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## II. Expropriation Laws and Practices: The People's Republic of China (PRC)<sup>42</sup>

### A. Legal Framework for Land Ownership and other Tenure Forms

Unlike developed countries where private land ownership is the main form of land ownership, the PRC adopts public ownership of land in the form of state ownership and collective ownership. Generally, urban land is owned by the state, and rural land, except for what is legally defined as state owned, is owned by collectives.<sup>43</sup> However, such public ownership of land has undergone a series of reforms since the late 1970s when the PRC started to move toward a market economy, resulting in a separation of land use rights from land ownership where land is still publicly owned while use rights to such land are allocated to private individuals.<sup>44</sup>

State ownership is exercised by the State Council<sup>45</sup> through land administrative agencies established at county, province, and state levels, with the land agency at each level responsible for management of state-owned land in its jurisdiction. In contrast, collective land ownership has never been clearly defined under Chinese laws. In the rural PRC, there are two levels of collectives: administrative-village collectives and villager-group collectives. An administrative village consists of more than two villager groups. Typically, the administrative-village collective owns the land within its geographical area that is not owned by villager groups, and the villager-group collective owns the land within the geographical boundaries of the individual group. A villager committee represents the administrative-village collective responsible for, among other things, “managing land and other assets that belong to [the]

administrative village collective,”<sup>46</sup> while the villager-group collective is usually represented by the head of the villager group.

Although the state maintains ownership of urban land, use rights to urban land may be granted to any entities and private individuals for value.<sup>47</sup> Granted use rights have specific terms ranging from 40–70 years depending on the intended use.<sup>48</sup> Upon expiration, land use rights together with structures and other fixtures on the land are acquired by the state without compensation.<sup>49</sup> However, the holder of granted rights may renew his use rights upon approval.<sup>50</sup> Once granted rights are acquired, the grantee enjoys a broad spectrum of land rights, including assignment, lease, or mortgage of such use rights for the remaining term.<sup>51</sup>

Rural land reform in the PRC takes a similar route. With the PRC’s decollectivization under a so-called household responsibility system in the late 1970s and early 1980s, the monolithic collective ownership of land has been replaced by a land system where a collective retains ownership of land while use rights to rural land are allocated in an egalitarian way to rural households for individual farming.

There are several fundamental characteristics from the perspective of interaction between collective landowners and farmer households in controlling rural land. First, virtually all rural households have access to some arable land. Rural landlessness is virtually non-existent. Second, landholdings are distributed among households in a substantially egalitarian fashion. Third, the existing legal ambiguities with respect to

<sup>42</sup> This is the first of three consecutive sections discussing expropriation laws and practices in each of the three countries covered by Regional Technical Assistance (RETA) 6091: Cambodia, PRC, and India.

<sup>43</sup> The People’s Republic of China Constitution, Art. 10.

<sup>44</sup> Id.

<sup>45</sup> The 1998 LML, Art. 2.

<sup>46</sup> The Organization Law of Villager Committee, Art. 5.

<sup>47</sup> The Interim Regulations on Allocation and Granting of Urban State-owned Land Use Rights, 1990. [Hereinafter, the Granting Regulations] Art. 8.

<sup>48</sup> Id., Art. 12.

<sup>49</sup> The Granting Regulations, Art. 40. This provision has been heavily criticized by legal scholars because it effectively gives the government the power to take the lawful private property, such as a house, from private individuals without compensation. See Weiguo, Wang, 1997. *A Study on China’s Land Rights* [zhongguo tudi quanli yanjiu], 66.

<sup>50</sup> The 1994 Urban Real Estate Management Law (UML), Art. 21.

<sup>51</sup> The Granting Regulations, Art. 4.

the nature and scope of collective ownership enables collective landowners to abuse their ownership power against individual households, through administrative readjustment of farmers' landholdings or other means.<sup>52</sup>

The landmark Rural Land Contracting Law (RLCL) of 2002 reinforces such individual rights to land by granting to the farmers use rights to arable land for a term of 30 years, grassland for a term of 30–50 years, and forestland for a term of 30–70 years.<sup>53</sup> The forthcoming Property Law further defines such use rights as usufruct property rights, independent from collective landowner's control during the statutory term.

## B. Expropriation Laws and Practice

### 1. Expropriation of Urban Assets

Because urban land is state owned, compulsory acquisition of land only involves “withdrawal” of land use rights.<sup>54</sup> However, Chinese laws on withdrawal of urban land use rights are quite limited. The 1998 Land Management Law (LML) provides five situations under which the government may withdraw urban land use rights from the right holders: (i) public interests, (ii) renovation of old towns, (iii) expiration of land use terms without renewal or denial of the renewal application, (iv) dissolution or relocation of the holder of administratively allocated land rights, and (v) termination of use of public infrastructure.<sup>55</sup> However, the right holder is entitled to a vaguely phrased “appropriate compensation” only in the first two situations.<sup>56</sup> In case of land use rights initially acquired through contract grant, the right holder is entitled to a compensation corresponding to the number of remaining years on the grant contract and the extent to which land has been developed.<sup>57</sup>

Although Chinese laws require compensation to the holder of urban land use rights when such rights are withdrawn in certain situations, the requirement has never been honored in practice. There have been no reported examples of compensating the holders for the loss of their urban land use rights.<sup>58</sup>

Compensation for expropriation of private properties in urban areas in the Chinese context, therefore, only involves structures, including residential houses and structures for business purposes. Compensation may be paid in cash or in kind, and the owner of the property to be demolished may select between monetary compensation and a replacement structure.<sup>59</sup> The amount of cash compensation is determined by a market appraisal of the condemned structure based on location, use, and floor space of the structure.<sup>60</sup> The method of appraisal should be the comparable sales approach, except in areas where housing markets are not developed.<sup>61</sup> As to in-kind compensation, the property owner is entitled to a replacement structure plus or minus any difference between the value of the replacement structure and the assessed market value of the condemned structure.<sup>62</sup>

In addition, the property owner is entitled to moving expenses and transitional resettlement subsidy.<sup>63</sup> Resettlement subsidy can be in the form of either cash subsidy or provision of a transitional home.<sup>64</sup> In the case of nonresidential structures, an “appropriate compensation” should be made for losses sustained by the property owner if such condemnation causes termination of production or business.<sup>65</sup> However, if the structure was initially used as a residential unit but later changed into a business structure, the owner is not entitled to compensation for termination of business, unless that person can produce evidence that such change of use was approved by and registered with relevant government agencies.

One of the distinctive features of Chinese urban condemnation laws is that the government itself is not

<sup>52</sup> Not all land readjustments are of the same magnitude. “Big” or comprehensive readjustments involve an overall change in the landholdings of all farm households in the village. In a big readjustment, all farmlands in the village are returned to the collective entity and reallocated among village households so that each household receives entirely new land. A “small” or partial readjustment consists of adding to or taking from a household's existing landholdings when that household's size changes. Under small readjustments, households that neither add nor lose members will continue to farm the same landholding.

<sup>53</sup> The 2002 Rural Land Contracting Law (RLCL), Art. 20.

<sup>54</sup> Chinese laws use different terms with respect to compulsory acquisition of urban land and rural land. Government taking of urban land is “withdrawal” of urban use rights, while rural taking is phrased as “expropriation” and involves transfer of land ownership together with farmers' land use rights.

<sup>55</sup> LML, Art. 58.

<sup>56</sup> Id.

<sup>57</sup> The UML, Art. 19.

<sup>58</sup> Further, in its reply to the Ministry of Construction on whether to compensate land use rights in condemnation of urban private houses, the State Council's Legislative Office implicitly ruled out compensation for land use rights. See China Rule of Law Publishing House. 2004. *New Compilation of Laws on Demolition, Compensation and Resettlement for Houses* [Xinbian Fangwu Chaiqian Buchang Anzhi Falu Shouce], 129–130.

<sup>59</sup> 2001 Urban Structure Demolition Regulations, Art. 23.

<sup>60</sup> Id., Art. 24. It should be noted that a market appraisal of the house taking into account the factor of location might reflect at least part of the value of the land on which the structure is erected.

<sup>61</sup> The Ministry of Construction Guiding Comments on Urban Structure Demolition, Art. 16.

