorities grant the land use rights by means of a contract.<sup>55</sup> Under this contract, the state transfers the land to the user for a fixed period, upon the payment of a fee.<sup>56</sup> This marks the beginning of the separation of "use" from "ownership"<sup>57</sup> and the development of leasehold rights in China. Rather than handing over virtual ownership to the user, as in the traditional system of pure administrative allocation, the state derives income from its land<sup>58</sup> and retains a reversionary interest.<sup>59</sup> Similar to the traditional system, however, the land use rights remain inalienable.<sup>60</sup>

49. In this paper, the first phase of reform is referred to as the "intermediate" system to distinguish it from the traditional (*xingzheng huabo*) system and from the second phase of the reform which is the "new" system discussed *infra* in Part III. All three systems exist concurrently in China today.

50. Legislation Survey, *supra* note 2.

51. *Id.*

52. Joint Ventures Law, *supra* note 40. The law provides that if the right to the use of the site is not taken as part of the Chinese joint venturer's investment, the equity joint venture shall pay the Chinese Government for its use. *Id.* art. 5.

53. Regulations for the Implementation of the Law of the PRC on Joint Ventures Using Chinese and Foreign Investment, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 6-550 (Sept. 20, 1983) (promulgated by the State Council). "The standard for a site use fee shall be set by the people's governments of the province, autonomous region or municipality directly under the central government where the joint venture is located. . . and shall be filed with the Ministry of Foreign Economic Relations and Trade and the state department in charge of land." *Id.* art. 49.

54. "Any joint venture requiring the use of a site shall file an application with local departments of the municipal (county) government in charge of land and obtain the right to use a site only after securing approval and signing a contract." *Id.* art. 47.

55. *Id.*

56. See Wang Jiafu & Huang Mingchuan, *supra* note 3, at 54, 56-57.

57. For the concept of separation of "use" from "ownership," see Part V of this paper, *infra* page 45.

58. Shenzhen collected between 1 and 21 yuan/m<sup>2</sup>. In 1986 it allocated 8 km<sup>2</sup> of land and recovered 14 million yuan. See Qi Mingshen, *Implementing Payment for Use of Urban Land to Develop Funds for City Development*, ZHONGGUO TUDI KEXUE [China Land Science] 1988, No. 4, at 11.

59. See Wang Jiafu & Huang Mingchuan, *supra* note 3.

60. *Id.*



Based on the Joint Ventures Law and its implementing regulations, many cities in the SEZs and coastal areas subsequently introduced similar legislation requiring not only foreign invested enterprises but all domestic Chinese enterprises<sup>61</sup> to pay for the use of newly granted land rights.

The duration of land use rights differs among jurisdictions. In Dalian and Tianjin it is simply determined by "the requirements of the particular project."<sup>62</sup> Most other jurisdictions, however, specify a maximum term of fifty years.<sup>63</sup> Those users who require the land for periods in excess of the maximum may seek an extension by renewal of the contract.<sup>64</sup> Since it will be some time before any land use rights issued under this system expire, it is too early to tell how difficult it will be to obtain extensions. Chinese officials invariably express confidence that such extensions will merely be a matter of formality, subject only to the negotiation of a new land use fee.<sup>65</sup>

The fees charged by the various jurisdictions for land use rights under this system depend on the use and location of the land. However, the fees are sometimes arbitrary and invariably much too low.<sup>66</sup> The base rates charged on land use by domestic Chinese enterprises are negligible and the maximum rates are not very much above the base.<sup>67</sup> This situation exists because the enterprises cannot absorb the cost of land use fees themselves and because, under the irrational state pricing structure, they usually cannot pass increased production costs on to consumers. As might be expected, foreign enterprises

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61. *Id.*

62. Regulations for Land Management of the Tianjin Economic and Technological Development Zone (ETDZ), art. 9, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 92-012; Measures of the Dalian ETDZ on the Administration of Land Use, art. 7, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 83-012.

63. Except for the Regulations for the Administration of Land Use in the Xiamen SEZ, art. 6, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 76-503, which sets a sixty-year maximum period, the Provisional Measures on the Administration of Land Use for Economic Development and Construction in Beihai Municipality, art. 12, *id.* ¶ 82-013, the Trial Measures of the Guangzhou ETDZ on Land Management, art. 12, *id.* ¶ 85-023, the Implementation Measures of Ningbo Municipality for the Administration of Land Use for Sino-Foreign Joint Equity Ventures, art. 10, *id.* ¶ 88-009, and the Provisional Regulations of the Shandong ETDZ on Land Management, art. 12, *id.* ¶ 96-103, all set a fifty-year maximum period.

64. Interview with knowledgeable Chinese officials (August 1989).

65. The author learned this in interviews in August 1989 with Chinese officials who predicted that the current land users will be given the right of first refusal of the new land use contract, subject to the negotiation of a new fee.

66. For example, Fushun, the first city to charge domestic enterprises for land use, levied fees ranging from .20 to .50 yuan/m<sup>2</sup> with a spread of only 1.5 times between the base and the maximum rate. See the 1985 Fushun Implementation Measures for the Collection of Land Use Fees (in Chinese) (on file at the offices of the *International Tax & Business Lawyer*). For a study on Fushun's experience in levying land use fees, see Zhou Cheng, Bi Baode, Zhou Yi-gen, Liu Junyan & Zhao Long, *Payment for Land Use in Urban Areas is a Must*, JINGJI LILUN YU JINGJI GUANLI [Economic Theory and Economic Management], 1987, No. 6, at 65.

67. See *supra* note 66. For low fees and small differentials between base and maximum rates, see also the Guangzhou example in Qi Mingshen & Gao Xiangjun, *On the Practice of and Enlightenment from Compensated Use of Land in Guangzhou*, at 19 (publication source cannot be identified) (on file at the offices of the *International Tax & Business Lawyer*).

pay considerably more than domestic Chinese enterprises.<sup>68</sup> But even these higher fees are inadequate to overcome the problems of the system of administrative land allocation still predominant in urban China. Since the fees cover only a fraction of development costs, the drain on government funds continues.

The introduction of fees for fixed periods of land use (*tudi piyong*) is an improvement on the traditional system of administrative land allocation. The newer system, however, is still limited in its application and routinely plagued by the problems associated with the continued inalienability of land use rights. Many of the inefficiencies and abuses associated with the rigidity of the old system thus remain.<sup>69</sup>

The Land Administration Law of 1986<sup>70</sup> was an administrative attempt to address the continuing problem of land abuse. Article 3 declared: "People's governments at all levels shall implement a policy of fully recognizing the value of and rationally using land, and shall practice overall planning, strengthen management, protect and develop the land's resources and prevent the indiscriminate seizure of cultivated areas and the misuse of land."<sup>71</sup> Although the law provided that those abusing land would be subject to the stiff sanctions of forfeiture, fines and disciplinary action,<sup>72</sup> violations continued to be common. In 1987 alone, 168,000 such cases were reported in eleven provinces and a few additional cities.<sup>73</sup> It is estimated that the number of cases could be as high as 400,000 in all of China.<sup>74</sup>

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68. Guangzhou, for example, charges domestic enterprises between ¥0.50 and ¥4.00/m<sup>2</sup> annually, depending on location, while foreign enterprises in that city pay between ¥2.00 and ¥70.00/m<sup>2</sup> annually. See Qi Mingshen & Gao Xiangjun, *supra* note 67. Incentives in the form of lower land use fees for foreign invested "export enterprises" and "technologically advanced enterprises" are provided in the State Council Regulations Concerning Encouragement of Foreign Investment, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 13-509, and some subsequently issued local implementing regulations. See Cohen and Valentine, *Foreign Direct Investment in the PRC: Progress, Problems and Proposals*, 1 J. OF CHINESE L. 161, 197-98 (1987).

