

China's Greatest Leap Forward and the Ones Left Behind—The Twofold Problem Causing the Rise in Land Disputes: Land Reclamation and Environmental Degradation

Tat-Lin Lay Angus*

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* © 2008 Tat-Lin Lay Angus. J.D. 2007, Florida State University College of Law; B.A. 2003, University of Warwick, U.K. Special thanks to my husband, Shane, for his support, my family for their continuous encouragement and invaluable insight into Chinese culture and society, and an extended thank you to Professor Tahirih Lee for her guidance.

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I. INTRODUCTION

China is one of the fastest growing economies in the world.¹ Its GDP has been increasing at an astonishing rate of eight to ten percent every year over the past decade,² every ten days China builds a new power plant big enough to power whole cities in America,³ and even the United States, a superpower in itself, cannot keep up in trade with this so-called “developing” country.⁴ The benefits of rapid industrialization, foreign investment, and China’s shift into a market economy are obvious—but at what cost?⁵ Some recent headlines offer a clue:

*Violent Protests Broke Out as Authorities Acquired Land Illegally in South China*⁶

1. *Eight Percent Rise Makes Nation Second Fastest Growing Economy*, ECON. TIMES, Aug. 16 2006, at A26, available at <http://www1.economictimes.indiatimes.com/articleshow/1896346.cms> (stating that China is the fastest growing economy; India is second).

2. See The U.S.-China Bus. Council, P.R.C. Economic Statistics, <http://www.uschina.org/statistics/economy.html> (last visited Jan. 10, 2008) (stating that China’s GDP between 1997 to 2004 fluctuates at 9.3, 7.8, 8.4, 8.3, 9.1, 10, 10.1, 9.9%, respectively); see also Xie Fuzhan, Nat’l Bureau of Statistics P.R.C., The National Economy Maintained a Steady and Fast Growth in 2006 (Jan. 25, 2007), http://www.stats.gov.cn/english/newsandcomingevents/t20070125_402382300.htm (stating that China’s GDP grows 10.7% in 2006); China Quick Facts, <http://web.worldbank.org> (search “China Quick Facts”; then select “China—China Quick Facts” hyperlink) (last visited Mar. 28, 2008) (“Real GDP grew stronger than expected.”). “China saw a 6-fold increase in GDP from 1984 through 2004.” China Quick Facts, *supra*.

3. See George F. Will, *Inconvenient Kyoto Truths*, NEWSWEEK, Feb. 12, 2007, at 72, available at <http://www.msnbc.msn.com/id/16960409/site/newsweek/page/2/>. Every 10 days China fires up a coal-fueled generating plant big enough to power San Diego. China will construct 2200 new coal plants by 2030. *Id.*

4. See U.S. Dep’t of State, Study Documents Negative Impact of U.S. Trade Deficit with China (Jan. 11, 2005), <http://usinfo.state.gov/ei/Archive/2005/Jan/12-31762.html> (“U.S. trade deficit with China rose twenty-fold, from \$6.2 billion to \$124 billion. It is expected to increase another 20 percent in 2004, to \$150 billion.”).

5. The U.S.-China Bus. Council, Foreign Investments in China (Mar. 14, 2005), <http://www.uschina.org/statistics/2005foreigninvestment.html>.

6. Chinaview, *Violent Protests Broke Out as Authorities Acquired Land Illegally in South China* (Feb. 26, 2007), <http://www.chinaview.wordpress.com/2007/02/26/violent-protests-broke-out-as-authorities-acquired-land-illegally-in-south-china/>. On February 4, 2007, thousands of villagers protested against land acquisition and lack of compensation in Guangdong Province. *Id.* Over 100 acres of land was appropriated by local government to establish land for a gas company. *Id.* The gas company paid the party officials compensation to be disbursed to villagers but villagers did not receive any funds. *Id.* According to reports the local official who received the compensation had fled. *Id.* Thousands demonstrated outside the gas company and were attacked by unidentified men with metal clubs, butcher knives and guns. *Id.* Many injured were seniors, women and children. *Id.*

*Officials Held Hostage by
Farmers in China*⁷

*Police Open Fire on Rioting Farmers,
Fishermen in China*⁸

*Thousands of Chinese Villagers
Protest Factory Pollution*⁹

According to widely publicized accounts and national statistics on the rise of rural unrest, land-related disputes are now among the top rural grievances in China,¹⁰ and environmental protests have increased twenty-nine percent since the year 2000.¹¹ The twofold problem rests in unstable and unenforceable land rights. Even farmers lucky enough to secure land rights must then deal with the destruction of the land itself due to a lack of environmental regulation enforcement.

For at least the past half-century, the rural population has struggled with the notion of protecting its property, and its rights. During the Communist revolution, private property was abolished and then replaced with communal farming. This change led to one of the worst famines of the twentieth century. Since this tragedy, the Chinese government has been slowly and reluctantly reintroducing partial property rights with the

7. Edward Cody, *Officials Held Hostage By Farmers in China*, WASH. POST FOREIGN SERV., Nov. 10, 2006, at A26, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/09/AR2006110900874.html?nav+emailpage> (reporting that hundreds of enraged villagers surrounded a granary in Guangdong province's Sanzhou village to protest inadequate compensation for land seized to build the granary).

8. Edward Cody, *Police Open Fire on Rioting Farmers, Fishermen in China*, WASH. POST FOREIGN SERV., Dec. 8, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/08/AR2005120800821.html> (reporting that paramilitary police and anti-riot units opened fire with pistols and automatic rifles for two nights on rioting farmers and fishermen who attacked them with gasoline bombs and explosive charges in protest of land confiscation).

9. Jim Yardley, *Rural Chinese Riot as Police Try To Halt Pollution Protest*, N.Y. TIMES, Apr. 13, 2005, at A3, available at <http://www.nytimes.com/2005/04/13/international/asia/13end-riot.html?ex=1271044800&en=ab5109b63a9b9799&ei=5088&partner=rssnyt> ("Thousands of people rioted this week in a village in southeastern China, overturning police cars and driving away officers who had tried to stop elderly villagers protesting against pollution from nearby factories.").

10. See Zhu Keliang et al., *The Rural Question in China: Analysis and Recommendations Based on the Seventeen-Province Survey*, 38 N.Y.U.J. INT'L L. & POL. 761, 766 (2006) (citing Zhao Ling, *Rural Activism Seriously Changes: From Tax Disputes to Land Ownership*, SOUTHERN WEEKEND, Sept. 2, 2004, at 5); Nat'l Bureau of Statistics (P.R.C.), China Statistical Yearbook 2005, First Trial Administrative Cases Accepted and Settled by Courts (2004), <http://www.stats.gov.cn/tjsj/ndsj/2005/indexeh.htm> (demonstrating that cases related to land are second only to disputes relating to city construction in the number of accepted and settled cases).

11. CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA (CECC), 2006 ANNUAL REPORT, available at <http://www.cecc.gov/pages/annualRpt/annualRpt06/index.php> (last visited Mar. 28, 2008).

goal of promoting productivity,¹² and farmers themselves have demanded even more protection of property and the revival of ownership rights.¹³ Today, although the central government promises to protect private property, the controversial approval of the new draft property law in March 2007 illustrates that the government is, in reality, persistent in maintaining state and collective ownership of land for itself.¹⁴ It is this unrelenting grip on land and the entrustment of land ownership to lower level land management schemes, which claim to act on behalf of the state and village interests, but in fact promote neither, that has led to an increasing number of riots and land disputes.¹⁵ In particular, illegal land takings by local government officials under the veil of “public interest”¹⁶ and the inherent and unchecked power of the village leaders to readjust and recontract land without compensation¹⁷ has led not only to hostility and division among the collective unit, but also physical revolt due to frustration with the instability and unpredictability of land rights in the countryside.¹⁸

12. See PETER HO, INSTITUTIONS IN TRANSITION, LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA 5 (2005).

13. See *id.* at 6; see also Keliang et al. *supra* note 10, at 769-70 (“From the late 1970s, several regions of China started to experiment with tearing down the collective farms and giving individual farmers limited freedom to farm. . . . the introduction of the HRS unleashed the energy and resources of millions of rural families and jump-started China’s agricultural growth. . . . The HRS was an enormously successful reform, lifting the living standards of hundreds of millions of rural people, and was the driving force behind the single greatest poverty-reduction achievement worldwide of the past three decades.”); Kari Madrene Larson, *A Lesson in Ingenuity: Chinese Farmers, the State, and the Reclamation of Farmland for Most Any Use*, 7 PAC. RIM L. & POL’Y J. 831, 838-39 (1998) (“While the official government policy prior to 1983 clearly favored the preservation of the collective production system, independent farmers initiated the *baogan daohu* system in various regions of the country. Farmers secretly contracted with local officials in order to form individual plots of land. Though such actions were forbidden by the central government, the benefits of independent compared to collective farming were so attractive that farmers were willing to disobey the government.”).