<sup>62</sup> 2001 Urban Structure Demolition Regulations, Art. 25.

<sup>63</sup> Id., Art. 31.

<sup>64</sup> Id.

<sup>65</sup> Id., Art. 32.

allowed to conduct condemnation and compensate for the condemned property.<sup>66</sup> Instead, the end user of the land, either a private developer or a public entity, on which the condemned property stands is authorized to demolish the property, negotiate and give compensation to the property owners upon receipt of use rights to the land and approval of condemnation.<sup>67</sup> Under this legal framework, the government delegates its eminent domain power and shifts its duty of compensating property owners to developers or contractors of public facility construction once such developers or contractors obtain land use rights.

As a result, urban condemnation is essentially an act conducted by one private entity on another private entity. The law requires that both parties enter into an agreement on all relevant arrangements, including amount of cash compensation, size, and location of resettlement home, moving date, and transitional arrangements.<sup>68</sup>

As to procedural safeguards for property owners, the law prescribes a three-step process. First, if the negotiation on compensation between developers and property owners fails to reach an agreement, any party can apply to the government's urban condemnation administration for an administrative review.<sup>69</sup> If not satisfied with the review decision, the appellant may file a lawsuit with the local court within 3 months of receiving the decision.<sup>70</sup> Third, if the property owner refuses to move out of the property before the demolition date, the end user may bring the case to the arbitration board or directly file a lawsuit with the local court for enforcement.<sup>71</sup> However, in either case, the pending lawsuit does not enjoin the developer from conducting condemnation.<sup>72</sup>

## 2. Expropriation of Rural Assets

Expropriation of rural assets is governed by a different set of laws, which can be outlined as follows:

- (i) **Purpose for land expropriation.** The PRC's Constitution mandates that any expropriation or requisition of land must be "for the needs of public interests."<sup>73</sup> The 1998 LML echoes the Constitution without providing any further

detail on what specific purposes serve the public interest: "The State may, in the public interest, lawfully requisition land owned by collectives."<sup>74</sup> Moreover, the PRC's existing legal framework governing land expropriation further requires that all nonagricultural use of land must use state-owned land.<sup>75</sup> Where the land is owned by a rural collective, it must first undergo a process through which the state expropriates the land and becomes the owner.<sup>76</sup> In such cases, the intended land user must apply to the state for approval of the use and conversion of agricultural land for nonagricultural purposes.<sup>77</sup> Upon approval, the state will exercise its eminent domain power through the county-level government.<sup>78</sup> Under such a land-taking framework, the state may take farmers' land not only for "public interests," but also for all other purposes nonpublic in nature.

- (ii) **Compensation for expropriation of land.** The PRC adopts an approach of compensating farmers based on the original use of the land to be taken and determining such compensation based on statutory standards. The current legal requirement for compensation consists three components: (a) a compensation for loss of land set at 6 to 10 times the average annual output value of the land for the 3 years prior to the requisition; (b) a resettlement subsidy set at 4 to 6 times the average annual output value; and (c) compensation for structures and standing crops to be determined by provincial governments.<sup>79</sup> The compensation law further caps the sum of compensation for loss of land and resettlement subsidy at 30 times the average annual output value for the preceding 3 years if the statutory standards are insufficient to maintain farmers' original living standards.<sup>80</sup>
- (iii) **Distribution of compensation.** Because of the existence of collective landowners, the

<sup>66</sup> 2001 Urban Structure Demolition Regulations, Art.10.

<sup>67</sup> *Id.*, Art. 13.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, Art. 16.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, Art. 15.

<sup>72</sup> *Id.*, Arts. 15 and 16.

<sup>73</sup> The People's Republic of China Constitution, 2004. Amendment 10.

<sup>74</sup> LML, Art. 2.

<sup>75</sup> LML, Art. 43. The exceptions to this rule include uses of collectively owned land for rural enterprises, rural public facilities, and farmers' residential houses. *Id.*

<sup>76</sup> *Id.*, Art. 43. A narrow exception to this rule is for rural public facilities, farmers' residential houses, and township and village enterprises, which may use collectively-owned land. *Id.*

<sup>77</sup> *Id.*, Art. 44.

<sup>78</sup> *Id.*, Art. 46.

<sup>79</sup> *Id.*, Art. 47.

<sup>80</sup> *Id.*

LML allocates three types of compensation between collective landowners and the affected farmers. Under the law, compensation for loss of land is allocated to the collective landowner. Compensation for young crops and fixtures is paid to the households whose land has been affected by the takings. Resettlement subsidies are paid to the collective or to another entity responsible for the resettlement, or to those to be resettled directly if no resettlement arrangements are necessary.<sup>81</sup>

- (iv) **Compensation for rural non-land assets.** Compensation for rural non-land assets—including standing crops, housing structures, and businesses—is governed by provincial regulations. While a variety of approaches are adopted in the 31 provincial jurisdictions, some common features can be summarized as follows:

*Crops.* For annual crops, compensation standards range from the land's crop season yield<sup>82</sup> to average annual yield of the preceding 3 years,<sup>83</sup> with most provinces adopting the crop season yield standard. For perennial crops, compensation is determined based on the crops' annual output,<sup>84</sup> or actual value.<sup>85</sup> In Guangdong, the compensation for perennial crops is based on the time of planting and the term of maturity.<sup>86</sup>

*Housing structures.* Most provinces do not have specific rules on compensation for expropriation of housing structures. The most common practice is issuance of ad hoc standards that are highly discretionary. In many provinces, these ad hoc standards made before the 1998 LML are still applied in current expropriations. However, in recent years, improvements have been made in developed areas such as Beijing and Shanghai. In Beijing, for example, compensation may be made in cash or with a replacement

home.<sup>87</sup> In the case of cash, compensation should be the sum of compensation for foundation plot location and replacement cost new minus accrued depreciation,<sup>88</sup> in which compensation for foundation plot<sup>89</sup> location is the average commodity house price in the relevant locality multiplied by the total area of foundation plot. Affected farmers are entitled to moving expenses. In Shanghai, compensation may also be made in cash, or with a replacement home, or with a replacement foundation plot plus subsidies. Cash compensation is calculated based on the formula of (unit replacement cost new minus accrued depreciation + unit price of land use rights of multi-story commodity residential buildings in the locality + price subsidy) X total floor space of the house to be demolished.<sup>90</sup> In addition, the municipality requires payment for moving expenses and transitional subsidy.<sup>91</sup>

*Businesses.* Most provinces have not promulgated any rules on compensating for structures for business use. Again, Beijing and Shanghai are exceptions. In these two municipalities, the government is required to pay an "appropriate compensation" for the termination of business or production on the condition that the owner has a business license.<sup>92</sup>

- (v) **Procedures for land takings.** The 1998 LML sets out procedures governing the taking of agricultural land by the state. Although the law requires notification of collective landowners and farmers in the event of state expropriation, such notification is only required to be conducted after the expropriation is approved.<sup>93</sup> Farmers may complain to the agency that approves the expropriation with respect to the compensation and resettlement

<sup>81</sup> Id., Art. 47, and LML Regulations, Art. 26.

<sup>82</sup> The Compensation and Resettlement Measures for Land Expropriation of Beijing Municipality. 2004. Art. 16.

<sup>83</sup> The Ningxia Autonomous Region Land Management Regulations, Art. 29.

<sup>84</sup> The Compensation and Resettlement Measures for Land Expropriation of Beijing Municipality. 2004. Art. 16; and Anhui Provincial Regulations for Implementing LML. 2002. Art. 37.

<sup>85</sup> Jiangxi Provincial Regulations for Implementing LML. 2000. Art. 29.

<sup>86</sup> Guangdong Provincial Regulations for Implementing LML. 2000. Art. 30.

<sup>87</sup> Beijing Municipality Measures on Management of Demolition of Houses on Collectively Owned Land. 2003. Art. 14. However, the municipal government also sets a standard for replacement cost new minus accrued depreciation at a level of yuan (CNY)400–700 per square meter (m<sup>2</sup>). Id., Art. 4.

<sup>88</sup> Beijing Municipality Rules on Demolition of Houses on [collectively Owned] Foundation Plot. 2003. Art. 3.