69. Guangzhou tried to cope with the large number of violations of this rule by grandfathering all land use rights that had been assigned without state approval. This at least brought them under the payment system and redirected black market rents into the state treasury. See Guangzhou Experimental Measures for Levying Urban Land Use Fees, art. 10, in TUDI SHIYONG ZHIDU GAIGE CANKAO WENJIAN ZILIAO XUANBIAN [Selected Documents and Materials on Reforms of the Land Use System] 66, 67 (Guangdong State Land Administration Bureau ed. 1988).

70. Land Administration Law, *supra* note 24.

71. Land Administration Law, *supra* note 24, art. 3.

72. *Id.* art. 47.

73. See Du Yinghua, *Improving the Management System, Strengthening Law Enforcement Measures*, Fazhi Ribao [Legal System Daily], Dec. 20, 1988, at 3.

74. *Id.*

### III. SECOND PHASE: ASSIGNABLE LAND USE RIGHTS

In calling for the introduction of a "socialist market system," the Thirteenth CPC National Congress<sup>75</sup> pointed the way to a more fundamental solution to the problems of the Chinese land system. Implementing such a system would require not only that the duration of land use rights be defined and that they be paid for, but also that they be assignable. The new "payment for assignable land use rights system" (*tudi shiyongquan juanrang*) was thus introduced. It was a breakthrough that could lead to the establishment of a real estate market in urban China.

Because of the urgency of the need, this system was introduced in the Shenzhen SEZ as early as the fall of 1987, before the enabling legislation was adopted in 1988 and before the Central Government regulations were in place two years later.<sup>76</sup> Shenzhen thus sold assignable land use rights for land that was to be used for housing developments.<sup>77</sup> Other cities also invited tenders for land development.<sup>78</sup>

In January 1988, Shenzhen<sup>79</sup> and Shanghai,<sup>80</sup> within a few days of each other, promulgated China's first regulations creating a system of assignable land use rights. In February, Hainan Province<sup>81</sup> and its capital city, Haikou,<sup>82</sup> both promulgated similar regulations. These four jurisdictions were soon followed by Guangzhou<sup>83</sup>, Fuzhou<sup>84</sup>, Shandong,<sup>85</sup> Xiamen,<sup>86</sup>

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75. See Zhao Ziyang, *supra* note 1.

76. For the Shenzhen experience see *supra* note 43. For the enabling legislation and regulations, see *infra* notes 92 and 94.

77. Shenzhen tender documents (in Chinese) (on file at the offices of the *International Tax & Business Lawyer*).

78. Shanghai invited tenders for the development of a 1.29 hectare piece of land called Lot No. 26 on March 22, 1988. The tender documents (English translation on file at the offices of the *International Tax & Business Lawyer*) provide that the successful tenderer would obtain the legal right to use the land for a [fifty year] term expiring September 30, 2038. See *infra* note 115. Several other cities soon followed this example. In September, 1988, the City of Fuzhou in Fujian Province leased twelve pieces of land totalling fifteen hectares. Nine of them, in the city center, were intended for the development of commercial high-rise buildings. The leases for these pieces of land were for eighty years. One plot, intended for residential high-rise construction, was to be leased for ninety years, and another, to be used for burial plots was leased for ninety-nine years. FBIS-CHI, No. 88-177, September 13, 1988, at 43. These long leases were not based on regulations but on a legal circular issued by the local government.

79. Regulations of the Shenzhen SEZ on Land Management, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 73-500 (Jan. 3, 1988) [hereinafter Shenzhen regulations].

80. Measures of Shanghai Municipality on the Compensatory Transfer of Land Use Rights, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 91-034 (Nov. 29, 1987) [hereinafter Shanghai regulations].

81. Hainan Land Management Measures, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 96-200 (Feb. 13, 1988) [hereinafter Hainan regulations].

82. Haikou City, Granting and Assigning Leaseholds for Value Provisions, 2 CHINA LAW AND PRACTICE, No. 3, at 23 (1988) (the Chinese version of the provisions is on file at the offices of the *International Tax & Business Lawyer*).

83. Measures of the Guangzhou ETDZ on the Compensatory Transfer and Assignment of Land Use Rights, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 85-035 (March 4, 1988) [hereinafter Guangzhou regulations].

Tianjin<sup>87</sup> and several others.<sup>88</sup> As of June of 1989, thirteen localities had adopted the new land use rights system.<sup>89</sup>

Strictly speaking, every one of these local regulations was initially illegal. Until recently, when they were amended, both the 1986 Land Administration Law<sup>90</sup> and the 1982 Constitution<sup>91</sup> forbade the sale and transfer of interests in land. The Constitution was appropriately amended only in April 1988. The revised version states: "No organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways. *The right to use land may be assigned in accordance with the provisions of the law.*"<sup>92</sup> The National People's Congress similarly amended the Land Administration Law in December 1988<sup>93</sup> to accommodate the local developments.

These developments culminated in the State Council proclamation of two administrative decrees. On May 19, 1990 the State Council adopted the Provisional Regulations of the PRC Governing the Grant and Transfer of Use Rights in State Owned Urban Land [hereinafter the State Council Land Use Rights Regulations],<sup>94</sup> and the Provisional Measures for the Control of Large Scale Land Development and Management by Foreign Investors, [hereinafter the State Council Large Scale Land Development Measures] which officially institutionalized the land use rights system.<sup>95</sup> These developments reflect the common Chinese practice of experimental lawmaking: once the central authorities are satisfied with the local experience, the central laws are amended or enacted accordingly.

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84. Fuzhou Decree on Compensatory Granting of Three Parcels of Municipal Owned Land, Decree on Compensatory Granting of State Owned Land, *see supra* note 78; Legislation Survey, *supra* note 2, at 2-3.

85. Shandong Province, Developing an Export Oriented Economic Provisions, 2 CHINA LAW AND PRACTICE, No. 7, at 16 (1988).

86. Xiamen, Leasehold Assignment Procedures, 2 CHINA LAW AND PRACTICE, No. 6, at 21 (1988).

87. Tianjin ETDZ Administration of the Granting and Assigning of Lease Provisions, 2 CHINA LAW AND PRACTICE, No. 7, at 19 (1988) [hereinafter Tianjin regulations]; Tianjin ETDZ Granting and Assignment of Leaseholds Implementing Procedures, 3 CHINA LAW AND PRACTICE, No. 5, at 25 (1989).

88. While the various local regulations vary slightly in their details, all establish the same general procedure for the acquisition and transfer of land use rights. *See* Legislation Survey, *supra* note 2.

89. *Id.*

90. Land Administration Law, *supra* note 24.

91. *See supra* note 24 and accompanying text.

92. PRC Const. art. 10 (amended April 12, 1988), *reprinted in* 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 4-500 (emphasis added).

93. Land Administration Law, *supra* note 24, art. 2.

94. For the law and the scope of its application, *see* Fazhi Ribao [Legal System News], May 31, 1990, at 2. The law is applicable to both domestic and foreign investors. *See* FBIS-CHI, No. 90-104, May 30, 1990, at 52.