14. Chinaview, Explanation on China’s Draft Property Law 1 (Mar. 8, 2007), http://news.xinhuanet.com/english/2007-03/08/content_5816944_1.htm.

15. See Kevin O’Brien, *Implementing Political Reform in China’s Villages*, 32 AUSTL. J. CHINESE AFFAIRS 35, 56-57 (1994) (stating that some village cadres are willing to sabotage popular participation to protect themselves from unruly villagers, while others feel they are populist cadres willing to defy state goals and duties to strengthen their own local standing and build a village following).

16. See J.D. Ping Li, *Rural Land Tenure Reforms in China: Issues, Regulations and Prospects for Additional Reform*, in LAND REFORM: LAND SETTLEMENTS AND COLLECTIVES 7 (P. Groppo ed., 2003), available at <http://www.fao.org/docrep/006/y5026e/y5026e06.htm> (explaining that article 65 of the 1998 Land Administration Law allows takings for certain approved uses in the name of “public interest,” but because this is not specifically spelled out, the state has virtually unrestricted power to expropriate land).

17. See Keliang et al., *supra* note 10.

18. See *supra* notes 6-8 and accompanying text.

To make matters worse, those who are lucky enough to have access to farmland face the escalating problem of pollution. As a result of China's blind rush towards rapid industrialization at the cost of environmental protection, China's environment is now one of the biggest concerns in the global community,¹⁹ and China is considered one of the largest contributors to global warming.²⁰ On a macro level, China's courts and local State Environmental Protection Agency (SEPA) offices are flooded with complaints from women alleging that toxic pollutants caused birth defects in children.²¹ Studies have discovered increased cancer mortality rates in heavily polluted rural areas,²² and agricultural production is threatened by polluted water and acid rain.²³ As the central government passes reforms intended to suppress environmental violations from above without providing sufficient supervision at the local level, implementation of idealistic environmental regulations has been replaced with lax enforcement,²⁴ and even the concealment of

19. Stefan Lovgren, *China's Boom Is Bust for Global Environment, Study Warns*, NAT'L GEO. NEWS, May 16, 2005, http://news.nationalgeographic.com/news/2005/05/0516_050516_chinaeco_2.html ("Public health, social stability, and continued economic growth are all at risk as China continues to pollute its way to prosperity." (quoting Elizabeth Economy, a member of the Council on Foreign Relations)).

20. Michael McCarthy, *China Crisis: Threat to the Global Environment*, THE INDEPENDENT, Oct. 19, 2005, available at <http://www.news.independent.co.uk/world/asia/article/320565.ece> ("Because of their increasing reliance on coal-fired power stations to provide their energy, the Chinese are firmly on course to overtake the Americans as the world's biggest emitters of greenhouse gases, and thus become the biggest contributors to global warming and the destabilisation of the climate.").

21. *Abortion Woman Stops Factory Pollution*, CHINA DAILY, June 18, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/18/content_452560.htm (reporting that a Shanghai woman sued a factory for emitting poisonous gases which she alleged caused chromosomal abnormalities in her unborn child).

22. E.g., Adam Briggs, *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO. INT'L ENVTL. L. REV. 305, 315 (2006).

23. U.S. EMBASSY-BEIJING, THE COST OF ENVIRONMENTAL DEGRADATION IN CHINA, <http://www.usembassy-china.org.cn/sandt/CostofPollution-web.html> (last visited Jan. 12, 2008). The Chongqing Environmental Protection Bureau found that nearly a quarter of the municipality vegetable crop was damaged by acid rain in 1993 and estimated damages to all crops and forests there totaled RMB 415 million (US\$65 million); acid rain falls on about a third of China territory. *Id.*

24. See Benjamin van Rooij, *Implementing Chinese Environmental Law Through Enforcement*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 149, 151 (J. Chen et al. eds., 2002) ("After the basic framework of environmental law had been set up, it became apparent that such a system could not create the desired effect without effective implementation, which was recognized as being difficult. For example, in 1994 the State Council Environmental Protection Commission declared that: 'Laws are not complied with, enforcement is weak, and offences are not being prosecuted . . . (Enforcement should become) the core of environmental protection work.'").

environmental disasters in the name of prosperity and local protectionism.²⁵

Most of the works discussing the plight of rural residents in China tend to only focus on either insecure land rights or inadequate environmental protection. There are few works that address the need to tackle both of these issues simultaneously, in order to not only ensure that farmers have rights to land, but also that the land they have is actually fit for farming. Given that the government is adamant in promoting its “scientific approach to development”—a national philosophy involving the balancing of economic development and environmental sustainability—it only makes sense to tackle both land rights and the environmental protection of land at the same time.²⁶ In effect, the failure of one necessarily undermines the effectiveness of the other, and thus the scientific approach as a whole.

In China’s current situation, the failure of both secure land rights and environmental protection is intertwined. The lack of individual land rights provides unscrupulous officials with a loophole to transfer property to more productive and profitable enterprises, and such enterprises lack incentives to comply with environmental regulations. In turn, environmental degradation caused by lax enforcement is undermining the goals of the recent land reforms, which were aimed at appeasing rising rural unrest by securing investments and promoting productivity. First, the lack of individual land rights is perpetuated by the central government’s persistence in placing land ownership and management powers in the hands of the village collective. However, it is this local decision-making body that takes land from the individual farmer and contracts it to the new enterprise despite its environmental risks. Given that the enterprise and village collective both operate to promote low cost production and high profits, the enterprise has little incentive to comply with expensive environmental regulations, and the collective has little incentive to enforce them. If individuals were given more secure and enforceable rights, this would reduce the power of the village collective to recontract land at will. Instead, power would be in the hands of the farmers, and any enterprise wishing to lease land would become answerable to the people that it will ultimately affect. This

25. Jim Yardley, *Rules Ignored, Sludge Sinks China Village*, N.Y. TIMES, Sept. 4, 2006, at A6, available at <http://www.nytimes.com/2006/09/04/world/asia/04pollution.html>.

26. Lin Giu, Chinese Embassy U.K., *China Improves Enforcement of Environmental Laws* (Sept. 29, 2005), <http://www.chinese-embassy.org.uk/eng/zt/Features/t214565.htm>; *The New Five Year Plan* (Nov. 9, 2005), <http://www.china.org.cn/english/2005/nov/148177.htm>.

accountability is more likely to induce compliance with environmental regulations.

In the same vein, the lack of environmental enforcement is also undermining the goals of recent land reforms issued by the central government.²⁷ Over the past decade, the Chinese government has adopted numerous laws that were aimed at securing long-term land leases to promote investment and productivity and to subdue the tensions in the rural countryside.²⁸ However, farmers continue to riot today because environmental degradation is harming their land and living conditions. This degradation renders any investment in the land for production meaningless. Thus, because a farmer's life is tied to the land, aspirational hopes to pacify rural unrest become undermined by the reality of unenforced laws when both land rights and land protection goals are not successfully implemented.

While many scholars and advocates have offered solutions that have not only been adopted by the Chinese government, but have also led to some progressive results, there are still flaws in the infrastructure that prohibit these reforms from being fully enforced and complied with.²⁹ This Article will discuss some of the suggestions put forward by members of the Rural Development Institute (RDI)³⁰—which has been instrumental in advising the Chinese government on the existing reforms in China. This Article will also discuss recent reforms initiated by SEPA and how these reforms, while necessary, are still missing meaningful implementation at the grass-roots level. In particular, this Article will address the futility of China's aspirational goal of establishing a nationwide "scientific approach to development" imposed from above, while it ignores the power of grass-roots decision makers to subvert such ideals with interpretations and determinations of their own, for the interests of their own locality.³¹ Furthermore, this Article will discuss the

27. Yang Lei, Facts and Figures: China's Drive To Build a New Socialist Countryside (Mar. 5, 2006), http://english.gov.cn/2006-03/05/content_218725.htm.

28. Zhu Keliang, Rural Dev. Inst., Our Work: Current Programs China, http://www.vdiland.org/ourwork/ourwork_china.html (last visited Mar. 28, 2008).