<sup>89</sup> Id., Art. 4.

<sup>90</sup> Shanghai Municipality Measures on Compensation and Resettlement for Demolition of Houses on Collectively Owned Land Subject to Expropriation. 2002. Art. 6.

<sup>91</sup> Shanghai House and Land Administration's Notice on Subsidies for Demolition of Residential Houses on Collectively Owned Land. 2002.

<sup>92</sup> Beijing Municipality Measures on Management of Demolition of Houses on Collectively Owned Land. 2003. Art. 22; and Shanghai Municipality Measures on Compensation and Resettlement for Demolition of Houses on Collectively Owned Land Subject to Expropriation. 2002. Art. 10.

<sup>93</sup> LML, Art. 46.

plan, but any disputes concerning compensation and resettlement shall not affect the implementation of the expropriation.<sup>94</sup>

Realizing the serious defects of its expropriation legislation, the Chinese government has taken some legal and policy measures to improve the regulatory framework, notably the State Council's Document No. 28 of 2004, the Ministry of Land and Resources' Regulations on Public Hearings, and legal measures adopted by some provincial governments in response to the central government's policy guidelines. These new developments include:

(i) **Compensation for land expropriation.**

Document No. 28 reemphasizes that compensation be determined based on the principle of preventing farmers' living standard from being lowered because of land expropriation. It specifically requires that local governments allocate part of their revenue from granting state-owned land use rights to farmers if the maximum sum of land compensation and resettlement subsidies (30 times the average annual output value of the land to be expropriated) is still insufficient to restore affected farmers' livelihoods. It also allows farmers to have an option of "stock-for-land" through which farmers can elect to contribute directly their land rights to a project with stable incomes in exchange for shares of stock in the project.

The Beijing municipal government recently reversed the maximum standard approach by adopting a "minimum protection standard" and requiring the expropriating agency to negotiate with the collective based on "no less than the minimum protection standard."<sup>95</sup> In Guangdong Province, the new rules on compensation for land expropriation for commercial purposes go even a step further. The rules are completely silent on the agricultural yield method and multiplier standard as provided under the 1998 LML. Instead, the rules require that conversion for nonagricultural and nonpublic purposes be

conducted in open market at the price reached through negotiation between collective and the end user or through auction, bidding, and public listing.<sup>96</sup> It appears at least in Guangdong, the standard of fair market value begins to emerge.<sup>97</sup>

(ii) **Allocation of compensation.** Document No. 28 clearly states that compensation for loss of land—the biggest component of compensation and resettlement package under existing expropriation law—must be primarily used for the farmer households who have lost their contracted land through requisition. Based on the spirit of this guideline, the Shanxi provincial government promulgated in October 2005 its regulations on allocation of land compensation between collective landowner and affected farmers. The regulations unambiguously require that 80% of land compensation go directly to affected farmers whose contracted land is expropriated, while 20% be retained with collective landowner.<sup>98</sup>

(iii) **Procedures for land expropriation.** The Ministry of Land and Resources promulgated the new Regulations on Land and Resources Hearings in 2004, which requires the land expropriating agency to inform affected farmers of their right to a hearing on compensation standards and the resettlement package, and such a hearing must be held, if requested, within 5 days after the parties are informed. Document No. 28 takes this further and states that before the expropriation is submitted for approval, its purposes, location, compensation standard, and resettlement and rehabilitation measures should be made known to farmers whose land is to be taken. Moreover, the rural collective and the farmer households should confirm the results of the survey on the existing situation of the land proposed to be taken.

<sup>94</sup> The LML Implementing Regulations, Art. 25.

<sup>95</sup> Beijing Municipality Regulations on Compensation and Resettlement for Land Expropriations. 2004. Arts. 9 and 10.

<sup>96</sup> The Guangdong Provincial Measures on Management of Transactions of Use Rights to Collectively Owned Construction Land. 2005. Art. 15.

<sup>97</sup> However, the Guangdong rules apply to commercial nonagricultural use of farmland only. Government expropriation of land for authentic public interests is expected to be governed by the 1998 LML.

<sup>98</sup> Shanxi Provincial Measures on Allocation of Land Compensation for Expropriation of Collectively Owned Land. 2005. Art. 13.

### C. Resettlement in the PRC: A Quick Snapshot

Land expropriations immediately trigger loss of land and subsequently affect the livelihood of those who depend on land for survival. According to the research conducted under ADB RETA 6091 project, more than 36 million farmers had lost all or part of their land between 1993 and 2003, and an additional number of 26.5 million farmers are projected to lose their land between 2001 and 2010.<sup>99</sup> However, the PRC does not have a national law addressing the whole range of resettlement issues except for prescribing monetary resettlement subsidies based on the land's agricultural yields<sup>100</sup> and generally calling for encouraging APs to engage in the development of business and nonagricultural production.<sup>101</sup> The 1998 LML does authorize the State Council to promulgate specialized regulations governing compensation and resettlement for construction of medium- or large-scale water facilities and hydropower projects.<sup>102</sup>

For example, the State Council has established rules for reservoir-related resettlement to “gradually assist resettlers to reach or exceed their original living standard”<sup>103</sup> through “developmental resettlement.”<sup>104</sup> Such developmental resettlement adopts an approach of deciding compensation and subsidy amounts before the construction starts and providing production support after the construction is completed.<sup>105</sup> Preconstruction compensation and resettlement subsidies are determined based on the land's agricultural yields, but with a much lower multiplier than what is stipulated in the 1998 LML.<sup>106</sup> For example, compensation for loss of arable land is three to four times the average annual yield of the preceding 3 years and resettlement subsidy is only two to three times the average annual yield.<sup>107</sup> If the sum of compensation and resettlement subsidies is “difficult” to resettle APs, the total amount can be increased but it cannot exceed 20 times.<sup>108</sup>

Post-construction support comes from revenues generated by the project. For example, the Regulations on Resettlement for the Three-Gorge Project establish a “post-construction support fund” from power generating revenues, which will be allocated to the provinces with resettlers because of the Three-Gorge Project.<sup>109</sup> According to research, as of 2000, yuan (CNY)1.76 billion had been raised annually as post-construction support fund for resettlers affected by hydropower projects throughout the country, which could be translated into CNY110 per resettler per year.<sup>110</sup>

In the absence of a national law regulating involuntary resettlement arisen from non-reservoir related expropriations, a variety of approaches have been developed by local governments to address post-expropriation livelihoods of APs.

- (i) The most common approach is monetary resettlement in which resettlement subsidies as required by the 1998 LML (plus part or all compensation for loss of land in some cases) are given to APs who, in turn, will be responsible for their survival. More than 90% of affected farmers were dealt with under this approach.<sup>111</sup>
- (ii) Another approach is the so-called “resettlement through joint stock share arrangement” method, where APs convert their share of land compensation and resettlement subsidy into joint stock shares of the company that is formed with collective investments of such compensation and resettlement subsidy.<sup>112</sup>
- (iii) A new resettlement practice—called “resettlement through establishment of social security mechanism”—was created and has been adopted in recent years in some developed provinces. Under this approach, all resettlement subsidies and part or all of the compen-

<sup>99</sup> *China's Capacity Building of Risk Management of Land Acquisition Resettlement*. 2005. *National Report*, 49. (Hereinafter, referred to as China Country Report).

<sup>100</sup> LML, Art. 47.

<sup>101</sup> LML, Art. 50.

<sup>102</sup> LML, art. 51.

<sup>103</sup> Regulations on Compensation and Resettlement for Medium and Large Water Facilities and Hydropower Construction. 1991. Art. 4.

<sup>104</sup> *Id.*, Art. 3.

<sup>105</sup> *Id.*

<sup>106</sup> It should be noted though that the compensation and resettlement standards for reservoir-related projects were promulgated long before the 1998 LML and may not be practically effective. However, such apparently out-of-date regulations have never been repealed, and therefore, are still in force.

<sup>107</sup> *Id.*, Art. 5.

<sup>108</sup> *Id.*

<sup>109</sup> The Regulations on Resettlement for the Three-Gorge Project. Art. 45.