95. The law governs only large scale development of land and infrastructures in the SEZs, open coastal cities and ETDZs by foreign investors. For the law and the scope of its application, *see* Fazhi Ribao, May 31, 1990, at 2.

A. The Process

The new assignable land use rights system is modeled after that of Hong Kong,<sup>96</sup> whereby the state retains ownership of the land and leases out the land use rights. The process used to accomplish this is the reverse of that under the intermediate system of "payment for land use allocation" (*tudi piyong*).<sup>97</sup> Under that system, the prospective user initiated the process and the approval of the investment project preceded the allocation of the land. Under the new system, however, the state first parcels land to be developed and prepares a draft granting contract accordingly; detailed construction plans are approved afterward.<sup>98</sup> The draft contract is prepared in accordance with state economic plans and municipal development requirements.<sup>99</sup> It is then offered to prospective developers and users either by negotiation, by invitation to tender, or by open auction, depending on the circumstances.<sup>100</sup>

Both Chinese and foreign<sup>101</sup> enterprises may submit detailed development proposals.<sup>102</sup> The municipal (county) land administration bureau then enters into a contract with the successful applicant who is thereupon required to pay a land transfer fee (*tudi churangjin*),<sup>103</sup> register its land use rights<sup>104</sup> and obtain a land use certificate.<sup>105</sup> The developer is required to complete the project and is entitled to retain the land use rights for the period specified in the contract.<sup>106</sup>

As in Hong Kong,<sup>107</sup> the government imposes terms and conditions as covenants on the lessee and the assignee in order to effect land development according to its land use planning.<sup>108</sup> The lessee may still mortgage or otherwise assign the land.<sup>109</sup>

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96. See Note, *Hong Kong Property Title and the Joint Declaration*, 21 TEX. INT'L L.J. 529 (1986).

97. See *supra* note 49 and accompanying text.

98. See Wang Jiafu & Huang Mingchuan, *supra* note 3, at 57-59.

99. *Id.*

100. See *infra* part III.B.

101. The Shanghai regulations require that foreign enterprises be registered in a country that maintains diplomatic relations with China and has established a commercial representative office there. Shanghai regulations, *supra* note 80, art. 4.

102. According to a survey by the State Land Administration, 31.4% of the parcels of land was acquired by foreign invested enterprises. See Legislation Survey, *supra* note 2, at 10.

103. See *infra* part III.C.

104. See *infra* part III.D.

105. See Wang Jiafu & Huang Mingchuan, *supra* note 3, at 57-59.

106. See *infra* parts III.E. and III.F.

107. See Ta Shanshi, *The Hong Kong System of Granting of Land*, SHANGHAI FANGDI [Shanghai Lands and Houses], 1987, No. 1, at 23.

108. See *infra* part III.G.

109. See the Shanghai regulations, *supra* note 80, arts. 26, 35; the Shenzhen regulations, *supra* note 79, art. 19.

### B. Selection of the Transferee

Whether the government proceeds by negotiation, tender, or auction depends primarily upon the type of project that it has planned for the site.<sup>110</sup> Negotiations are entered into for the development of public interest projects to provide facilities for education, defense, and utilities.<sup>111</sup> Tender is the preferred method for other major construction projects where the details of the development plans and the reputations of the developers are important considerations, and where the government consequently does not wish to be bound to award the contract to the highest bidder.<sup>112</sup> Auction has been employed where land is to be used for general commercial purposes, such as shopping centers and hotels, and for other general commercial use where profit is the main consideration.<sup>113</sup> Shanghai, however, does not have any provision for the auction of land use rights,<sup>114</sup> and the first project under its new regulations was initiated through the tender process.<sup>115</sup>

### C. Payment

Once the transferee has been chosen, the contract is signed and payments are made in accordance with the agreement.<sup>116</sup> There are two direct payments, as well as a number of other charges and taxes.<sup>117</sup> The main direct fee is the initial payment, tantamount to capitalized rent, called the "land use transfer fee" (*tudi shiyong churang fei*), the "land price" (*tudi jiage*) or the

110. See Shenzhen Land Administration System Reform Office, Basic Measures for the Reform of the Shenzhen SEZ Land Administrative System 13-14 (unpublished paper on file at the offices of the *International Tax & Business Lawyer*).

111. If negotiation is the chosen means of offering the land use right, then interested parties may apply for information about the specific requirements of the project. The parties must then submit documents including their credentials and a letter of intent containing their construction plan and the proposed amount and method of payment. *Id.* The land administration bureau is then obliged to respond within a specified period. *E.g.*, Shanghai regulations, *supra* note 80, art. 16(3) (the Municipal Land Bureau must respond within thirty days of receiving the letter of intent); Guangzhou regulations, *supra* note 83, art. 10(3) (the Land Management Department of the Land Administrative Commission must respond within seven days).

112. If this is the chosen method of offering the land use rights, interested parties can find the detailed development conditions in the tender documents and draft contracts issued by the local authorities. In Shanghai, the only contract offered by tender to date was won by a foreign company. See *infra* note 115. In Shenzhen, however, Chinese developers have prevailed. See Shenzhen SEZ, Invitation for and Submission of Bids for Land Sale Tentative Procedures, 2 CHINA LAW AND PRACTICE, No. 2, at 21 (1988). For different methods used by various localities in granting land use rights, see Legislation Survey, *supra* note 2, at 10.

113. See *supra* note 110.

114. The Shanghai regulations provide that, "[t]he Municipal Land Bureau may adopt such methods as bilateral agreements and invitations for tenders when transferring land use rights." Shanghai regulations, *supra* note 80, art. 14.

115. See Shanghai Land Administration Bureau, Tender Documents (Lot No. 26 in Shanghai Hongqiao ETDZ) (Mar. 22, 1988) (English translation on file at the offices of the *International Tax & Business Lawyer*).

116. Wang Jiafu & Huang Mingchuan, *supra* note 3, at 57.

117. See *infra* part III.I.

"granting price" (*churang jin*).<sup>118</sup> It may be paid all at once or by installments.<sup>119</sup> As in Hong Kong,<sup>120</sup> a small annual "land use fee" (*tudi shiyong fei*) is also payable as a token reminder that the state retains title to the land and that the user has only a leasehold interest.<sup>121</sup>

As a substantial secondary market for land use rights has not yet developed, and since the state has a monopoly in the primary market, it would seem that the authorities have considerable flexibility in determining the amounts of these fees. For example, in 1987, the Shenzhen government by negotiation sold land use rights to 5,000 square meters of land for only 200 yuan/m<sup>2</sup> (US\$54/m<sup>2</sup>).<sup>122</sup> When Shanghai recently issued land use rights to 1.29 hectares of land by tender, however, the transfer fee amounted to more than 8,000 yuan/m<sup>2</sup>.<sup>123</sup> The stated policy, however, is to charge only moderate prices in order to attract investment, particularly in manufacturing and residential projects.<sup>124</sup>

#### D. Registration

In 1987, pursuant to articles 9, 10 and 14 of the Land Administration Law before amendment, the State Land Administration Bureau issued two sets of rules for the establishment of land survey and registration schemes in all localities.<sup>125</sup> Again, local governments in the Special Economic Zones and coastal cities are leading the way. Most areas, however, have yet to establish such a system.