29. *Id.* (stating that the recommendations of RDI have resulted in the adoption of thirty-year lease rights, the Land Management Law, and the Rural Land Contracting Law).

30. The Rural Development Institute (RDI) was founded by Roy Prosterman, professor of law at the University of Washington and world expert on land reform. RDI has worked with China's central policy-makers on rural land tenure issues since 1987, and is the principal foreign advisor in a current reform under which eighty-five million families have received secure, thirty-year land-use rights. *Id.* Zhu Keliang and Li Ping are staff attorneys for the Rural Development Institute. *Id.*

31. CHIH-JOU JAY CHEN, TRANSFORMING RURAL CHINA, HOW LOCAL INSTITUTIONS SHAPE PROPERTY RIGHTS IN CHINA 180 (2004) ("It is the variation of social and political institutions in each locality that dictates variations in economic organizations and property rights relations.")

weaknesses in entrusting the implementation of these schemes solely with the local governments and lower government entities. Instead, this Article suggests a three-pronged approach to removing the political and economic incentives, and the mask of officialdom, behind which corrupt local decision makers (local officials, village heads, and judges) are able to work. Specifically, this approach advocates transparency in both laws and procedures by using public participation and pressure to narrow the scope of discretion of grass-roots decision makers. Also, attempts to make local government and courts independent from each other and from private entities must be pursued by discouraging the use of *guanxi* and removing financial dependence and temptations. Finally, specific adjustments to existing schemes must be made to ensure more successful implementation, and ultimately the prevention of potential violations.

Given that in 2006 China saw approximately 23,000 land-related riots—which calculates to about 2.6 riots every hour—the Chinese government is facing increasing pressure to appease the rural population before the farmers rise and revolt as they did a half-century ago.³² The suggestions in this Article are not implausible or unlikely, given the focus of recent reforms and public declarations on eradicating corruption in the government and courts,³³ and SEPA's recent attempts to expand their presence in local regions.³⁴ However, the recommendations that result in relinquishing or reducing the powers of the village collective to readjust land are less likely to be achieved in the immediate future. Rather, recent reforms have been aimed at ameliorating the standard of living of the rural population, instead of restricting the scope of land reclamation. The approval of the new property law essentially reinforced the powers of the collective and the exclusion of the rural population from receiving meaningful property rights.³⁵ In light of these recent changes, it is clear

32. *Caught Between Right and Left, Town and Country*, THE ECONOMIST, Mar. 8, 2007, available at http://www.economist.com/background/displaystory.cfm?story_id=8815195 (“In the countryside and in the cities, property and land disputes have become a leading cause of social unrest. A senior official said in January that the number of ‘mass incidents’ in China had fallen to about 23,000 last year from 26,000 in 2005. But such figures are ill-defined and subject to political distortion.”).

33. *100,000 Officials Punished in 2006*, CHINA DAILY, Feb. 14, 2007, http://www.china-daily.com.cn/china/2007-02114/content_809007.htm (“[T]he Chinese government has waged an ongoing battle against corruption, a problem that President Hu Jintao has warned is a threat to the party’s legitimacy.”).

34. Chinese Embassy U.S., *China To Install 3 More Regional Environment Centers* (May 5, 2006), <http://www.china-embassy.org/eng/gyzg/t250617.htm>.

35. While controversial in creating private property rights that in practice only benefit urban residents, in reality it does little to help the rural population and even reaffirms the government’s intent to exclude farmers on collectively owned land from certain property rights enjoyed by urban residents on state owned land.

that the central government intends to continue limiting rural land rights. However, these limits need to change if the government wishes to end the long run of rural unrest.

To highlight the importance and urgency of the problems facing the rural population, Part I of this Article will discuss: the history and framework in which these local decision makers work; the political, financial, and personal pressures the local decision makers face in the property distribution context; and the potential impact of China's new property law, approved in March 2007. Part II will discuss the pollution problem faced by the farmers who are actually able to hold on to land, the limitations on effective implementation, and the lack of environmental enforcement. Part III will suggest solutions through the three-pronged approach that may offer China long-term stability in the protection of land through the enforcement of laws, as opposed to short-term suppression of violations. Finally, this Article will conclude with some observations on the future of Chinese farmers and their cameo role in China's greatest leap forward.

II. LAND RECLAMATION

It has long been recognized that there is, and has been, a widening gap between the rural and urban lives of Chinese citizens in terms of individual income, access to health insurance, and education.³⁶ In 2006, the National People's Congress (NPC) announced its eleventh five-year plan focusing its attentions on rural reform. The NPC's plan called for the abolition of the agricultural tax to increase rural income, free public school education for rural children, and even new rural insurance to subsidize medical care for the 800 million farmers who cannot afford to see a doctor.³⁷ Despite such valiant attempts to raise the standard of living of the country's most destitute and ignored people—and the

36. See *Facts and Figures: Widening Gap Between China's Urban, Rural Areas*, PEOPLE'S DAILY ONLINE, Mar. 3, 2006, http://english.people.com.cn/200603/03/eng20060303_247425.html ("The average income of urban residents was 2.57 times that of rural residents in 1978, but the gap expanded to 3.22 times in 2005. In particular, the gap has widened markedly since 1997 The ratio of lecturer-level teachers in rural primary schools was 35.9 percent in 2004, 8.9 percentage points lower than that in urban primary schools Eighty percent of medical resources are concentrated in cities. Only 22.5 percent of rural people are covered by rural cooperative medical care system."); *Boost Farmers' Incomes*, CHINA DAILY, July, 10, 2006, http://www.chinadaily.com.cn/bizchina/2006-07/10/content_637310.htm ("[T]he latest income growth figure shows the trend of a widening rural-urban wealth gap has not been effectively stopped, not to mention being reversed. China's urban residents make on average three times what their rural cousins earn, and their income increased by 9.6 per cent last year.").

37. Lei, *supra* note 27.

apparent successes, according to national reports—land riots continue to plague the countryside.³⁸

For many years, scholars believed the problem lay in unclear and undefined property rights, which lead to insecure land tenure and ultimately left farmers vulnerable to the village collective and local officials.³⁹ However, the Rural Land Contracting Law (RLCL) was then adopted in 2002.⁴⁰ The RLCL defined rural property rights, the responsibilities of the collective and the individual households, and a system for dispute resolution for the first time.⁴¹ Nonetheless, land riots are still prevalent to this day, which suggests that the problem may be more than a mere lack of definition. Rather, as discussed below, the issues fueling rural unrest in China are much more deeply rooted. In fact, the issues are embedded in the structure of the rural land management system, which lacks accountability and transparency. This makes the current land management system fertile ground for corrupt practices, and the lack of competence and independence makes the implementation of any reform almost impossible.

A recent incident helps illustrate the discontent and frustration resulting from the above inadequacies. In November 2006, in Sanzhou village, Guangdong province, hundreds of enraged farmers held local officials and investors hostage inside a granary for nearly twenty-four hours.⁴² The farmers claimed the granary had been built on land seized by local officials, who then sold the land for development.⁴³ While compensation for the land had been paid to the village collective, the farmers believed that “[t]he amount investors paid for the land was significantly higher than the compensation farmers actually received,”⁴⁴

38. See *Chinese Farmers Better Off By Average 133 Yuan*, CHINA DAILY, Dec. 28, 2006, http://www.chinadaily.com.cn/bizchina/2006-12/28/content_769871.htm (stating that China's 900 million farmers were an average 133 yuan (17 U.S. dollars) better off this year after the government scrapped the agricultural tax); *Chinese Farmers' Income Grows 11.4% in First Nine Months*, CHINA DAILY, Oct. 20, 2006, http://www.chinadaily.com.cn/bizchina/2006-10/20/content_712876.htm (“According to the Ministry of Agriculture, the abolition of the agricultural tax on January 1 this year has reduced farmers’ per capita annual tax burden by 140 yuan (18 dollars) compared with 1999.”).

39. See, e.g., Larson, *supra* note 13, at 831; Ping Li, *supra* note 16, at 9.

40. Rural Land Contracting Law (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* http://english.gov.cn/laws/2005-10/09/content_75300.htm.

41. *Id.* Rural Land Contracting Law is the popular name and will be used throughout the remainder of the Article.