<sup>110</sup> Tang, Chuanli. Undated. *Policies and Practice in Resettlement for Reservoir Construction in China*. Available: [www.cws.net.cn/Journal/slxh/20009z/14.html](http://www.cws.net.cn/Journal/slxh/20009z/14.html)

<sup>111</sup> *China Country Report*, *supra* note 99, 60.

<sup>112</sup> One such example is a toll highway project in Shanghai. Affected farmers waived their right to land compensation and resettlement subsidy in exchange for an annual dividend adjusted for inflation for 28–30 years, depending on the expiration date of their 30-year land rights. The annual dividend is calculated based on the net income from land plus standard labor costs. In 2002, this dividend was CNY1,350 per mu (1/15 of hectare). See The Housing and Land Administration of Qingpu District of Shanghai, Summary of Experiment on Building Infrastructures in Cooperation with Collective Land Use Rights. In Lu Xinshe, ed. Yanjiu Zhengdi wenti Tansuo Gaige Zhilu. 2003. *Study on Land Expropriation Issues and Explore Ways for Reform*. Part II, 198–203. It should be noted that determination of such “dividend” is not based on the toll road's profits and does not take into account transitional cost, interference with farmers' farming on remaining land, etc.

sation for loss of land are used to finance a social security safety net including pension, unemployment insurance, and medical insurance.<sup>113</sup>

One of the bright spots of local legislation on resettlement comes from Beijing where the Measures on Compensation and Resettlement for Land Expropriations have been adopted. Under the measures, the affected village may choose between monetary compensation for loss of land and land rezoned for nonagricultural purposes in accordance with the municipality's overall land use planning so that farmers may use the land for income generating nonagricultural endeavors.<sup>114</sup> Moreover, the developer of the expropriated land is required to employ first the APs when it has such openings.<sup>115</sup> If no employment is provided, the end user of the land must make a lump-sum employment subsidy to APs equivalent to 48–60 months of the city's minimum wage.<sup>116</sup>

## D. Present Problems

### 1. Urban Expropriations

In general, the PRC's urban expropriation laws contain the following flaws:

- (i) **Noncompliance by government with respect to compensation for urban land use rights.**<sup>117</sup> Although existing urban land laws require compensation to land users for the urban land use rights withdrawn for urban development, governments at all levels have failed to abide by such legal mandate in urban expropriation practice.

This is particularly dangerous to the PRC's objective of establishing the rule of law in the country. Non-compensation for land rights also introduces an incentive structure where the value of land is not an issue in urban expropriation, resulting in apparently irrational as well as unsustainable urban redevelopment.<sup>118</sup>

Compensating house alone in urban expropriations is equivalent to depriving house owners of their legitimate rights to land. In an urban setting, land use rights may be much higher in value than structures erected on the land. As of 2002, the total market value of the PRC's urban land use rights was estimated at the level of more than \$3.1 trillion.<sup>119</sup> Even 10% of this value came from the uncompensated land, which would be equivalent of more than \$300 billion of loss digested by urban property owners.

- (ii) **Delegation of eminent domain power to the commercial condemner.** In the PRC, the compulsory power is often delegated to developers who are expected to maximize profit margins by depressing property values and lowering compensation. Partly because of this institutional arrangement, the number of complaints over unfair compensation has increased dramatically in recent years. In 2003, the central government received more than 10,000 complaints over compensation for urban condemnation, and most of these complaints were related to unfair compensation and coercive practices by condemners.<sup>120</sup>
- (iii) **Denial of the right to compensation for undocumented properties.** Chinese urban condemnation laws decline to compensate for the condemned properties that are unlawful because they were not built with a building permit and therefore are not documented. In most urban areas, the sole evidence of

<sup>113</sup> For example, in Jiaying of Zhejiang Province, all resettlement subsidies—determined based on the need rather than the quantity of land expropriated and part of compensation for loss of land—are contributed to the city's social security fund, which in turn pays to APs in the following ways: (i) APs at the retirement age receive a city standard pension of CNY398 per person per month as of 2002; (ii) those 15 years younger than the retirement age are entitled to pension upon retirement and a living allowance of CNY160 per person per month prior to retirement; and (iii) those regarded as labor are entitled to a lump sum of employment subsidy plus a government contribution to social security fund determined based on their farmwork years. The total cost per person was CNY43,000 in 2002. The Land Administration of Jiaying of Zhejiang, 2003. *Actively Pushing land takings Reform*. In *Id.*, 169–177.

<sup>114</sup> The Beijing Municipality Measures on Compensation and Resettlement for Land Expropriations. 2004. Art. 15.

<sup>115</sup> *Id.*, Art. 24.

<sup>116</sup> *Id.*, Arts. 26 and 27.

<sup>117</sup> As discussed above, urban land use rights may be obtained either through allocation at no cost or through granting by paying to the state a land use fee. However, the PRC's urban land expropriation laws require paying an appropriate compensation to land users regardless of how land use rights are obtained. See LML, Art. 58.

<sup>118</sup> According to the statistics compiled by the Ministry of Construction, the amount of urban condemnation measure in the floor space of structures being demolished was nearly doubled between 1996 and 2000 as compared with that between 1991 and 1995. The scale of such urban condemnation dramatically increased in the new century. In many provinces, especially those in coastal provinces, the amount of urban condemnation for the first 6 months of 2003 exceeded the total amount in 2002.

<sup>119</sup> Available: [www.southcn.com/finance/financenews/guoneicaijing/20020624794.htm](http://www.southcn.com/finance/financenews/guoneicaijing/20020624794.htm)

<sup>120</sup> Policy Research Center of the Construction Ministry. 2004. *The Latest Guide to Urban Structure Demolition*.

property ownership adopted by the developer-condemner is the house certificate registered with the urban real estate registration office. Because a certificate will not be issued to the owner of the property without a building permit, these property owners are not entitled to any compensation no matter how long they have built and possessed the property or how dependent they are on the property for their livelihood.

- (iv) **No effective participation by APs in determining compensation.** Although the law requires negotiation on compensation, such negotiations are seldom arm-length negotiations in practice because of the substantial power imbalance between the condemner and the condemnee. Property owners—especially those living in blighted areas under condemnation—are usually powerless, with inadequate sources of information, and without access to unbiased appraisal organization. Most often, upon approval of the condemnation, the developer hires the appraisal company to assess the value of the structure under condemnation and to come up with a written agreement for the condemnee to sign. When the condemnee has objections or disagreement, the condemner often threatens the condemnee for obstructing urban development for “public interests.”<sup>121</sup>

## 2. Rural Expropriations

With rapid economic development and urbanization taking place in the PRC in recent years, farmlands have been lost at an unprecedented pace. Over 3.15 million ha of farmlands, more than 2% of the PRC's total arable landmass, was taken for various kinds of nonagricultural uses between 1990 and 2002,<sup>122</sup> about 36.4 million farmers have been rendered landless between 1993 and 2003.<sup>123</sup> According to the questionnaire survey conducted by Chinese consultants under the RETA project, more than 50% of affected farmers reported that their living standard had been reduced or substantially reduced because of land

expropriations.<sup>124</sup> This is a clear indication that the PRC's land expropriation practices might have failed to meet the minimum standard as adopted by the PRC Government and ADB—that is, AP's livelihood should not be lowered because of land expropriation for necessary economic development projects. This subsection will highlight institutional deficiencies related to compensation for loss of assets as reported in the RETA Country Report (the PRC) and discovered by RDI's own research.

- (i) **Ambiguous definition of “public interest.”** Although the PRC's expropriation laws require the state to expropriate farmland for public interests, such public interests are not defined in either statutory or case law, giving the government virtually unlimited power in taking farmland for any purpose. Allowing government exercise of eminent domain power for commercial interests gravely distorts the land market, resulting in government intervention in land transactions that could be otherwise achieved through private negotiation. According to the RETA Country Report (the PRC), about 22% of land expropriations in 16 provinces during 2000–2001 were for commercial interests, such as real estate developments.<sup>125</sup>
- (ii) **Inadequate compensation standard for loss of land use rights.** In the PRC, compensation for loss of land and subsidies to affected farmers for resettlement are provided as a package. Such practice tends to blur the distinction between replacement value of land and the needed financial and nonfinancial support to APs for restoring their livelihoods. With respect to compensation for loss of land, several institutional problems exist. First, compensation for expropriating farmland for either public interests or any commercial purpose is subject to the statutory limits which are usually well below the fair market value—let alone replacement cost—of the land to be taken.