118. See Yang Fan, Zhang Jun, Wang Jian & Li Yan, *Several Problems Regarding Compensatory Transfer of Land Use Rights*, JINGJI CANKAO [Economic References], May 9, 1988, at 4.

119. See, e.g., a Shenzhen model land use contract, para. 2 (in Chinese) (on file at the offices of the *International Tax & Business Lawyer*).

120. Ta Shanshi, *supra* note 107, at 33.

121. The Guangzhou regulations state: "Land use fees refer to fees collected by the State as it exercises its ownership rights over the land . . . ." The annual fee in Guangzhou will be brought down to a uniform rate of 2 yuan/m<sup>2</sup> over the next ten years. Guangzhou regulations, *supra* note 83, art. 32. Shanghai charges a uniform fee of 1 yuan/m<sup>2</sup>, with a minimum annual payment of 1,000 yuan. Shanghai regulations, *supra* note 80, art. 22.

122. Shenzhen Land Administration Reform Office, *Basic Approach Towards Land Administration Reform*, ZHONGGUO TUDI, 1988, No. 4, at 13. In 1987, under this new system, the Shenzhen government sold five pieces of land totalling 0.16 km<sup>2</sup>, receiving a thirty-five million yuan one-time payment. Qi Mingshen, *supra* note 58, at 11. This was two and one-half times the amount they had been able to collect under the intermediate system. In 1988, Shenzhen auctioned land use rights and projected receipts of more than one hundred million yuan while their infrastructure development cost was eighty million yuan. Qi Mingshen, *supra* note 58, at 11.

123. *The Emerging Real Estate Market in China*, Renmin Ribao (Overseas) [People's Daily], Nov. 14, 1988, at 3. This was for the auction of Lot No. 26 on July 8, 1988. The transfer fee for the package was US\$28 million, or US\$2,170/m<sup>2</sup>, the equivalent of US\$8.78 million per acre. For transfer fees received by various localities, see Legislation Survey, *supra* note 2, at 10-11.

124. Interview with Chinese officials in Shanghai and Shenzhen (June 1988).

125. These two rules are entitled: The Urban and Rural Land Survey and Recording Rules and The Nationwide Land Registration Rules. See Urban and Rural Land Survey and Recording Rules and the Nationwide Land Registration Rules (State Land Administration Bureau 1987).

Shenzhen<sup>126</sup> was the first to adopt rules for land registration, followed by Shanghai<sup>127</sup> and other localities. According to these measures, users must register their newly acquired land use rights within a specified period.<sup>128</sup> Moreover, as in the Torrens system,<sup>129</sup> title in land becomes effective and a legal interest is thus created only once it has been registered.<sup>130</sup> Buildings and land are registered separately, the former with the local building construction authority,<sup>131</sup> and the latter with the local land administration agency.<sup>132</sup> Bureaucratic jealousy and confusion in property registration inevitably result.

### *E. Conditions of the Contract*

Finally, in order to perfect their land use rights, users must fulfill the conditions and covenants specified in the contract. Chinese land use contracts invariably contain extensive conditions and covenants not typically found in Western lease agreements. These provisions include not only legal descriptions of the land and the duration of use, but also terms detailing permitted use, building height, size and location, site coverage, and areas of greenery.<sup>133</sup> These provisions normally run with the land and bind not only the original grantee of the use rights but also subsequent assignees and lessees.<sup>134</sup> Such detailed provisions take the place of the zoning and subdivision control legislation normally found in Western systems.<sup>135</sup> The Standing Committee of the National People's Congress has recently adopted the PRC

126. Detailed Implementing Rules of the Shenzhen SEZ on Land Registration and the Issue of Certificates, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 73-547 (March 8, 1988) [hereinafter Shenzhen Registration Rules].

127. Shanghai, Registration of Transfers for Value of Leaseholds Implementing Rules (promulgated Oct. 12, 1988), 3 CHINA LAW AND PRACTICE, No. 5, at 24 (1989); Shanghai Notarization of Transfers for Value of Leaseholds Implementing Rules (promulgated Oct. 12, 1988), 3 CHINA LAW AND PRACTICE, No. 5, at 25 (1989).

128. In Shenzhen, land use rights must be registered with the Land Bureau within thirty days of the signing of the land use contract. A fine of ten yuan per day is imposed if the contract is not registered within the specified period. Shenzhen Registration Rules, *supra* note 126, arts. 26(6), 28.

129. For an excellent explanation of the Torrens system, see T. MAPP, *TORRENS' ELUSIVE TITLE: BASIC LEGAL PRINCIPLES OF AN EFFICIENT TORRENS' SYSTEM* (1978).

130. Registration is evidenced by land use certificates. For example, the Shenzhen Registration Rules provide that, "Land ownership rights and land use rights shall be verified by land certificates. Legally verified land ownership rights and land use rights shall be protected by State [sic] law and no unit or individual shall infringe upon these rights." Shenzhen Registration Rules, *supra* note 126, art. 3.

131. See, e.g., Shenzhen City, Urban and Rural Housing Registration Certification Issuance Procedures, 2 CHINA LAW AND PRACTICE, No. 3, at 21 (1988).

132. See Chen Min, Chen Lianghua & Xu Jiming, *Several Measures for the Registration and Certification of Use Rights in State-Owned Land*, SHANGHAI FANGDI, 1987, No. 3, at 14.

133. See, e.g., Shanghai Tender Document, *supra* note 115, at 5-14.

134. See Shenzhen regulations, *supra* note 79, art. 23; Shanghai regulations, *supra* note 80, art. 29.

135. Interview with a Chinese official at the State Land Administration Bureau (May 1988). Zoning and subdivision control legislation is rarely seen in Chinese localities.



Urban Planning Act, effective April 1, 1990.<sup>136</sup> The implementing regulations have yet to be promulgated by the central and local governments.

### F. Duration

The duration of the lease, like that if the land use rights obtained under the intermediate system discussed previously, varies in accordance with the jurisdiction and the nature of the project.<sup>137</sup> An important consideration is the degree of control that the state wishes to exert over land development. It must be remembered that China remains officially committed to the Marxist ideal of public ownership. Long leases would limit the state's ability to re-direct the use of the land while short ones enable them to put an early end to any undesirable uses. Long leases would also deprive the government of the benefit of rising land values.<sup>138</sup> However, the lease must be long enough to allow users to amortize their capital investments and reap a reasonable profit.

Jurisdictions have chosen various lengths for their leases. The first two jurisdictions to implement the new system of land use (Shanghai and Shenzhen) set the maximum period at fifty years.<sup>139</sup> The Hainan regulations, however, set the maximum lease period at seventy years.<sup>140</sup> The Guangzhou regulations, adopted a month later, originally set a maximum period of fifty years, but this has recently been extended to seventy years as well.<sup>141</sup> Tianjin followed a similar course.<sup>142</sup> In September 1988, the City of Fuzhou in Fujian Province by a legal circular stretched the leasing periods to eighty years for commercial development, ninety years for residential high-rise construction, and ninety-nine years for burial plots.<sup>143</sup> By a subsequent decree,<sup>144</sup> the city followed the practice of most localities in setting the maximum lease period at seventy years. This happened to be in line with the State Council Land Use Rights Regulations promulgated subsequently.<sup>145</sup>

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136. For the Act, see Fazhi Ribao, Dec. 30, 1989, at 2.

137. See Legislation Survey, *supra* note 2, at 6.

138. These two considerations prompted the Crown to cease the practice of granting very long leases in Hong Kong. See Note, *supra* note 96, at 532.