42. Cody, *supra* note 7.

43. *Id.*

44. *Id.*

and suspected that corrupt officials pocketed part of the difference.⁴⁵ Eventually, riot police were able to force their way into the granary to release the hostages.⁴⁶ However, when the officials were asked about the allegations of corruption, they responded by directing the inquiry to the provincial propaganda department, which in turn claimed to know nothing about it.⁴⁷ With that, the incident went unresolved, and the investigation dead-ended, leaving undercompensated farmers without redress.⁴⁸

A. *A Brief History of Land Ownership in China*

Historically, Chinese farmers have been more than familiar with the notion of shifting property rights. Over the past sixty years, China's rural economy has flip-flopped from private ownership to communal collectivization, and now to a state of limbo of unclear and unstable rights due to the government's intent on maintaining parts of the collective approach, but also recognizing the economy's need for the revival of private autonomy.⁴⁹

Prior to the 1949 Communist revolution, Chinese farmers worked on independent farms owned by wealthy landlords in a privatized property system.⁵⁰ However, with the Communist revolution came land confiscation and collectivization, bound within the ideals of the Great Leap Forward.⁵¹ Land was taken from the rich and redistributed to the poor—the farmers who actually worked the property⁵²—and private property was replaced with the “*hukou*” (resident permit) system of communal production.⁵³ Rural restructuring under this system involved collectivizing various single farms into larger communes.⁵⁴ Farmers' rights to land were severed, and they were forbidden to buy grain from other farms, effectively forcing them to remain and work the land they were given.⁵⁵ Tragically, this crusade did not result in any great leaps

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See generally* Chinaview, *supra* note 14 (explaining that the draft property law reiterates that the state and the collective are the sole land owners, but private individuals have limited rights to land use).

50. *See* Ho, *supra* note 12, at 5-6.

51. *Id.* at 6.

52. *Id.*

53. Larson, *supra* note 13, at 831.

54. *Id.* at 835.

55. *Id.* at 831.

forward, but instead China fell several steps backward.⁵⁶ Unable to purchase grain from more productive collectives, less productive farmers were forced into starvation, with deaths estimated at fifteen to forty million.⁵⁷

Thus, during the 1970s, China saw various attempts to stabilize the declining economy. Initially, the government broke down the commune system into smaller collectives and allowed small family plots to be farmed for personal use once again.⁵⁸ Then, as the economy began to stabilize,⁵⁹ farmers took it upon themselves to make clandestine arrangements with local officials to contract individual plots of land, despite individual ownership still being illegal.⁶⁰ Even though the government was determined to hold rural farmers to the collective system, it recognized the immediate increase in production with individual plots. The state adopted this semi-private system legally in 1980⁶¹ to induce more production in the countryside, and ultimately to limit the individual's control over land.⁶² Under this "*baogan daohu*" (household responsibility) system, the village collective had the authority to contract land to individuals based on the individual household's family size (on an equal per capita basis) for a specific number of years.⁶³ Although the land was still owned by the collective, the government finally gave back to individual farmers the autonomy to make land use decisions.⁶⁴

56. HO, *supra* note 12, at 6.

57. Larson, *supra* note 13, at 835.

58. *Id.* at 834.

59. HO, *supra* note 12, at 6 (stating that the Household Responsibility System produced 400 million tons of grain in 1984).

60. Larson, *supra* note 13, at 838-39.

61. HO, *supra* note 12, at 6.

62. *Id.* ("Freedom in the private use of land shifted with the political winds Depending on the region, farming was more or less privatized, with managerial responsibilities vested in the household These privileges were rescinded twice (and subsequently reinstalled) during the leftist extremism of the Great Leap Forward. . . ."); *see also* Keliang et al., *supra* note 10, at 769.

63. HO, *supra* note 12, at 6.

64. *See id.* at 7 ("[O]f the three means of production, only capital and labor have been privatized, while land ownership is still firmly in the hands of the state and the collective."); XIAN FA [Constitution] art. 8 (1982) (P.R.C.), *translated in* http://english.gov.cn/2005-08/05/content_20813.htm ("Rural people's communes, agricultural producers cooperatives and other forms of cooperative economy, such as producers', supply and marketing, credit and consumers cooperatives, belong to the sector of socialist economy under collective ownership by the working people. Working people who are members of rural economic collectives have the right, within the limits prescribed by law, to farm plots of cropland and hilly land allotted for their private use, engage in household sideline production and raise privately owned livestock.").

Despite the benefits of the *baogan daohu* system, the system was fundamentally flawed; the rights it created could not, in practice, be enforced. First, these individual rights ultimately conflicted with the village collective's right to readjust land on a periodic basis, or whenever it deemed necessary.⁶⁵ And second, such rights were rarely written down or formally recorded,⁶⁶ rendering the system weak due to its informal nature, and, thus, unenforceable.⁶⁷

B. Problems with Deciphering Rights Under the Constitution and Land Laws

In an attempt to protect long-term property rights, and thus ensure a more stable economy, the Rural Land Contracting Law (RLCL) was adopted in 2002. Initially, the law was considered a breakthrough.⁶⁸ Among other things, this law required all contracts to be in writing,⁶⁹ prevented readjustments to land by the collective during the term of the contract,⁷⁰ specified a comprehensive means of dispute resolution, and even allowed individuals to sue in court before first exhausting administrative review.⁷¹ However, rather than mass implementation and enforcement of this law, even today the breakthrough provisions remain on paper rather than in practice.⁷² For instance, despite the legal requirement that contracts be in writing, three years after its adoption, the issuing agencies and rural farmers had not embraced this requirement and it is still rare for rural farmers to possess written contracts and land-use certificates.⁷³ According to a survey based on seventeen provinces in China, in 2005, while 42.8% of those interviewed possessed actual

65. HO, *supra* note 12, at 45-59.

66. See Keliang et al., *supra* note 10, at 785 (stating that at least half the land transfers in rural China were verbal transfers among relatives of the same village); see also HO, *supra* note 12, at 47 (stating that even village committees find it difficult to enforce their ownership rights against the state, as customary rights are unwritten).

67. HO, *supra* note 12, at 68 (“[T]he unwritten character of customary rights make[s] [ownership rights] difficult to authenticate. Laying the burden of proof with the collective can lead to the abuse of state power, as it is a strong legal instrument with which customary claims can be brushed aside.”).

68. See Keliang, *supra* note 28.

69. Rural Land Contracting Law, art. 12 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), translated in http://english.gov.cn/laws/2005-10/09/content_75300.htm.

70. *Id.* art. 26.

71. *Id.* art. 26, ch. IV (Settlement of Disputes and Legal Responsibilities).

72. See Keliang et al., *supra* note 10.

73. Rural Land Contracting Law, arts. 12, 37 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), translated in http://english.gov.cn/laws/2005-10/09/content_75300.htm.

written contracts, the majority were unilateral documents with universal terms requiring no signature from the farmer.⁷⁴ In fact, only 10.4% of farmers possessed actual “compliance” documents containing the signature of the lessee indicating that the farmer actually agreed to the terms.⁷⁵ In other instances, the lack of involvement of the farmer led to a sense of apathy towards the meaning of a contract. Some farmers who had a contract were unable to locate it when asked to present it,⁷⁶ and others held no value to such documents and were willing to burn them when local officials violated the contract terms.⁷⁷ The situation is made worse when, despite contractually secured rights, the state and the collective still have the inherent right to reclaim land under both the Constitution of the People’s Republic of China and land laws.

According to the Constitution, “[t]he State may, in the public interest, requisition land for its use in accordance with law.”⁷⁸ However, because no explanation of what constitutes “public interest” was ever offered, this provision essentially operates as an authorization of land expropriation for all purposes, including purely commercial objectives.⁷⁹

In addition, the “in accordance with law” language also inhibits a farmer’s ability to contest a taking. As long as “public interest” is not defined and the courts are unable to interpret the law, local officials who wish to reclaim land have the authority and discretion to determine that their desired purpose is one promoting “public interest.”⁸⁰ Thus, such action meets the “in accordance with law” language. After all, plaintiffs that are unable to define what constitutes “public interest,” will find it very difficult to prove that a taking was *not* in the “public interest.”

Furthermore, even when takings are deemed to be proper and compensation due, the process of dividing the compensation is inherently unfair to the farmer, leaving him with barely nominal compensation, and no real forum to redress his loss. Under article 47 of the Land Administration Law, compensation for requisitioned land must include compensation for land, the young crops on the land, and resettlement

74. Keliang et al., *supra* note 10, at 788.

75. *Id.* at 789.