<sup>121</sup> Id., 113–115.

<sup>122</sup> Yu Jianrong, 2005. Get into the Dispossessed Farmers. *Nanfang Weekend*. 14 July.

<sup>123</sup> *China Country Report*, supra note 99(49).

<sup>124</sup> *China's Capacity Building of Risk Management of Land Acquisition Resettlement: National Report*. 2005. Appendix II “China Research on Valuation method of Land Acquisition Compensation,” 10.

<sup>125</sup> *China Country Report*, supra note 99(25). Moreover, in two rounds of fieldwork conducted during 2002–2003, RDI researchers found that more than half of land expropriation incidents had been for commercial uses ranging from real estate projects to gas stations. Prosterman, Roy, Li Ping, and Brian Schwarzwalder. 2004. Reform on the Land Takings System: Fieldwork Findings and Recommendations for Further Reform. *China Rural Survey*. 6.

In its own investigation, Chinese consultants under the RETA 6091 project found that the sum of land compensation and resettlement subsidy was, in general, less than 20% of the price at which government sold the use rights to the same land to developers.

## Box 2: How Much Do Affected Farmers Get in Land Expropriations?

RDI Fieldwork Findings

**Case 1.** A field research was conducted in four suburban villages of Fuyang of Anhui Province in late 2002. In a total of 14 land expropriation incidents we found during the field research, the highest amount of land compensation received by the affected farmers was CNY23,000 per mu of arable land. In contrast, according to the published figure, the government in the same locality sold such land use rights to developers in 2003 for CNY160,000–CNY300,000 per mu.

**Case 2.** In a field research conducted on a golf course project in 1998 in Shuangliu of Sichuan Province, farmer interviewees reported that compensation for loss of land for the golf course was CNY13,000 per mu. However, the interviewed government officials in charge of negotiation with the golf course owner reported that the sale price of the same land was CNY35,000 per mu. Moreover, the officials claimed that government had the right to retain 50% of the proceeds for any land use rights sold to developers.

CNY = yuan, mu = 1/15 of a hectare, RDI = Rural Development Institute.

Source: Li Ping. Unpublished Fieldwork Notes on Crop Compensation Standards. The government sales price was taken from "Introduction of Granting Use Rights to State-owned Land in Anhui Province." 2003. *Zhongguo Guotu Ziyuan Bao*. *China Land and Resources News*. 12 August.

Second, no Chinese laws or government policies provide any guidance on valuation of land to be expropriated. Determination of compensation is thus based on average agricultural yield of the preceding 3 years regardless of farmers' investment in land, location of the land, potential best use of the land, local demand for such land, market price for agricultural product that the land is producing, and other factors that typically consist of the value of farmland. Chinese consultants of the RETA project report that among the four valuation methods (agricultural yield, comparable sales, income capitalization, and expected nonagricultural market price minus infrastructure cost) tested for research purposes, the land's value was

in most cases the lowest when applying the agricultural yield method.<sup>126</sup>

Third, Chinese land compensation laws explicitly cap the compensation for loss of land at a maximum of 10 times of the annual agricultural yield, leaving virtually no legal basis for farmers to demand a higher compensation, or a compensation that affected farmers are willing to accept. In the meantime, the government is authorized to sell use rights to such expropriated land to commercial interests at a market price that is in most cases several times higher even than the maximum compensation paid to affected farmers. Although the recent central policies allow compensation to exceed the maximum legal standards, such policies have not yet been fully implemented and its results remain to be seen.

- (iii) **Unfair calculation of resettlement subsidy.** Under the 1998 LML, resettlement subsidy, the only remedy available for damages resulting from resettlement is in fact tied to the amount of land expropriated, rather than the number of people who need to be resettled. This linkage unfairly affects farmers with small landholdings. The PRC's arable land per capita is already at the lowest end in the world; with the PRC's rapid economic development, the farmers' already small landholdings are expected to get even smaller. Thus, even a small-scale land expropriation will create a large number of landless farmers. Linking resettlement subsidy to the amount of land under expropriation is, in effect, a reduction of the government's budgetary expenditure on resettlement, which will eventually shift the government's responsibility of restoring affected farmers' livelihood to affected farmers themselves, and will inevitably bring about a result that fails well short of ADB standards.
- (iv) **Excessive interception of compensation by collectives or local governments.** While the compensation may be low, the affected farmers do not even receive the full amount of this already low compensation in many cases. Chinese law requires that the compensation for loss of land—the biggest component of the

<sup>126</sup> *China Country Report*, *supra* note 99(34–35).

three categories of compensation/resettlement package—be paid to the collective landowner for the development of the collective economy.<sup>127</sup> The decision as to whether this compensation is shared between the collective landowner and the affected farmers, and if so, at what ratio, is entirely subject to the collective landowner's discretion.

- (v) **Land-for-land practice in the form of illegal “big land readjustment.”**<sup>128</sup> Because land is the primary means of subsistence for most APs, cash compensation itself may not be able to provide a sustainable source of income and living support for affected farmers, especially those living under marginal conditions. ADB has thus adopted a policy that equivalent land will be provided as the first alternative to compensating affected farmers' loss of land to expropriation.<sup>129</sup> This land-for-land approach is certainly preferable to the cash compensation approach in an area where economically meaningful land can be obtained lawfully to fairly compensate the affected farmers. However, in the PRC, land-for-land compensation is usually conducted through village-wide land readjustment, especially where a portion of the village's land is expropriated. RDI has done more than 1,000 individual farmer interviews in more than 20 provinces since 1987, and found no case in which a small readjustment was conducted in response to land expropriation in the village. Relying on big readjustment to compensate affected farmers appears incompatible to the ADB policy, and clearly violates existing Chinese laws governing farmers' land rights. ADB's land-for-land policy requires provision of replacement land, which is equivalent in quality and quantity. However, based on RDI's empirical experience in the PRC, any big readjustment will universally result in a reduced land share, and often in less quality, for APs. Second, any administratively orchestrated land readjustment is tantamount to “collective taking” of unaffected farmers' land to compensate affected farmers' in the

### Box 3: Anhui and Jiangxi – A Tale of Two Provinces

In Anhui, interviews were conducted with a total of 32 farmers in four counties. The vast majority of Anhui farmers, 21 of 25 that expressed their opinion, were highly confident that their land rights would remain free from the process of readjustment for the entire 30-year term. Because of this confidence, 10 farmers reported that they had made long-term investments on their land to increase productivity or diversify into higher value-added crops. The specific investments included planting fruit trees, shifting from chemical to organic fertilizer, building greenhouses for mushroom or vegetable cultivation, and digging irrigation ponds. On the average, farmers who had made such investments reported that their net income per mu of land had increased fivefold in the first year following the investment. To make these investments, farmers invested both labor and cash, ranging in amounts from several hundred to as much as CNY20,000. Farmers uniformly told us that without secure land rights, they would not have invested on their land.

Jiangxi presents a starkly contrasting picture. Only two of 26 farmers interviewed during a 2003 field research expressed high confidence that their land rights would remain secure and free from land readjustment during the 30-year term. In fact, 16 of the 26 villages had already conducted a land readjustment since purportedly giving farmers 30-year rights under the 1998 LML. As a result, only four farmers reported making any long-term investments on their land. Among these four farmers, two believed that none of their land would be subject to readjustment (the two “high confidence” farmers noted above), while one had invested only on his dry land because the village announced that dry land would no longer be subject to land readjustments, while readjustments would continue on paddy land. Only one of the farmers we interviewed (the only one reflecting such behavior in either of the two provinces) risked making a long-term investment on land he still considered subject to possible readjustments; and he made sure that the greenhouses he built were movable, just in case.

CNY = yuan, LML = Land Management Law, mu = 1/15 of a hectare.