139. The Shanghai regulations specify a maximum period of fifty years for most purposes other than industrial developments, which are limited to forty years, and recreational projects, which are limited to twenty years. Shanghai regulations, *supra* note 80, art. 8. The Shenzhen regulations, promulgated within two days of those of Shanghai, stipulate that the maximum period shall be determined in accordance with the requirements of the project, not to exceed fifty years. Shenzhen regulations, *supra* note 79, art. 16.

140. Hainan regulations, *supra* note 81, art. 22.

141. Guangzhou regulations, *supra* note 83, art. 5; Renmin Ribao (Overseas), Aug. 14, 1989, at 1.

142. Tianjin regulations, *supra* note 87, art. 9; Renmin Ribao (Overseas), Aug. 9, 1989, at 1.

143. See *supra* note 78. For a general survey of the leasing period among various localities, see Legislation Survey, *supra* note 2, at 6-7.

144. The Fuzhou Measures for Compensated Grant and Transfer of Use Rights in State-Owned Land, art. 7, proclaimed May 8, 1989, and reprinted in JINGJI YU FALU [Economy and Law, Hong Kong], 1990, No. 2, at 32.

145. See *supra* note 94, art. 12.

During the whole period of the contract, the holder of the land use certificate is entitled to the land use rights. There are provisions, however, for expropriation on payment of "appropriate compensation."<sup>146</sup> Since the primary market is completely monopolized by the state and since the secondary market is likely to remain very thin for some time, it may be very difficult to determine what will be considered fair or "appropriate" compensation.

### G. Assignability

The major breakthrough in China's urban land reform is the development of assignable land use rights, facilitating sale, exchange, mortgage, gifts and inheritance. All land regulations, however, place some restrictions on assignment.<sup>147</sup> Thus in the Shanghai regulations,<sup>148</sup> and perhaps also in those of Hainan,<sup>149</sup> the original purchaser of the land use rights must complete the capital investments undertaken in the original granting contract before they will be permitted to assign the rights for the remainder of the land use period. The Shenzhen regulations require only that twenty-five percent of the contracted investment be paid before the use rights may be assigned.<sup>150</sup> These provisions are an understandable attempt to curtail speculation in land use rights—an activity that would no doubt be highly lucrative in these rapidly growing economic zones.

Unfortunately, these restrictions may also inhibit the development of the market for land use rights. The more recent Guangzhou regulations wisely refrain from imposing any such restrictions, as land use regulations and lease contracts usually already call for the assignee to complete the project and comply with the covenants stipulated in the original contracts.<sup>151</sup> So long as the development conditions and covenants are fulfilled, state approval is not required and assignments can be effected by registration.<sup>152</sup> Partial assignments, however, may require approval, as in subdivision control legislation present in some Western land systems.<sup>153</sup>

146. See, e.g., Shanghai regulations, *supra* note 80, arts. 42-44.

147. See Legislation Survey, *supra* note 2, at 8-9.

148. Shanghai regulations, *supra* note 80, art. 26.

149. It is not perfectly clear whether the Hainan regulations require that the original transferee satisfy the conditions of the contract. The wording may be interpreted as permitting transfer subject only to the condition that *someone* satisfy them. The regulations provide: "*Subject to compliance with the relevant conditions*, a land user that has acquired land use rights through the government's compensatory transfer system may assign the land use rights . . ." Hainan regulations, *supra* note 81, art. 24 (emphasis added).

150. Shenzhen regulations, *supra* note 79, art. 20.

151. See Guangzhou regulations, *supra* note 83, art. 16. See also *supra* note 109.

152. For the procedures for the assignment of land use rights, see Guangzhou regulations, *supra* note 83, arts. 15-28.

153. For example, the Shanghai regulations require approval for all partial assignments. Shanghai regulations, *supra* note 80, art. 26. However, the Guangzhou regulations expressly provide for partial assignment without prior approval unless otherwise stipulated in the original contract. Guangzhou regulations, *supra* note 83, art. 15.

### H. Reversion and Extension

At the end of the contracted land use period, all rights to the land, together with any buildings on it, revert to the state.<sup>154</sup> The land use contract may stipulate that the developer must either clear away or dismantle certain equipment and buildings or pay clearing fees.<sup>155</sup>

All the new land use regulations, like those establishing the intermediate payment for land use allocation (*tudi piyong*) system,<sup>156</sup> provide for the extension of the land use period.<sup>157</sup> Most contemplate that such an extension would be effected through the negotiation of a new contract, upon the payment of a new fee.<sup>158</sup> The requirement that a new contract be formed would seem to imply that new investment undertakings may be required as well, although this is not at all certain. The key appears to be in the payment of a new transfer fee. Since the expectation is that renewal should be relatively straightforward under the intermediate system, the same should be true of this new system. The recent Guangzhou Land Use Regulations confirm this.<sup>159</sup>

### I. Fees and Taxes

As discussed earlier,<sup>160</sup> one of the key features of the reforms, is the payments for land use: land transfer fees and annual land use fees. There are, in addition, a number of other fees and taxes that are levied on land and land transactions. A brief review of these levies will indicate that they are not dissimilar to those found in market economies.

As in most other civil law countries, the first transaction tax usually encountered is the stamp duty (*yinhua xue*).<sup>161</sup> It is charged upon the making of all legal documents, including land contracts (at 0.1% of the contract value) and certificates (at the flat rate of ¥5 per document). Foreign invested

154. See e.g. Shanghai regulations, *supra* note 80, art. 41.

155. *Id.*

156. See *supra* note 70 and accompanying text.

157. See Legislation Survey, *supra* note 2, at 6.

158. Interview with knowledgeable Chinese officials (August 1989).

159. "If the party with title to the land use rights wishes to continue to use the land after the expiry of the land use term, an application for an extension of the term of usage may be submitted to the Administrative Commission six months before the expiry of the term and, following its approval, a new transfer contract based on the current price of land use rights shall be signed with the Administrative Commission." Guangzhou regulations, *supra* note 83, art. 36.

160. See *supra* part III.C, page 24.

161. The State Council Provisional Rules on Stamp Duty, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 31-712 [hereinafter Provisional Rules on Stamp Duty].

enterprises, which are required to pay Consolidated Industrial and Commercial Taxes,<sup>162</sup> however, are exempt.<sup>163</sup> Failure to pay the stamp duty is punishable by fines.<sup>164</sup>

Another transaction tax is the contract tax (*qi xue*),<sup>165</sup> which resembles land transfer taxes in other jurisdictions. It is levied on all contracts for the assignment of land use rights and, in some localities,<sup>166</sup> also on the original transfer from the state. The rate, based on the Contract Tax Law of 1950,<sup>167</sup> is six percent of either the purchase price or, in the case of a gift or exchange, the current value.<sup>168</sup>

All urban real estate in China, not only that acquired under the newly reformed land system, is subject to taxes analogous to property taxes in other countries. Thus, buildings owned by domestic Chinese enterprises or individuals are subject to the Urban Building Tax at the rate of 1.2% of current value.<sup>169</sup> Land in the hands of domestic enterprises or individuals is taxed at rates ranging from ¥0.30/m<sup>2</sup> to ¥6/m<sup>2</sup> in small towns,<sup>170</sup> and from ¥0.50/m<sup>2</sup> to ¥10.00/m<sup>2</sup> in large cities.<sup>171</sup> Foreign invested enterprises pay taxes both on buildings and land use rights under the 1950 Urban Real Estate Tax regulations.<sup>172</sup> Under these regulations, the building tax is one percent and the land tax is 1.5% of the average price of similar properties in the vicinity.