76. Larson, *supra* note 13, at 842.

77. *Id.*

78. XIAN FA [Constitution] art. 10 (1982) (P.R.C.) *translated in* http://english.gov.cn/2005-08/05/content_20813.htm.

79. Keliang et al., *supra* note 10, at 780.

80. Ping Li, *supra* note 16, at 7 (“[B]ecause the law does not specifically spell out such ‘public interests,’ the state has virtually unrestricted power to expropriate land.”).

subsidies.⁸¹ However, the law only requires the government to compensate the farmer for standing crops.⁸² The village collectives, on the other hand, have the authority to divide the remaining majority share as they see fit, which often results in the collective receiving the largest category of compensation for loss of land, as well as compensation for resettlement.⁸³

In addition to formal state takings for which farmers are theoretically compensated, there is a more sinister form of land expropriation that often involves no compensation and is legitimate according to Chinese land laws. Under the Constitution and the Land Administration Law, land that is not owned by the state is owned by the collectives, never the individual farmers.⁸⁴ Therefore, the collectives have the power to contract with individuals and to distribute land according to family size. The collectives can also maintain control of land ownership at all times, until the state exercises a taking under the Constitution. This unbridled control over land management and resources has led to two main abuses of power: land recontracting, and readjustments.⁸⁵

Recontracting is an administrative action whereby village officials take back some or all of the land granted to certain individual farmers, and then lease or assign the land for agricultural use to a nonvillager.⁸⁶ The collective can charge the nonvillager a rent collection fee, which it cannot normally charge to village households.⁸⁷ Farmers who have had their land taken away, therefore, are not entitled to any compensation as this is a right of the collective that owns the land. Instead, the affected farmer will either be reallocated a smaller piece of land in the same locale as a result of partial reclamation, or a whole new parcel of land in a different location.⁸⁸ If the farmer is relocated to a new parcel of land, surrounding farmer households will have their land reduced in size and each piece of land taken from other households will form the allotment

81. Land Administration Law, art. 47 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999) (P.R.C.), *translated in* <http://english.people.com.cn/data/laws/laws.php>.

82. Ping Li, *supra* note 16, at 7.

83. Keliang et al., *supra* note 10, at 781.

84. XIAN FA [Constitution] art. 9 (1982) (P.R.C.) *translated in* http://english.gov.cn/2005-08/05/content_20813.htm; Land Administration Law, art. 2 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999) (P.R.C.), *translated in* <http://english.people.com.cn/data/laws/laws.php>.

85. *See generally* Ping Li, *supra* note 16; Keliang, *supra* note 28; Keliang et al., *supra* note 10, at 781.

86. Keliang et al., *supra* note 10, at 775-76.

87. *Id.* at 776.

88. *See id.* at 770.

given to the original land-losing farmer.⁸⁹ This redistribution of land tenure is known as readjustment.⁹⁰ Decisions to recontract and readjust are in the full discretion of the village collective and are often made without consent or knowledge of the affected farmers.⁹¹

While the practice of recontracting has since been strictly prohibited under the RLCL, the more pressing issue of readjustments. During the 1980-90s, readjustments became the single biggest threat to secure land tenure.⁹² Although it was publicly condemned by the government, has not been prohibited by law.⁹³ Under the RLCL, the law states that the collective cannot take back land under article 26, but article 27 goes on to provide for situations which do allow for land readjustments.⁹⁴ However, rather than clearly defined examples, this provision creates yet another ambiguous loophole for local decision makers to manipulate. According to article 27:

Where during the term of contract, such special circumstances as natural calamities that seriously damaged the contracted land make it necessary to properly readjust the arable land or grasslands contracted by individual peasant households, the matter shall be subject to consent by not less than two-thirds of the members of the villagers assembly of the collective economic organization concerned or of the villagers' representatives and shall be reported for approval to the competent administrative departments for agriculture, etc. under the relevant township (town) people's government and the people's government at the county level.⁹⁵

The problem with this clause is that "special circumstances" is not defined, and so in effect, it is giving the village collective the discretion, once again, to decide what constitutes a "special circumstance." For example, if a nonvillage enterprise wishes to build on the collective's land, the enterprise may approach the village assembly with a proposal. No land may be requisitioned unless a natural disaster occurs or a taking is authorized in the name of public interest.⁹⁶ Therefore, any taking will be subject to government scrutiny, but the village assembly may avoid government review by classifying the action as a "readjustment" as

89. *See id.*

90. *See id.*

91. *Id.*

92. Ping Li, *supra* note 16, at 2.

93. *See id.* (explaining that 1997 Document 16 explicitly prohibits extensive readjustments and promotes local adoption of a no-readjustment policy).

94. Rural Land Contracting Law, arts. 26-27 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* http://english.gov.cn/laws/2005-10/09/content_75300.htm.

95. *Id.* art. 27.

96. *Id.*

opposed to a “taking.” A new and profitable economic enterprise could theoretically be a “special circumstance” because the role of the assembly is to promote the economic interests of the village,⁹⁷ and local officials’ interests are often aligned with local protectionism.⁹⁸ Under the language of the RLCL, the collective may legitimately determine that such an economic opportunity qualifies as a “special circumstance” justifying land readjustment. Here, the requisition is approval from two-thirds of like-minded assembly members and presumed to be in compliance with the words of the law.⁹⁹ A scenario such as this is not implausible. Statistics show that in 2001, while only six cases of land readjustments were caused by natural disasters, 423 incidents of illegal land readjustments were reported.¹⁰⁰ Observers such as J.D. Ping Li, staff attorney for RDI and advisor to the Chinese government on land use issues, also anticipate such abuse.¹⁰¹ To prevent potential abuse, Ping Li suggests that any model for implementing the RLCL must interpret the term “special circumstances” in line with the legislative intent of discouraging land readjustments of any kind.¹⁰²

Ping Li’s advice has not been taken, as seen in the approval of the new draft property law in March 2007.¹⁰³ Although this draft was highly criticized and opposed by left wing factions of the government for creating private property rights in contradiction to Communist ideals, the promise of meaningful and secure property rights for the rural population is highly overstated. Not only does the law reiterate the restricted property rights of rural residents in contrast to urban residents, it also reaffirms that no individual has a private property right to the land itself, by firmly placing ownership in the hands of the state and collectives.

According to China’s official explanation of the draft property law, “[i]ndividual persons shall be entitled to enjoy ownership of such immovables and movables as their lawful incomes, houses, articles for daily use, means of production and raw materials.”¹⁰⁴ For urban residents, condominium rights give individual persons rights to the above, plus

97. O’Brien, *supra* note 15, at 39.

98. *Id.* at 55.

99. Rural Land Contracting Law, art. 27 (promulgated by the Standing Comm. of the Nat’l People’s Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* http://english.gov.cn/laws/2005-10/09/content_75300.htm.

100. See Keliang et al., *supra* note 10, at 794.

101. Ping Li, *supra* note 16, at 8.

102. *Id.*

103. Chinaview, *supra* note 14.

104. *Id.* at 8.

ownership over the special parts within a building, such as the residential units and the units for business purposes, and enjoy the right of sharing and jointly managing the common parts other than the special parts, such as the public facilities like the lifts and public places like the greens . . . garages and parking lots, the functions of the owners' committee and the relations between the owners and the property services.¹⁰⁵

On its face, this provision may indeed appear progressive. However, when compared to the provision covering ownership rights for rural residents, rural residents are clearly placed at a disadvantage regarding their rights to private property. Specifically, the draft rejects the possibility of farmers having equal rights as urban residents, such as the right to transfer, mortgage, or have the house-site-use right. To justify this unequal treatment, the government stated:

In view of the fact that at present, the social security system in the rural areas of our country has not yet been established in an all-round way and that the right to land contractual management and the house-site-use right provide the farmers' lifelong foundation, the conditions for lifting such restrictions are not yet ripe, when considering from the perspective of the country as a whole.¹⁰⁶

The government, therefore, appears to believe the rural population is not ready for equal rights to private property. Instead, any right to subcontract, exchange, and/or assign property is referred back to the RLCL and the Land Administration Law, essentially binding the rural population to laws that do not secure them any rights.¹⁰⁷ As suggested by some Western commentators, therefore, the law seems to merely protect the growing middle class in China, primarily in urban cities, by increasing their rights and economic security while the rural population is left behind.¹⁰⁸

One could argue that there are some aspects of the law that appear to treat all individuals equally, in that all individuals are denied actual ownership rights to the land itself. However, even this universally applied provision disproportionately impacts the rural population in ways that do not affect the urban dweller. Both urban and rural residents have ownership rights to buildings and immovables inside the property but no rights to land. The important difference is that urban dwellers do not need the land without the structure on it, while farmers' lives are

105. *Id.*

106. *Id.* at 7.