Source: Prosterman, Roy, and Brian Schwarzwalder. 2004. From Death to Life: Giving Value to China's Rural Land. *China Economic Quarterly*, Vol. 8, No. 1.

community, which appears to be at odds with the ADB policy of avoiding land takings and subsequent involuntary resettlement where feasible.<sup>130</sup>

Big land readjustment also violates Chinese laws on farmers' land rights. As indicated above, RLCL provides that no land readjustment is permitted within the 30-year period except for readjustment conducted between isolated households in the event of special circumstances, such as natural disasters that

<sup>127</sup> The Implementing Regulations of the 1998 LML, Art. 26.

<sup>128</sup> For definition of big readjustment, see supra note 52 and accompanying text.

<sup>129</sup> ADB. *Handbook on Resettlement: A Guide to Good Practice*, 35.

<sup>130</sup> *Id.*, 101.

have seriously damaged farmers' contracted land.<sup>131</sup> Clearly, a village-wide big readjustment is illegal regardless of what circumstance under which it is instituted. Further, land readjustment—especially village-wide big readjustment—has proved to be detrimental to the farmers' tenure security and thus their enthusiasm to make long-term investment in land and engage in intensification or diversification in the process of increasing their living standard through farming.

(vi) **Erratic and inconsistent compensation for non-land assets.** For example, in most provinces, compensation for perennial crops, such as fruit trees, is only a 1-year output value of the crop regardless of its age. As to structures such as residential houses, all but two provincial jurisdictions (Beijing and Shanghai) have yet to develop specific and coherent legal standards. Such a legal vacuum makes it possible for local expropriating agencies to depress the value of standing crops and structures arbitrarily. RDI obtained a detailed list of compensation standards during its fieldwork conducted in 1998 on an expropriation project involving a golf course, as shown in Table 1.

(vii) **Inadequate protection of married/divorced women's entitlement to compensation.**<sup>132</sup> Under RLCL, collective entity cannot reassign the land that it allocated to a woman if she later moves out of the village, unless and until the collective in her marital village has allocated land to her.<sup>133</sup> While these new rules create greater overall land tenure security, they also have the potential to deprive some women of access to land. Specifically, if a woman moves from a village that conducted a small readjustment upon her departure to a village that does not readjust land upon her arrival, she no longer has a land share and in a sense becomes "landless." Second, even if the woman's original village does not readjust her land share out upon her marriage

or divorce, the land share allocated to her is regarded as a joint property of her maiden family or ex-husband's family, and it is difficult for her to partition that land share. When a land expropriation occurs in the village she moved out of because of marriage or divorce, and compensation is made based on either amount of landholdings or number of exiting family members, she may not be able to claim her legitimate share of compensation. Third, in many rural villages, "married-out" women are regarded as nonmembers of the community and the collective decision on distribution of compensation often excludes them from the list of beneficiaries even though their contracted land is still within the village. Fourth, for those women who married into suburban villages where land expropriations are more frequent, collective landowners often use the villagers' discrimination

**Table 1: Standards of Compensation for Standing Crops and Structures**

Standing crops	
Annual crops	CNY400/mu regardless of variety of the crop
Perennial crops	
Timber trees	(in CNY)
• Less than 3 cm in diameter	1.5/tree
• 3–5 cm	3/tree
• 6–10 cm	5/tree
• 11–15 cm	8/tree
• 16–20 cm	10/tree
• 21 cm or above	15/tree
Fruit trees	
• Mature tree with fruits	50/tree
• Trees that just bear fruits	30/tree
• Trees that do not bear fruits	10/tree
• Young trees	1/tree
Bamboo	0.6/kg
Structures	
Brick house	88/m <sup>2</sup>
Clay brick house	45/m <sup>2</sup>
Grain storage	40/piece
Pigsty	40/piece
Drying ground	40/piece

cm = centimeter, CNY = yuan, kg = kilogram, m<sup>2</sup> = square meter, mu = 1/15 of a hectare.

Source: Li Ping, 1998. Fieldwork Note (on file with RDI).

<sup>131</sup> RLCL, Art. 27.

<sup>132</sup> This problem is deeply rooted in the PRC's patrilocal tradition prevailing in rural areas, in which a woman usually moves to her husband's village upon marriage or moves back to her maiden village upon divorce, leaving her land share behind in the village she moves out of.

<sup>133</sup> RLCL, Art. 27.

against “married-in” women and refuse their household registration as a villager.<sup>134</sup>

- (viii) **Absence of procedural safeguards.** Farmers’ right to notice, participation, and appeal in land expropriations is seriously lacking in both the legal regime and in practice. Although the law requires notifying the farmers of the planned expropriation, this notification is, in effect, a simple ultimatum demanding that farmers get ready for the taking within a predetermined timeframe. Moreover, the PRC’s expropriation laws authorize the state to enforce the expropriation plan and to take actual possession of the land even if disputes concerning compensation and resettlement are not resolved.<sup>135</sup> During 2002 and 2003 field research on land takings in 17 villages of three provinces, RDI researchers did not find a single farmer who had been consulted before and after the expropriation plans were made. None of the affected farmers in these 17 villages was allowed to participate in the expropriation process or appeal the land expropriation decisions.

## E. Recommended Reforms

Like every DMC, land expropriations in the PRC, while benefiting economic development of the country as a whole, negatively affect the livelihoods of people living in the project areas, resulting in loss of their movable and immovable assets, loss of their income generating sources, and disruption of their daily living. To prevent their livelihoods from being worse off because of land expropriations, the threshold requirement for a sound and rational land expropriation regime is to replace what they have lost. Clearly, to meet such a minimum requirement, APs must be provided with a comprehensive replacement package. It should include full compensation for lost assets at the assets’ replacement value and resettlement measures that address negative impacts on non-assets aspects of AP’s livelihoods. For the purpose of this paper, the recommendations below will focus on issues related to the replacement of AP’s lost assets.

### 1. Adopt Socially Sensible Solutions to Address Urban Woes

- (i) **Allow compensation for urban land use rights.** With rapid urban development, urban land use rights are becoming increasingly valuable. Conversely, failure to compensate for land use rights will certainly depress the value of the condemned structure, and thus fails to offer full replacement value of the AP’s losses. Specific operational rules should be made requiring the condemner to pay compensation for land use rights in addition to structures. Such rules should include, but not be limited to, adoption of fair market value standard, application of the comparable sales approach in valuation of urban land use rights since there is already an active land market in urban areas, and mechanism to enforce such compensation.
- (ii) **Gradually take back the expropriating power.** The PRC may be the only country in the world that delegates to private entities the government’s eminent domain power in determining, negotiating, and paying the compensation to owners of condemned properties. Such delegation was initially intended to create a forum for condemned property owners to negotiate with the condemner-developer at arms length for a compensation that best reflects the market value of the property because of the absence of government’s involvement. However, because of their goal of maximizing profit, these condemners-developers tend to minimize the compensation costs of property development in negotiations. Moreover, these condemners-developers have full access to market information and financial resources for determination of the property value while individual property owners do not. Such power imbalance is used to distort the valuation process to their favor. Lastly, these condemners-developers usually possess closer ties with the government agency in charge than average property owners do.<sup>136</sup>

<sup>134</sup> *China Country Report*, *supra* note 99 (72–73).

<sup>135</sup> The Implementing Regulations of the 1998 LML, Art. 25.

<sup>136</sup> Policy Research Center of the Construction Ministry. 2004. *The Latest Guide to Urban Structure Demolition*, 46.

They tend to label their condemnation as a government-sanctioned action and force individual property owners to accept the deal on the table. To adopt a socially sensible system for urban condemnation, such delegation must be restored to the government.

- (iii) **Allow compensation for undocumented or unregistered property.** Categorically declining compensation for undocumented property will disproportionately affect poor and low-income urban dwellers who were forced to self-build and inhabit these undocumented houses because of the government's inability to provide affordable housing. Moreover, many of these undocumented houses have existed openly without the government's objections for many years. Since the PRC does not have an adverse possession law, the government should, for public policy considerations, take into account the fact that condemnation of these properties without reasonable compensation will inevitably lead to tremendous hardships and social instability. Third, this socially insensible policy is clearly inconsistent with the prevailing international development policy that the lack of title should not be a bar to compensation. Urban condemnation laws should be improved to allow compensation for undocumented properties.