All these taxes are relatively low and are in forms familiar to Western businesses. Of greater concern is whether substantial capital gains taxes will be imposed on land holdings in China. So far, no central law imposes such a

162. See A.J. EASSON & LI JINYAN, *TAXATION OF FOREIGN INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA* 103-10 (1989).

163. *Foreign Enterprises Exempt From the Stamp Tax*, Renmin Ribao (Overseas), Aug. 8, 1989, at 1.

164. Provisional Rules on Stamp Duty, *supra* note 161, art. 13.

165. See the Shanghai regulations, *supra* note 80, arts. 45-46, which refer to the Detailed Rules for the Implementation of the Provisional Regulations of Shanghai Municipality on Contract Tax.

166. For example, Guangzhou charges a 2.5% "management fee" on transfer and assignment prices and 3% on the current value of a gift or exchange. Guangzhou Measures, *supra* note 83, art. 30.

167. Zhongyang Renmin Zhengfu Faling Huibian 1949-50 [Compendium of the Central People's Government 1949-50], art. 5, (Law Publishing House 1982).

168. See Shanghai regulations, *supra* note 80, art. 5(1). Compare with the Hong Kong Lease Assignment Tax of three percent, see Note, *supra* note 96, at 533.

169. Provisional Regulations on Real Estate Tax, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 39-505. Since implementing regulations have yet to be enacted, it is unclear how the property is to be assessed in the absence of an established real estate market.

170. Provisional Regulations of the PRC Governing Land Use Tax in Cities and Towns, art. 4, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 39-509 (1988). These taxes, with the lowest base rate starting at ¥0.30/m<sup>2</sup> and ranging to ¥10.0, do not adequately reflect the great variety of land values. As such, they do not provide much incentive for domestic enterprises to make the best use of their land.

171. *Id.*

172. Provisional Regulations Governing the Urban Real Estate Tax, art. 6, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 39-500.

tax. Some localities nonetheless charge capital gains "fees" on assignments,<sup>173</sup> though under the constitutional practice, only the central government has power to levy taxes.<sup>174</sup> The city of Haikou charges a twenty percent "fee" on profits from the assignment of land use rights.<sup>175</sup> Guangzhou levies a capital gains "fee" on a progressive scale, starting at fifteen percent and going up to a maximum of fifty percent.<sup>176</sup> Shenzhen and Shanghai do not charge such "fees." Whether there should be a capital gains tax on property is currently a matter of contention. The prevailing view among officials<sup>177</sup> is that such a tax is not necessary since profits are already captured by other taxes.<sup>178</sup>

### J. Nature of the New Reform

The new land system improves on the traditional administrative and intermediate systems by creating a more fiscally realistic allocation process and by expanding the land use rights created under it. The user's rights to possess, use and derive profits from land are protected by law. These rights are, however, limited to surface rights only. All underground natural resources and objects are invariably reserved for the state.<sup>179</sup> The ability to dispose of land use rights by assignment and mortgage has also been established.<sup>180</sup> Also, as discussed previously,<sup>181</sup> assignment by private agreement is now subject only to fairly reasonable planning and anti-speculation conditions. These

173. See Hainan regulations, *supra* note 81, arts. 17, 27. The CCH translation renders the term *zengzhi xue* as "value added tax" but notes that "capital gains tax" is also a possible translation. The Guangzhou regulations impose "value added fees" (*zengzhi fei*) at progressive rates up to fifty percent of the capital gain. Guangzhou regulations, *supra* note 83, art. 33.

174. Interview with the State Council Bureau of Legal Affairs (June 1990). However, the Constitutional provisions are silent as to whether the local government has taxation authority.

175. Haikou Provisions, *supra* note 82, art. 28.

176. Guangzhou regulations, *supra* note 83, art. 33. The increments are as follows: 15% tax if the capital gain is 100% or less of the original price; 30% on any portion of capital gain between 100% and 200%; 40% on the next 100% increment; and 50% on any increment over 300%. *Id.*

177. Interviews with officials at the State Council Bureau of Legal Affairs (August 1989).

178. See the Consolidated Commercial and Industrial Tax, referred to in the Shanghai regulations. Shanghai regulations, *supra* note 80, art. 48. See also the income tax laws concerning foreign enterprises, discussed in T. GELATT & T. CHANG, CORPORATION AND INDIVIDUAL TAXATION IN THE PRC (2d ed. 1987).

179. See, e.g., Shanghai regulations, *supra* note 80, art. 3; Guangzhou regulations, *supra* note 83, art. 3; Hainan regulations, *supra* note 81, art. 19. This differs from common law principles, whereby tenants in fee simple are entitled to all mines and minerals under their land. R. MEGARRY, MANUAL OF THE LAW OF REAL PROPERTY 570 (4th ed. 1969). The distinction is, however, attenuated by the fact that most common law jurisdictions have encroached on the fee simple mineral rights by various statutes or by reservations contained in the grants of public land that vest specific mineral rights in the state. See R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 71 (4th ed. 1975).

180. See, e.g., Shanghai regulations, *supra* note 80, art. 2(2); Shenzhen regulations, *supra* note 79, art. 19.

181. See *supra* part III.G, page 30.

rights are proprietary in nature and come very close to resembling the full rights of ownership.<sup>182</sup>

Property ownership, as defined in the General Principles of Civil Law, comprises the "rights of an owner, according to the law, to possess, use, reap benefit from and dispose of his own property."<sup>183</sup> Only the limit on the duration, therefore, prevents the land use rights from encompassing the complete rights of ownership. Moreover, these limits are being increasingly relaxed. The fifty-year maximum adopted by Shanghai and Shenzhen in early 1988 was subsequently lengthened to seventy years in most localities,<sup>184</sup> and nationwide according to the State Council regulations.<sup>185</sup> In addition, although it may be premature, all signs indicate that obtaining extensions of the original leases will become a matter of course.<sup>186</sup>

The reform of the urban land system and the introduction of real estate markets in China are clearly under way. Trends established by the local laws indicate that the contracts are becoming increasingly flexible as the government replaces direct control with regulation and tax incentives, giving the land user a significant measure of proprietary rights.

The advantages of this system compared with the old are manifest: rigidity, waste and inefficiency have been replaced with flexibility, prudence and productivity. Assignability makes possible the voluntary transfer of land to more productive uses. The clearer definition and increased protection of proprietary interests in land will enable planning and encourage long term investment by land users while the ability to mortgage these interests will facilitate the growth of the capital markets needed to fund such investments.<sup>187</sup>

#### IV. TRANSITION TO THE NEW SYSTEM

The majority of urban land remains under the old administrative allocation system of free and perpetual use, and to a much lesser extent the intermediate system of payment for land use allocation.<sup>188</sup> In order to provide a legal

182. Most Chinese commentators are of the view that land use rights under the new system are not mere contractual rights but are also proprietary in nature. See, e.g., Jin Liqi & Xu Ming, *On Land Management Rights*, ZHONGGUO FAXUE, 1989, No. 1, at 59; Cai Zhilong, *Some Legal Questions on Compensated Land Use Rights*, ZHONGGUO FAXUE, 1989, No. 3, at 69.