107. *Id.* at 9.

108. Stefan R. Landsberger, *China's Next Revolution*, THE ECONOMIST, Mar. 10, 2007, at 9, available at http://www.economist.com/opinion/displayStory.cfm?Story_ID=8815075.

intrinsically tied to the land itself for cultivation as a means of production and livelihood. Farmers have far less of an interest in the building or shed that sits on the land, and so any law that protects only property rights to buildings and immovables, rather than the soil, is inherently biased towards city dwellers and provides little, or no, meaningful property rights to the rural population.

Furthermore, the draft property law mentions that *land* owned by the collective can be expropriated by the state.¹⁰⁹ This shows that any omission of the word “land” in drafting the rights of individuals is not an accidental omission. Rather, the drafters knew how to incorporate land as a potential asset to be owned and have specifically defined land as a resource owned by the collective, and not the individual. Two other areas of the draft itself also indicate this suggestion. For instance, China’s official explanation for the draft property law openly praises the collective in land management and successful enterprise.¹¹⁰ When the provision is read in context with the official explanation, this implies that there is no intent to deprive the collective or the state of any management powers, as they are doing such a commendable job, and especially as the rural residents are not ready to handle land transfers and management themselves.¹¹¹

In addition, the two goals of the new draft property law emphasize the strengthening of the powers of the state and collective, compared to the submission of the individual. Expressly stated, some of the goals of the law are to “strengthen protection of State-owned and collective-owned property” and “guide the development of the economic sector of non-public ownership.”¹¹² The law then goes on to clarify that while

the equal legal status and the right to development of all the subjects of the market shall be guaranteed[,] . . . [e]qual protection does not necessarily mean that the economic sectors of different forms of ownership play the same role or perform the same function in the national economy. According to the provisions of the Constitution, the economic sector of public ownership is dominant, the State-owned economic sector is the

109. Chinaview, *supra* note 14, at 9.

110. *Id.* at 7 (“Through their evolution over the last few decades, some of them were established by State-owned enterprises for the purpose of offering jobs to the children of their workers and for the youths who had received a school education and had returned to cities and towns from the countryside; and others were established by State-owned enterprises for the purpose of separating subsidiary industries from them and replacing their surplus labor force in the course of reform of the enterprise system. Through reform of the enterprise system over the last few years, great changes have taken place in the enterprises of the collective in cities and towns.”).

111. *Id.*

112. *Id.* at 1, 3.

leading force, and the economic sector of non-public ownership constitutes an important component of the socialist market economy, each playing a different role and performing a different function in the national economy.¹¹³

The emphasis on different ownership rights having different roles and powers gains additional meaning when read alongside the statement that the state and collectives dominate and guide the nonpublic ownership. Considered together, the statements imply that while neither state nor individual can violate laws, only one party—the State and collective—can *create* laws, regulations, and rules that will govern the nonpublic owners. As a result, this law reaffirms the power and discretion of the state and collective to make decisions for local prosperity and public interest, but do little to change the position of farmers before the approval of this law. Still governed by the RLCL and Land Administration Law,¹¹⁴ which were already flawed for their inability to tackle the problem of readjustments, the scope of “public interest,” and inadequate and misappropriated compensation, the rural population is left to tackle these issues alone and seek redress through rural unrest.

C. Inadequacy of Legal Channels for Redress and Corruption Within Those Channels

In order to understand the limits of redressability and the impact of corrupt practices in the close quarters of the land management context, it is first important to understand the structure of land management in rural China and the means by which land readjustments and takings occur.

The village collective owns the land in the rural countryside, and it consists of two bodies. At the top is the village assembly, which functions as the supreme decision-making body, deciding all major village affairs, while the village committee below implements its decisions.¹¹⁵ The powers of the village assembly include participation in village management, oversight of major expenditures, supervision of village heads, and power to veto decisions made by the village committees.¹¹⁶ Members of the village assembly tend to be made up of heads or deputy heads of the village small groups. While official reports claim that members of these assemblies are elected by “all the people

113. *Id.* at 4.

114. *Id.* at 7.

115. Ann F. Thurston, U.S. Inst. of Peace, *Muddling Towards Democracy, Political Change in Grassroots China* 17 (Aug. 1998), available at <http://www.usip.org/pubs/peaceworks/pwks.23.pdf>.

116. *Id.*

from a village,"¹¹⁷ for some observers, these formal elections are mythical. In reality, the elections are often very informal and draw on tradition rather than law.¹¹⁸

In fact, the village committee is the only organization required by law to be democratically elected every three years.¹¹⁹ The village committee is responsible for mediating civil disputes, helping to maintain social order, and reporting popular opinion and proposals to the government.¹²⁰ The most controversial issue surrounding the village committee is its sometimes contradictory role. On one hand, it is charged with implementing decisions made by the village assembly, which is supposed to have the village's best interests at heart.¹²¹ On the other hand, it is responsible for publicizing government policies and persuading villagers to follow those policies, even (and sometimes particularly) when government policies are unpopular.¹²² This dubious role is a problem for the effectiveness of the village, and causes friction in land management decisions. According to a 1994 official report,

village heads lack authoritativeness with the farmers This is partly due to the fact that the village organization is more of an administrative body in reality. And village heads often act on behalf of the government, and cannot give too much consideration to the interests of the local community and farmers. Therefore, village heads are not always identified as one of the farmers themselves.¹²³

The tension and friction are further exacerbated when the village collective exercises a land reclamation or readjustment that farmers wish to challenge, and the farmer's complaint gets lost in the administrative bureaucracy. Originally, the LAL prohibited a farmer from contesting a land reclamation until he exhausted all administrative remedies.¹²⁴ Under article 16, all disputes over land use and ownership first had to be resolved through consultation between the parties; if such consultations failed, the matter would then be resolved by the local government.¹²⁵ The

117. *Id.*

118. *Id.* at 27 (explaining that in Lishu county, Jilin province, the winning candidates seemed to be the villages' "most prosperous entrepreneurs," many of whom had been heads of production teams under the commune system).

119. *Id.*; see also XIAN FA [Constitution], art. 111 (1982) (P.R.C.), translated in http://english.gov.cn/2005-08105/content_20813.htm.

120. Thurston, *supra* note 115.

121. *Id.*

122. *Id.*

123. *Id.*; see also O'Brien, *supra* note 15, at 35 (explaining that farmers routinely defied village leaders, and many felt local cadres were unnecessary, and even parasitic).

124. Larson, *supra* note 13, at 848.

125. Ping Li, *supra* note 16.

local governments are the bodies responsible for supervising and inspecting any violations of the law or regulations governing land administration.¹²⁶ Only upon failure of both remedies could a party finally file a suit with the People's Court.¹²⁷

These provisions, in practice, heavily hindered any chance for redress. For example, if the local government exercises a taking for a new enterprise, and the village collective readjusts the land to the farmer's detriment, the farmer must first take up his concerns with the village collective. However, the members of the village collective are deterred from taking action because the village assembly may be motivated by local protectionism, and the village committee's role is to implement the assembly's decisions and promote the government's interests rather than the villager's interests. Thus, satisfying township superiors is often easier than advocating villager interests,¹²⁸ and the members of the collective themselves may also have a personal interest in "remaining a cadre [which] can provide unprecedented opportunities for travel, corruption, and legitimate financial gain."¹²⁹ Furthermore, after consultations with the village collective fail, the farmer must then attempt to negotiate the taking with local officials. However, this "remedy" is also flawed in that the official that the farmer is required to convince may be the same official who violated the farmer's rights in the first place; thus, any attempts to persuade the official that he is in fact incorrect or corrupt is futile.¹³⁰

Although farmers have immediate standing to sue today under article 51 of the RLCL, because of the limits of the judicial system and its dependence on the local government, plaintiffs still have difficulty obtaining judicial redress.¹³¹ Courts are supposed to be "independent," according to the Judges Law.¹³² Yet, they are weak and open to the influence of local officials due to the potential of financial gain and

126. *Id.*

127. *Id.*

128. O'Brien, *supra* note 15, at 55.

129. *Id.*

130. *See* Larson, *supra* note 13, at 832.