## 2. Introduce a Replacement Value Approach along with Minimum Compensation Standards

The principle for determining compensation for state expropriation for public purposes is that the costs of such expropriation benefiting the public as a whole should not be borne by private individuals, especially those who are socially or economically disadvantaged. Where land expropriation is unavoidable, compensation should be sufficient to replace the assets affected farmers have lost.

Designing a compensation standard for the PRC that is both socially sensible as well as politically acceptable is perhaps more challenging than for most developing countries. The reasons are: (i) there is virtually no rural land market and it is difficult, if not entirely impossible, to get relatively accurate market value of land through valuation; (ii) even if a fair market value can be derived, the shortage of farmland

per capita and increasing population pressure will certainly drive up the cost of replacement land, making it virtually impossible for affected farmers to purchase similar replacement land rights with the compensation equivalent to the fair market value of the lost land rights; and (iii) even if these replacement land rights are successfully purchased with the compensation, they will be for another 20 years or so from now.<sup>137</sup> If the land transaction were a cross-village transaction, the affected farmers–purchasers would almost certainly lose such purchased rights eventually.

However, the new central leadership's increasing awareness of the tremendous negative consequences of "urban-biased development at all cost" and refocusing on the improvement of farmers' livelihood appear to present a prospect—no matter how slim it is at this juncture—for developing a compensation standard that is leaning toward replacement of not only monetary value, but functional and utility values as well, of the land lost to expropriations. That is, replacement of most—if not all—possible benefits that the lost land conveys to affected farmers.

The threshold requirement under such replacement value approach is full and informed participation by affected farmers. While land expropriation is compulsory, the determination of the land's value should not be compulsory at all under the replacement value approach. Under this mechanism, determining compensation for loss of assets is essentially a four-step work. First, an independent assessment should be conducted to assess what benefits affected farmers would have to give up directly from the loss of land. Second, an independent survey on what affected farmers are willing to accept with respect to compensation. Third, based on the information from the assessment and survey, the government expropriating agency will initially determine the land's value and propose it to affected farmers and their collective landowners. Fourth, at this stage, a negotiation process begins where a willing buyer (the state) makes an offer to the collective landowner and the affected farmers who may or may not be willing to accept the government offer. The outcome of such non-compulsory interactions should be an agreement on compensation for land expropriation at or close to the replacement value of the land to be taken.

<sup>137</sup> The second round of rural land allocation for 30 years started in 1998 for most rural villages, and farmers' 30-year land rights are supposed to expire around 2028.

Existing Chinese expropriation laws adopt an approach of setting a numerical ceiling on multipliers of annual agricultural yields in determining compensation level, which is clearly at odds with the willing-to-accept concept. The first step for reforming the PRC's compensation standards is to abolish this ceiling approach as the Beijing municipal government does in replacing the ceiling approach with a "minimum protection price" approach. As the RETA Country (the PRC) Report suggests, on the other hand, using a multiplier of annual yield to determine compensation for the land to be taken has been widely implemented for many years, and it would be difficult—if not impossible—to completely take it out from the valuation process. To tailor the WTA concept to fit peculiar Chinese context, an alternative is to substantially increase the level of statutory multiplier standards based on initial social assessment (ISA) and valuation surveys and use these standards as minimum benchmarks rather than a maximum ceiling. This benchmark standard should be equal or similar to the replacement cost, subject to modification based on rebuttal evidence.

It is important to note that no matter what specific approach is to be taken, the overarching principle is the affected farmers' willingness to accept the deal. Government should take every action possible to ensure the farmers' awareness of the government's offer and the farmers' right to accept, decline, or make a counteroffer on the government's offer.

### 3. Apply "Land-for-Land" in Compliance with Existing Laws and Strictly Prohibit "Land Readjustments" as Compensation

Unlike most DMCs, the PRC's arable land per capita is quite small. After more than 20 years of household responsibility system, virtually all farmlands in the PRC have been allocated to farmers for 30 years, and there is little land available for compensating affected farmers that has not already been allocated to other farmers. To motivate farmers to make long-term investments in their land of limited amount and make their land more profitable through intensive farming and crop diversifications, the PRC has promulgated a series of laws and policies strictly restricting administrative land readjustments conducted by collective landowners and local officials.

Land readjustment, especially village-wide "big" readjustment, seriously undermines farmers' tenure security, which dampens the farmers' motivation to make long-term investments in land, depresses

the development of a rural land rights market, and obstructs the creation of land value. Because of these negative impacts, Chinese laws on land readjustment contain the following provisions:

- (i) A general principle of no readjustment during the farmers' 30-year contract period;
- (ii) Strict prohibition of village-wide ("big") land readjustments;
- (iii) Land readjustments between isolated households are permissible when (a) natural disasters that seriously damage farmers' land or other special circumstances occur, and (b) two thirds of villagers and township and county governments approve it; and
- (iv) Lawful land readjustment may be conducted on village-reserved flexible land, reclaimed land, and the land that has been voluntarily surrendered.<sup>138</sup>

Clearly, any "land-for-land" approach, if it involves a village-wide land readjustment to "compensate" affected farmers for loss of their landholdings, is illegal regardless of whether such readjustment meets procedural requirements. During numerous rounds of fieldwork in rural PRC, RDI researchers have never found a land readjustment after an expropriation that was a legally permissible small readjustment.<sup>139</sup> Therefore, extra caution should be taken to ensure that the source land is not made available through nonvoluntary land readjustments.

Alternatively, allocating to affected households pre-reserved land, escheat land, wasteland, reclaimed land because of land expropriation<sup>140</sup> and land voluntarily returned to collective landowners could be a lawful practice, and should be seriously considered when such land is available. For example, in Beijing and Guangdong, if collective landowners and affected farmers elect nonmonetary compensation, the developer of the expropriated land is required to set aside a portion of such land and allocate it to affected households for nonagricultural use (e.g., opening a shop, restaurant, or a rental premise), which is expected to generate higher income than agricultural use of the land.

Any "land-for-land" program should be scrutinized for its legality and the farmers' willingness to accept.

<sup>138</sup> RLCL, Arts. 27 and 28.

<sup>139</sup> Prosterman, et al., *supra* note 125.

<sup>140</sup> Chinese laws require the land expropriator to reclaim the same amount of nonarable land into arable land of the same quality. LML, Art. 31.

The primary legal standard for a lawful land-for-land program is such that the program does not lead to a land readjustment of existing landholdings of all villagers and thus result in weakened security of tenure for all farmers. Second, any “land-for-land” program—no matter how desirable as perceived by expropriating agency—should be provided to affected farmers along with an offer of monetary compensation reflecting the full replacement value.

#### 4. Designate a Fair Ratio of Allocation of Compensation between Collective Owners and Farmers

Existing laws require that the compensation for loss of land, the biggest component of compensation/resettlement package for land expropriation, be retained with collective landowner, and resettlement subsidy be paid to whoever is responsible for the affected farmers' resettlement.<sup>141</sup> Such a scheme is susceptible to abuses and misuses, as evidenced by a growing number of grievances and protests by farmers who have eventually received grossly inadequate compensation in cases of expropriations.

Under the RLCL, all farmers are entitled to 30-year land use rights that are free from land readjustments. The forthcoming Property Law further defines farmers' 30-year rights as property rights and not contract rights.<sup>142</sup> Depending on the discount rate used for future income streams, the initial economic value of farmers' 30-year land rights represents somewhere between 75% and 95% of the value of full, private ownership. Therefore, farm households who lose their 30-year land use rights as the result of a state expropriation should be entitled to somewhere in the range of 75–95% of the total compensation paid.

At present, once the compensation amount is determined, the government delivers the money to the collective entity (usually the villager committee). No government agency meaningfully monitors or supervises the distribution of the funds to the affected households. Some rules are needed to ensure that compensation is actually disbursed to affected households. The most desirable way of distributing compensation is to require the government agency in charge of land expropriation to make direct payments to the affected households based on the above ratio. Another possible way involves

the use of an escrow agent, in lieu of directly providing the compensation to the collective landowner. Thus, a state bank might be designated as the intermediary responsible for receiving the compensation from the state and for receiving all documentation from the collective landowner and affected land users. Upon completion of the transaction, the escrow agent would then distribute the compensation directly to affected households according to controlling agreements or laws.