183. General Principles of Civil Law, *supra* note 24, art. 71.

184. See *supra* part III.F, page 28.

185. See *supra* note 145 and accompanying text.

186. Interviews with officials at the State Bureau of Land Administration (May 1988) and at the State Council Bureau of Legal Affairs (August 1989).

187. See also Wang Jiafu, "On China's Compensatory Transfer of Land Use Rights System," speech delivered at the World Peace through Law Conference, Beijing, China, April 1990 (on file at the offices of the *International Tax & Business Lawyer*).

188. *Id.* The new assignable land use rights system is currently applicable in selected urban areas for experimentation. See the State Council Regulations, *supra* note 94, art. 51. It is also applicable in SEZs, open coastal cities and ETDZs. See the State Council Large Scale Land Development Regulations, *supra* note 95, art. 18.

framework for the eventual transition of all land in China from the old administrative system (*xingzheng huabo*) and the intermediate payment system (*tudi piyong*) into the new assignable system (*tudi shiyongquan juanrang*), the State Council has adopted two pieces of legislation.

The first, the Provisional Regulations of the PRC Governing Land Use Tax in Cities and Towns [hereinafter Tax Regulations], were effective November 1, 1988.<sup>189</sup> As previously discussed,<sup>190</sup> it imposes an annual tax on land use ranging from 0.26 yuan/m<sup>2</sup> in townships and industrial and mining areas to 10 yuan/m<sup>2</sup> in large cities. In addition, the law provides that provincial governments may raise these rates "appropriately" in developed areas.<sup>191</sup> These taxes are meant to replace the annual land use fees being collected in some localities under both the intermediate and the new systems and to provide incentives for enterprises nationwide either to make more efficient use of the land themselves under the traditional system, or to join the new system and assign its use to other enterprises that can employ it more efficiently.<sup>192</sup>

The second piece of legislation, the Provisional Regulations Governing the Grant and Transfer of Use Rights in State Owned Urban Land<sup>193</sup> is designed to facilitate the new system of compensatory assignments of land use rights. The State Council adopted the draft regulations just ten days after the Tax Regulations, but did not promulgate them until nearly two years later<sup>194</sup> because of jurisdictional disputes within the State Council.<sup>195</sup> The regulations that became effective on the date of their promulgation contained a chapter with transitional provisions whereby enterprises already possessing land under the old administrative system could enter into contracts with the

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189. Provisional Regulations of the PRC Governing Land Use Tax in Cities and Towns, 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 39-509 (Sept. 27, 1988) [hereinafter Tax Regulations].

190. See *supra* notes 170-71 and accompanying text.

191. Tax Regulations, *supra* note 189, art. 5.

192. Interview with knowledgeable Chinese officials (August 1989).

193. See *State Council's 14th General Meeting Adopts in Principle the Provisional Regulations on Urban State Land Use Rights Transfer and Assignment*, Renmin Ribao (Overseas), July 23, 1988, at 1.

194. See *supra* note 94 and accompanying text.

195. The jurisdictional dispute concerns the question of which ministry within the State Council is to collect this fee and administer the new system. The Ministry of Construction argues that land administration cannot be separated from the administration of construction and development projects, for which they are responsible. According to a Chinese official at the State Council Bureau of Legal Affairs interviewed by the author in August 1989, the State Land Administration contends that urban land administration should not be separated from rural land administration, for which they are responsible. The jurisdictional dispute is not fully settled in the newly proclaimed State Council Regulations. See *supra* note 94, arts. 7, 25. The author was advised by a State Council legal official in June 1990 that it will be resolved in the forthcoming organic regulations of the State Council.

The enactment of the tax law was not delayed because there was no dispute as to who would be responsible for administering it. Article 13 of the provisional tax regulations provide that those regulations are to be interpreted by the Ministry of Finance and that implementing measures, to be adopted by provinces, autonomous regions and the three municipalities directly under the central government, must be reported to the Ministry of Finance for the record. Tax Regulations, *supra* note 189, art. 13.

state that would delimit their land use rights and make them assignable, thereby bringing them into the new system.<sup>196</sup> Fully implementing this "carrot and stick" legislative scheme would therefore likely advance the development of the real estate market called for by the Thirteenth CPC National Congress in 1987.

One could hardly expect that so radical a transformation should proceed easily. The taxes imposed and fees collected for land use in localities experimenting with both the intermediate and the new reforms are so low that they may provide only a weak incentive for bringing land under the new system.<sup>197</sup> Increases in the land use tax can only occur in coordination with more general economic reforms, such as pricing and enterprise deregulation. This presents a formidable challenge for the foreseeable future.

In the meantime, Hainan's transition strategy may provide a temporary solution. It plans to bring all perpetual land use rights now under the traditional and intermediate systems into the new one by redefining their duration and applying a fee to them.<sup>198</sup> Units holding land acquired under the old systems will be allowed to assign their newly defined land use rights and keep half of the assignment profits.<sup>199</sup>

Recent events within China have dramatized the stress presented by economic liberalization. In view of these events, one cannot help but question the regime's commitment to continuing modernization in general and reform in urban land systems in particular. On June 9, 1989, in the very speech in which he congratulated the army on its efforts on behalf of the state in Tiananmen Square, Deng Xiaoping reaffirmed his resolve to continued economic reform:

Is our basic concept of reforms and openness wrong? No. . . . [W]e must continue to persist in integrating a planned economy with a market economy. There cannot be any change in this policy. In practical work we can place more emphasis on planning in the adjustment period. At other times, there can be a little more market regulation, so as to allow more flexibility. The

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196. See the State Council Land Use Rights Regulations, *supra* note 94, ch. 7, especially art. 45. The State Council regulations however contain no provision regarding the transformation of the intermediate payment system (*tudi piyong*) into the new system. This may be because the intermediate system is already an improvement on the old system and the regulations' transitional provisions would become applicable when the use period under the intermediate system expires.

197. See *supra* notes 121 and 170-72 and accompanying text for the applicable tax rates.

198. The Hainan regulations provide:

State land occupied by organs, groups, enterprises, public institutions, the armed forces or individuals before the promulgation of these Measures shall also be subject to the implementation of the system of compensatory usage of land for specified periods of time. . . . If any of the above-mentioned land user units or individuals conduct compensatory assignment of land use rights, it shall report the details to the State Land Bureau. . . and shall carry out assignment procedures in accordance with the law. Of the land price payment collected on the assignment . . . 50% shall be paid to the municipal or county finance organ. . . .

Hainan regulations, *supra* note 81, art. 25.

199. *Id.*



future policy should still be an integration of planned economy and market economy. What is important is that we should never change China into a closed country.<sup>200</sup>

Deng continued, saying that "[i]f there is any inadequacy to talk about, then I should say our reforms and openness have not proceeded well enough."<sup>201</sup> Recent developments in the real estate field include the American company MGM's acquisition of a seventy year lease on 1.9 square miles of land in Tianjin to build an industrial park,<sup>202</sup> and Guangzhou's plans to lease seven plots of downtown land totalling 10.4 acres.<sup>203</sup> These developments indicate that the Chinese leadership does indeed want real estate markets in urban China to emerge as a vehicle for attracting foreign investment.