131. *See* HO, *supra* note 12, at 50. Chinese courts juggle conflicting and unverifiable claims and intervention by local government officials with only a faint hope of rectifying past wrongs. *Id.* Judges must: administer justice with laws embedded in institutional ambiguity, confront land theft from individuals and the village by higher administrative levels, and face the reality that land stolen over time cannot be simply returned to the original owner because it is not easy to determine who the original owner was. *Id.*

132. Judges Law, art. 1 (promulgated by the Standing Comm. of the Nat'l People's Cong., July 1, 1995, effective July 1, 1995) (P.R.C.), *translated in* <http://en.chinacourt.org/public/detail.php?id=2692>.

political pressure.¹³³ A farmer may be prevented from even having his case accepted by the court at the earliest filing stage, as Party Committees have been known to issue internal orders prohibiting courts from accepting certain “sensitive matters.”¹³⁴ As judges rely on the local government to fund the court and their own careers, observers suggest that “the people’s court simply doesn’t have the nerve to accept cases related to ‘hot issues’ such as . . . land expropriation.”¹³⁵

In addition, because judges are undereducated¹³⁶ and underpaid,¹³⁷ this leads to an inability to understand the legal issues, and an incentive to deny claims to save resources. Even when suits make it to the court room, judgments are not based on property rights issues, but on party policy and loyalty.¹³⁸ Furthermore, even when a farmer is fortunate enough to get an impartial judge, such judges may be discouraged from adjudicating in favor of the plaintiff for fear of retaliation by the local government.¹³⁹ For example, in the Fujian province of China, a judge who found in favor of a plaintiff and against a local enterprise found his daughter transferred to a remote rural outpost by her employer: the county.¹⁴⁰ And finally, when courts award judgments for plaintiffs, the farmer faces the next hurdle of trying to get the judgment enforced. Given that local officials and the police are charged with enforcing the law, and such officials have just lost a potential bonus as the judgment invalidated their taking, actual enforcement is unlikely.¹⁴¹

133. See HO, *supra* note 12, at 49 (“China’s legal culture . . . is characterized by the fragmentation of law, the dependency of the courts on local government, and the subordination of law to policy: in other words, the distinction between the judicial and administrative powers is blurred.”); see also Larson, *supra* note 13, at 850-51 (describing judges bowing to pressure from political party alliances and doing favors for friends who are local officials).

134. Kevin J. O’Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, 51 THE CHINA J. 75, 81 (2004), available at <http://www.polisci.berkeley.edu/faculty/bio/permanent/Obrien,k/China%20Journal2004.pdf>.

135. *Id.*

136. RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 289 (2002).

137. *Id.* at 311.

138. Larson, *supra* note 13, at 851; see also O’Brien & Li, *supra* note 134, at 83-84 (“If local officials cannot persuade a complainant to drop a suit, they sometimes intervene directly in the legal proceedings. One practice is simply to dictate a verdict, usually on grounds that cadres in judicial departments must obey Party leadership and support the government’s work Judges often find it difficult to resist a Party Committee or government department . . . because courts and their personnel are ranked lower in the local bureaucratic hierarchy than many other administrative officials at the same level.”).

139. See O’Brien & Li, *supra* note 134, at 84 (“[M]ost judges wish to be impartial but many eventually cave in to outside forces. They may be embarrassed when this happens, but also know that they might otherwise suffer consequences to their careers or even ‘cause the court to lose its supply of food and drink.’”).

140. Larson, *supra* note 13, at 853.

141. *Id.*

III. LACK OF ENFORCEMENT OF ENVIRONMENTAL REGULATIONS

To add salt to the wounds of the farmers who struggled to maintain their right to work the land, these farmers face a new problem: pollution. Rapid industrialization combined with the lack of incentives to enforce environmental regulations has produced enough pollution to destroy crops,¹⁴² contaminate drinking water,¹⁴³ and cause cancer and other diseases.¹⁴⁴ The problem of pollution became rife in China after the 1950s and 1960s national goal of rapid industrialization despite the cost to environmental protection.¹⁴⁵ The situation became so desperate, in fact, that in 1983, the protection of the environment became a basic law and adopted as Article 26 of the Constitution.¹⁴⁶ However, the government adopted this aspirational goal without sufficient guidance, or the means for implementation. As a result, regulations continued to be neglected as local protectionism and a lack of adequate monitoring by local Environmental Protection Bureaus provided no incentive to abate pollution. The failure of local governments to protect the interests of rural residents and the land they work is, once again, the cause of rural unrest. Instead, officials have opted for economic gain, and reforms have become thwarted by corruption and complacency.¹⁴⁷

A. *The Structure of Environmental Regulation*

There are many layers and contributors to the lawmaking and enforcement of environmental regulations.¹⁴⁸ At the top is the NPC, which has the legislative and state power to enact “basic laws” and amend the Constitution.¹⁴⁹ Under Article 26 of the Constitution, it is the

142. See Case of Leng Shouchun, http://www.clapv.org/new/show_en.php?id=17&catename=LAC (last visited Mar. 28, 2008) (reporting that industrial wastewater from a factory was discharged into the irrigation canals in the village for six years, and two serious hydrochloric acid leakages polluted the soil and underground water, threatening the villagers’ health).

143. Giu, *supra* note 26.

144. Briggs, *supra* note 22.

145. See *id.* at 149-50 (describing how the impact of pollution from rapid industrialization reached the countryside through the emergence of highly economically successful Township and Village Enterprises (TVEs)).

146. XIAN FA [Constitution], art. 26 (1982) (P.R.C.), translated in http://english.gov.cn/2005-08/05/content_20813.htm.

147. Van Rooij, *supra* note 24, at 157 (“There have been instances where a local EPB reported a case to the police and the procuratorate and no action was taken although it should have been [I]t might . . . be because of local protectionism and a low environmental awareness within both the police and the procuratorate.”).

148. State Env’tl. Protection Admin. (P.R.C.), Major Responsibilities of SEPA (May 5, 2003), http://www.english.sepa.gov.cn/xztz/jgzq/gszn/200405/t20040513_50000.htm.

149. Judicial System: The National People’s Congress, <http://en.chinacourt.org/public/detail.php?id=45> (last visited Apr. 22, 2007).

state's duty to "protect[] and improve[] the environment in which people live and . . . control pollution and other public hazards."¹⁵⁰ These basic laws, however, are intended only to be aspirational goals, and do not impose a universal rule for implementation. Rather, it is the State Council that is charged with administering and executing the authority and policies of the central government and has the power to enact administrative regulations.¹⁵¹

Below the State Council are the ministries, bureaus, and commissions, such as SEPA. SEPA has the power to promulgate its own regulations, as well as develop and implement national pollution control plans, develop conservation policies, set pollution quality standards, and manage data monitoring.¹⁵² SEPA's responsibilities also include conducting and approving Environmental Impact Assessments (EIA), which are reports that evaluate the potential environmental impact of a new enterprise.¹⁵³ Despite all these law-making and policy-determining powers, SEPA is a multilevel organization with various localized Environmental Protection Bureaus (EPBs) at the provincial, prefectural, municipal, county, and village levels. Thus, the execution of these plans are ultimately hindered by the power struggles among thousands of local officials who have the ultimate power to enforce such regulations, but also ulterior motives not to do so.¹⁵⁴

B. Flaws in the Regulatory System: Corruption and Ineffective Implementation

Local EPBs use various tools to enforce environmental regulations and to encourage violators to comply with these laws. Informal methods can range from negotiating with the violator to abate the destructive activity, to using the media to put public pressure on the violator to prevent further damage, to convincing the local government to create local policies that incorporate environmentally friendly practices into its

150. See *supra* note 12 and accompanying text.

151. See Legislation Law, art. 56 (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 15, 2000, effective July 2000) (P.R.C.), translated in http://www.novexc.com/legislat_law_00.html.

152. State Env'tl. Prot. Admin., *supra* note 148.

153. *Id.*

154. See Briggs, *supra* note 22, at 316-17 (explaining that local governments are motivated by tax revenues than environmental protection and thus put pressure on environmental protection officials to limit or ignore penalties and fees assessed against polluters); Zachary Tyler, *Transboundary Water Pollution in China: An Analysis of the Failure of the Legal Framework To Protect Downstream Jurisdictions*, 19 COLUM. J. ASIAN L. 572, 601 (2006) (stating that local authorities who do not enforce their own regulations are unwilling to report violations in surrounding jurisdictions in fear of bringing attention to their own violations).

economically driven ones.¹⁵⁵ These informal methods involve the EPB's own independence and initiative to induce compliance, and have proven to be among the more successful ways to control pollution.¹⁵⁶ However, the success of these methods also relies on the individual EPB officer's good faith and commitment to environmental protection.