#### 5. Adopt the Replacement Value Standard for Non-land Assets

Compensation standards for non-land assets are typically governed by provincial regulations. Based on our research, such provincial standards vary from jurisdiction to jurisdiction, but few of them apply the replacement value standard in determining the value of non-land assets. Hence the following recommendations:

- (i) **Structures.** It is important to note that adopting a uniform standard province-wide may not reflect the true replacement value of structure within the province. For example, location has much greater impact on the value of houses in suburban areas than those in non-suburban areas. Fortunately, recent measures on valuation of structures in Beijing and Shanghai offer a useful guidance for further reforms. In the valuation of structures, a two-layer compensation scheme should be adopted subject to affected farmers' election.
  - Replacement home or cash compensation subject to farmers' election; and
  - In case of cash compensation, full replacement cost along with moving expenses and transitional costs should be included. For structures used for business purposes, compensation should also include loss of reasonable and foreseeable profits as supported by appropriate evidence.
- (ii) **Crops.** For annual crops, the current standard (the value of the crop's season yield) adopted in most provinces is acceptable. However, none of the provincial standards for perennial crops reflects replacement value of the

<sup>141</sup> The Implementing Regulations of the LML, Art. 25.

<sup>142</sup> The Draft Property Law (for public comment), Chapter 11

crop. It is recommended that valuation of perennial crops should be based on the crop's income generating capacity for its remaining economic life.

## 6. Improve Resettlement Subsidy to Satisfy the Needs for Alleviation of Non-asset Impoverishment Risks

No matter how fair and just compensation is paid for loss of assets during land expropriations, such compensation alone is far from sufficiently restoring farmers' livelihoods. This paper is not supposed to provide a set of detailed recommendations to address non-asset impoverishment risks. However, some general advice may be offered for further reforms in this regard.

The Beijing Municipality has made the first move by offering affected farming labors a resettlement subsidy equivalent of 48–60 months of the city's minimum wage.<sup>143</sup> This is essentially a subsidy for involuntary unemployment, and this could be adopted as a benchmark standard for all provinces nationwide.

Further, experiments on provision of food subsidies, pension, medical insurance, and job training currently conducted in many provinces should be encouraged and may be expanded.

Finally, it must be kept in mind that it is the government's statutory duty not to lower AP's living standard in land expropriations, and therefore, the government should bear the costs for elimination or at least alleviation of impoverishment risks, rather than shifting such costs to collective landowners and affected farmers. Therefore, administrative land readjustments to achieve a temporary social peace in the community should not be considered as an option.

## 7. Protecting Women's Rights to Compensation

Women, especially those who married into or divorced from the village where land expropriation occurs, are often deprived of their entitlement to compensation. Such unequal treatment can be traced to both legal loopholes and traditional thinking. First, although the RLCL guarantees that a woman has a land share

wherever she resides, the Chinese law is silent on whether the farmers' land rights are partitionable, and therefore, entitlement to land compensation can be individualized. This legal vacuum puts women in a dilemma: forfeiting her claim or fighting for her right against her maiden family, with little legal guidance. Second, because local culture is often discriminatory of outsiders, it would be easy for collective landowners to summon villagers' support for rejecting "married-in" women's claim for land compensation. Third, distribution of land compensation is usually subject to discretion by collective landowners. If they were poorly educated about women's rights to land and to land compensation, they would be inclined not to allocate compensation to "married-in" women.

Women's land rights are complete only when such rights are legally recognizable, socially recognizable, and enforceable by external authorities.<sup>144</sup> To protect women's right to compensation effectively, the first step is to make their entitlement enforceable under the law. Since the RLCL explicitly requires that a married woman's land share be retained with her maiden family unless she gets a new land share in her husband's village, a possible legal reform could be making her land share identified to her and allow her to partition her land from the household landholdings.

Collective landowners are the key for recognition of women's right to land and to compensation when a land expropriation occurs. Before such rules are promulgated, collective landowners should be educated with respect to existing laws on protection of women's rights and interests in general. Under the no-readjustment law, a woman who moves out of her maiden village because of marriage or divorce will retain her land share in the village and thus should have a legitimate claim for land compensation unless she has received a land share in her new village.

## 8. Reduce the Number of Involuntary Acquisitions by Clearly Defining and Narrowing the term "Public Interests"

One of the primary institutional reasons for rampant land expropriations in recent years is the lack of a clear and precise legal definition of "public interests." This lack of clarity is further exacerbated by the fact that the state exerts legally sanctioned compulsory acquisition

<sup>143</sup> The 2005 minimum wage in Beijing is yuan (CNY)580 per month. See Beijing Labor and Social Security Bureau and Beijing Bureau of Personnel. 2005. Notice on Adjusting Minimum Wage for Beijing Municipality. A resettlement subsidy calculated based on the new Beijing rule can amount to CNY27,840–34,800 per labor, which is already greater than the statutory ceiling of 30 times of average annual output value for grain farming.

<sup>144</sup> Mehra, Rekha. 1995. Women, Land, and Sustainable Development. *International Center for Research on Women Working Paper* No. 1, 4.

power in almost all cases, regardless of the nature of the end use. It is common that the construction of a commercial gas station is classified as “public interests.” Furthermore, the delegation of the state’s compulsory expropriation power to the county government gives local governments substantial incentive to expropriate land for commercial purposes because it generates revenue by paying farmers little under the mantle of “public interests” and selling to private, commercial developers for substantial amounts of money.

The PRC should adopt new legislative or regulatory measures that clearly define and limit the scope of “public interests.” One effective option, based on international experience, is to adopt an inclusive list of specific permissible public purposes. Other purposes such as commercial, nonagricultural uses of farmland by the private sector should be achieved through voluntary negotiation between the affected landowners and users on the one hand, and the party wishing to acquire rights to the land on the other.

#### **9. Improve Land Takings Procedures to Guarantee Farmers’ Right to Notice, Right to Participation, and Right to Appeal**

The PRC’s legal regime and its implementation are seriously inadequate with respect to farmers’ right to notice of the intended expropriation, their right to participation in the takings process, and their right to appeal. The recent policy measures taken by the central government in Document No. 28 in addressing the problems of inadequate procedural safeguards are an important step forward. Therefore, the PRC Government should take at least the following two steps to achieve the objectives of the recent procedural improvements.

First, the National People’s Congress should consider enacting the new policy measures as law. Although promulgating new policies will help decrease violations by local government officials and collective cadres of farmers’ right to due process, these policy measures do not have strong binding force as laws.

For example, violation of policies at most results in administrative sanctions, which are usually milder than legal penalties. Moreover, policy guidelines typically cannot be applied in court when the affected farmers bring their case for a judicial hearing. Without improved legal rules, the judges have to review the case based on existing legislations that have proven inadequate in addressing affected farmers’ complaints about violations of their procedural rights.

Second, the government should develop specialized institutions to address farmers’ grievances concerning land expropriations. Legislating good laws and rules is merely the first step in the long march toward protecting the farmers’ right to due process. At present, farmers’ grievances cannot be addressed in court because of high legal fees and other artificial restraints. The PRC should consider developing a semi-judicial land tribunal system as in Hong Kong, China or Australia. Land tribunals offer several important advantages over courts of general jurisdiction as a means of resolving rural land disputes: (i) the mere existence of land tribunals sends a message to the community about the importance of rural land management and the need for the rule of law in rural areas; (ii) land tribunal judges are presumably land law experts, ensuring that land disputes are resolved consistently and predictably according to applicable laws; and (iii) land tribunals streamline the dispute resolution process, avoiding a backlog of cases that often exists in courts of general jurisdiction.

As an alternative, the PRC may consider creating a special land-law panel within the existing courts of general jurisdiction to meet the imminent needs of the affected farmers for judicial redress. Judges sitting in such panel should receive specialized training on land laws and policies and other aspects of land disputes including land valuation, land survey, and land economics.

Whether it is a land tribunal or a specialized panel, farmers must have reasonable access to the dispute resolution body. Procedural rules may be modified as well so that the proceedings may be more accessible and less formal.