## V. THEORY AND IMPLICATIONS

The transition from the traditional method of state bureaucratic land management to a system in which land use rights trade in a commodity market was as innovative ideologically as it is economically. The key to making the development of a commodity market ideologically consistent with socialist concepts of public ownership was the recent theoretical discovery that "use and management" could be separated from "ownership." The use/ownership distinction is a result of the ideological dilemma the government faces in trying to adhere both to socialism and to commodity economics. On one hand they must remain committed to "the four cardinal principles";<sup>204</sup> on the other hand, they are committed to economic modernization and the development of an economy in which not only consumer goods, but factors of production such as labor and land trade as commodities.<sup>205</sup>

This twist in the socialist perspective is achieved by the Chinese authorities in two steps. The Chinese economy must pass through a stage of capital accumulation (if not capitalism) before the material conditions of true socialism can be attained.<sup>206</sup>

In the report to the Thirteenth CPC National Congress, General Secretary Zhao Ziyang thus proclaimed:

Our Party has already made a clear and definite statement on this question: China is now in the primary stage of socialism. . . . We must proceed from this

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200. FBIS-CHI, No.89-122, June 27, 1989, at 8, 10 (English translation).

201. *Id.*

202. *Tianjin Signs Biggest Foreign Investment Project*, Renmin Ribao (Overseas), Aug. 9, 1989, at 1. It is estimated that the completion of the project will cost MGM approximately US\$3 billion.

203. *China to Lease Seven Sites in Guangzhou to Foreigners*, Asian Wall Street Journal Weekly, Aug. 21, 1989, at 10.

204. These four principles are: (1) Adherence to the Socialist Road, (2) the Dictatorship of the Proletariat, (3) the Leadership of the Communist Party and, (4) the Guidance of Marxism-Leninism-Mao Zedong thought. See PRC Const. preamble, reprinted in 1988 China Laws For Foreign Business (CCH Austl. Ltd.) ¶ 4-500; *Deng Xiaoping on Upholding the Four Cardinal Principles and Combating Bourgeois Liberalization*, BEIJING REV., July 16-19, 1989, at 20-22.

205. Zhao Ziyang, *supra* note 1.

206. *Id.* at 26-27.

reality and not jump over this stage. Under the specific historical conditions of contemporary China, to believe that the Chinese people cannot take the socialist road without going through the stage of fully developed capitalism is to take a mechanistic position on the question of the development of the revolution, and that is the major cognitive root of Right [sic] mistakes. On the other hand, to believe that it is possible to jump over the primary stage of socialism, in which the productive forces are to be highly developed, is to take a utopian position on this question, and that is the major cognitive root of Left [sic] mistakes.<sup>207</sup>

Such high authority permitted both Chinese lawyers and economists to assert in 1988<sup>208</sup> what Adam Smith asserted in 1776:<sup>209</sup> that a clear definition of property rights is necessary to provide adequate incentives for investment and individual initiative.

The Chinese have thus conceded that the old administrative practice of gratuitous allocation of perpetual land use rights erred in not allowing the factors of production to be circulated.<sup>210</sup> What was needed was a conceptual system of property rights encouraging the efficient circulation of productive resources, while maintaining some semblance of socialism. The separation of "use" from "ownership" accomplished this. As stated by a prominent economist in the Party's theoretical journal, "[t]he fact that we have come to realize the possibility of separation between ownership rights and operational rights of the enterprises under ownership by the whole people should be taken as a theoretical breakthrough."<sup>211</sup> This was the innovation that permitted the whole range of reforms from the household responsibility contract to the establishment of the foundations of real estate markets under the new land administration system in urban areas.

If the economic reforms proceed as promised by Deng Xiaoping, and if the land use system continues in the present direction, foreign and domestic

207. *Id.* at 25-26.

208. Zhou Qiren, *Land System: Valid Property Rights, Long Term Tenancy, and Paid Transfer*, JINGJI CANKAO [Economic References], Nov. 2, 1988, at 4, translated in FBIS-CHI, No. 88-226, Nov. 23, 1988, at 41, 42.

See also, Song Tingming, *Public Ownership, Profit Mechanisms, Contract Responsibility System*, Renmin Ribao, Feb. 27, 1989, at 6, translated in FBIS-CHI, No. 89-043, Mar. 7, 1989, at 30, 31: "[N]o one can change the law that people are born to seek their own economic interests. One can only bow to it."

209. "It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from their regard to their own interest." A. SMITH, *THE WEALTH OF NATIONS* 14 (Random House Ed. 1937). This radical departure from Marxist ontology is not being accepted easily by the Chinese authorities who continue, especially after the events in Tiananmen Square, to denounce "bourgeois liberalism" and consumerism.

210. See Zhou Qiren, *supra* note 208.

In the past, our system was to a very great extent under the condition that possessing something equalled owning it. Factories had large numbers of machines and equipment but they were not used or transferred; land was occupied but was not fully used or sold. This is because society did not recognize the right to sell, and returns were not protected.

*Id.* at 42.

211. Xiao Liang, *A Decade of Ownership Study and Reform in Retrospect*, QIUSHI [Seeking Truth], 1988, No. 11, at 22, translated in FBIS-CHI, No. 89-010, Jan. 17, 1989, at 48.

Chinese investors alike may look forward to the development of vigorous real estate markets in urban China.

The use of land in China will naturally remain subject to rigorous control by the state. Indeed, Deng's speech foreshadows "more emphasis on planning in the adjustment period."<sup>212</sup> However, unrestricted land use rights have never existed, even in the West. In modern Western cities, land regulation is, if anything, more extensive than that existing in China currently. Only the most libertarian deny that some measure of social control over the use of such an essential commodity as land is desirable.<sup>213</sup> The problem is to strike a balance between the autonomy of the individual and the interests of the community.<sup>214</sup>

From this point of view, the emerging urban land system in China is not fundamentally different from what is common in the West: land will be managed and operated on a decentralized basis by more or less autonomous individuals and corporate economic agents, subject to the planning requirements of the state. What distinguishes the two systems is their differing points of departure. In the West, where land has long been privately owned, the state exerts control by regulation; in China, where the point of departure is state ownership, similar results are achieved in a more proprietary manner—through the use of leasing contracts. Of course, the balance struck in the end may be quite different. In an excellent comparative study of Soviet and American land use regulation, Professor John Hazard considers the balance between community and individual interest.<sup>215</sup> He notes that privately owned land in the United States, where the balance is in favor of the private owner, is being subjected to more restraints in the interest of community welfare.<sup>216</sup>

Western property markets and Western economies in general have been relatively prosperous under such regimes of regulated property rights. Perhaps, with a similar system, China can hope to achieve equal results. In fact, with the controlled duration of land use rights in China, the state effectively imposes limited accumulation of wealth in property markets by individuals and, by doing so, better preserves the public interest than could an unlimited free market regime of land ownership. It is for this reason that, although the gap between Chinese and Western land use systems is narrowing, the Chinese system can hope to achieve even better results.

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212. See *supra* note 200, at 10.

213. See, e.g., R. NOZIC, *ANARCHY, STATE, AND UTOPIA* 3-9 (1974).

214. Of course, there is a very great difference in the underlying reasons for striking this balance. Whereas in Western liberal democracies, the autonomy of the individual is an end in itself, Chinese authorities view it mainly as a means of invigorating the economy. See *supra* note 34, documents VI-VII.

215. Parker School of Foreign and Comparative Law, *Soviet Legal Institutions: A Manual for Comparison* 73 (J. Hazard, ed. 1988) (unpublished course materials, Columbia University) (on file at the offices of the *International Tax & Business Lawyer*).

216. *Id.*