Formal enforcement, on the other hand, comes in the form of criminal sanctions and civil liability imposed via national laws or court orders.¹⁵⁷ The problem with criminal sanctions is that enforcing a court order involves cooperation with the local government and the procuratorate. Because of either local protectionism, low environmental awareness, or a lack of experience or expertise in dealing with pollution related crimes, sanctions are not always enforced.¹⁵⁸ Furthermore, civil liability is not a real deterrent. In some cases, environmental laws provide a maximum amount for fines imposed on a violator, but the EPBs do not have the power to impose them. For example, while the Marine Environmental Protection Law provides a maximum fine of RMB 1,000,000, county EPBs can only issue fines up to RMB 10,000, RMB 50,000 for city-level, and RMB 200,000 at the provincial-level.¹⁵⁹ Thus, if the cost of postviolations fines are less than previolation costs of installing appropriate equipment or adopting environmentally safe practices, then it is worth taking the risk of environmental sanctions for the unscrupulous enterprise, and EPBs have little power to persuade them otherwise.

Instead, the real power of EPBs lies in the prevention of violations rather than imposing sanctions once the damage has already occurred. Unfortunately, with more power has come more abuse. Without a sufficient infrastructure to implement these regulations, loopholes in existing mechanisms allow for corrupt practices, and insufficient funding provides no incentive to discontinue the corruption.¹⁶⁰

One of the pollution preventing mechanisms that has particularly suffered from inadequate infrastructure and corruption is the Environmental Impact Assessment System (EIAS).¹⁶¹ This process

155. Van Rooij, *supra* note 24, at 153.

156. *Id.* at 154.

157. *Id.* at 155-62.

158. *Id.* at 157.

159. *Id.* 161.

160. See generally Ruoying Chen, *Information Mechanisms and the Future of Chinese Pollution Regulation*, 7 CHI. J. INT'L L. 51, 51-78 (2006) (discussing a lack of political independence, limited financial resources and ill-designed regulatory schemes has led to abuses of power and misinformation which undermines the goals of environmental protection).

161. *Id.* at 54-55.

requires any “commencement of a business project,” but not a government plan, to be screened and approved by SEPA and its local bureaus before construction begins.¹⁶² The local bureaus are charged with assessing the potential environmental impact of the new business, and SEPA uses this information to regulate intermediaries and guide public participation in the enterprise’s decision-making processes.¹⁶³ The problem with this system is that because of inadequate staffing and expertise,¹⁶⁴ the system must rely on the applicant businesses to monitor their own activities.¹⁶⁵ Given that SEPA retained the veto power to prohibit any applicant that does not meet the EIA standards from operating, this self-monitoring has led businesses to provide understated predictions and inaccurate information to the assessment board in hopes of being approved.¹⁶⁶ Furthermore, with so many small to medium sized enterprises with various industrial and commercial projects emerging, SEPA cannot apply universal environmental guidelines.¹⁶⁷ Thus, each assessment must be done individually, causing long delays in the reviewing process and a loss in profits for the enterprise awaiting approval from the board. Therefore, to speed up the process, businesses provide skewed information in hopes of reducing the need for further investigation.¹⁶⁸

The applicant businesses are not the only players stunting the success of the EIA system however. Insufficient financing, local protectionism, and political pressure also play their roles.¹⁶⁹ In particular, the EIA system’s structure has caused the reviewing and approval process to depend heavily on fees from applicant enterprises. Currently, the fee payment schedule involves enterprises paying only a fraction of the agreed-upon fee up front, and then paying the remainder only upon approval. Therefore, EPBs which are low on funds are encouraged to approve the enterprise despite the assessment results in order to get paid

162. *Id.* at 55.

163. *Id.*

164. *Id.* at 65-66. Initially, SEPA had the best scientists, but due to downsizing, many have gone to private enterprises with better pay, training, and career prospects than the public sector. Since then, SEPA and EPBs tend to coerce small and midsize domestic enterprises into receiving technical assistance during assessment and approval stages while leaving the larger private enterprises to conduct their own research, because they have superior experts. Furthermore, as SEPA is still in its early stages of development, every incident is a learning experience. SEPA has little experience in dealing with novel pollutants and treatments, such as how to remove sulphur dioxide from coal. *Id.*

165. *Id.*

166. *Id.* at 56.

167. *Id.* at 66.

168. *Id.* at 68-69.

169. *Id.* at 66.

the remaining sum.¹⁷⁰ In addition, the process of rent-seeking, a fee paid for expedited services, is also a problem because officials focus their attention and resources on the highest paying clientele, as opposed to monitoring facilities and gathering real-time data to detect violations before they occur.¹⁷¹

Finally, similarly to the land use context, political clout also plays a role in determining whether an enterprise gets approved. According to a World Bank study, state-owned enterprises have far more bargaining power with local environmental authorities than privately owned enterprises, and larger enterprises also have more bargaining power than smaller ones.¹⁷² This theory can be seen in practice as recently as 2004, when SEPA suspended the construction of thirty new enterprises for failing to have an EIA report required by law. While SEPA was applauded by the central government, one month later, most of the thirty projects resumed construction, suspiciously having passed the environmental assessment.¹⁷³ Given the observations above, the circumstances surrounding their approval seem dubious to say the least. Also, even when violators are caught and sanctioned, politics plays its part again. Officials publicly denounce polluters and charge huge fines for the benefit of public image, but as soon as the money passes to the local administration, the local authorities have the power to reduce sanctions or refund the money to the violating enterprise in the form of a tax break for improving its environmental protection schemes.¹⁷⁴

C. Problems Suing Polluters

Despite an increasing number of success stories of pollution victims getting vindication for the wrongs done to them, there are still significant flaws in the judicial system that leave many aggrieved petitioners without redress. First, there are at least five functional and procedural obstacles that prevent a petitioner from receiving vindication, which are particularly well summarized by Adam Briggs.¹⁷⁵ In particular, potential plaintiffs face: difficulties retaining counsel, procedural obstacles to getting the claim recognized by a court, procedural obstacles to discovery, an absence of fair and impartial judges to hear the cases that

170. *Id.* at 68-69.

171. *Id.*

172. Hua Wang et al., World Bank, *Incomplete Enforcement of Pollution Regulation* 5 (Jan. 31, 2002), <http://go.worldbank.org/1PQHUFQZR0>.

173. Giu, *supra* note 26.

174. Briggs, *supra* note 22, at 317.

175. *Id.* at 326.

actually make it to court, and a lack of judicial decisions reflecting sound and consistent reasoning.¹⁷⁶ Even if vindication is awarded, getting the award enforced is problematic.¹⁷⁷

While one could argue that there are only enough lawyers to serve a fraction of the society in any country, lawyers are particularly scarce in China.¹⁷⁸ The mass persecution of Chinese lawyers and judges during the Cultural Revolution seriously diminished the legal community, and the remaining and replenished community that exists today faces obstacles of its own.¹⁷⁹ First, it must be recognized that again, the rural population is a highly disadvantaged class in terms of access to the means of protecting its interests. Many rural farmers do not have the resources to hire a lawyer, and there are only a limited number of Legal Aid advocates in the country.¹⁸⁰ Lawyers themselves are also discouraged from taking "big cases" because they run on limited resources, and because China does not allow for contingency fees.¹⁸¹ Furthermore, judges are still poorly educated, often with little more than a high school education.¹⁸² The profession is still in its revival stages since the Cultural Revolution and has not yet reached full-fledged professionalization.¹⁸³ Rural courts are also worse off than urban courts as many judges that do have the appropriate qualifications have moved to the urban city, where salaries are higher.¹⁸⁴ In addition, even when a rural individual has secured a lawyer who is willing to work despite the long haul ahead, there are also some unscrupulous judges who will bar a plaintiff from using his own counsel. Instead, the judge will assign a local official as counsel, despite the fact that the official's interests are often in conflict with the plaintiff's.¹⁸⁵

176. *Id.*; see also Van Rooij, *supra* note 24, at 158-59. The factors to be weighed when determining the appropriate fine include, the degree of fault of the polluter, the degree of harmful results, attitude of the polluter toward taking corrective measures, and whether the polluter is a first offender. *Id.*

177. Briggs, *supra* note 22, at 316; O'Brien & Li, *supra* note 134, at 76.

178. Briggs, *supra* note 22, at 366.

179. Larson, *supra* note 13, at 851-53.

180. See Int'l Bridges to Justice, Where We Work: China, <http://ibj.org/where-we-work/asia/china/2> (last visited Mar. 28, 2008) (stating that there are only 120,000 lawyers in the country attempting to serve 1.2 billion Chinese citizens).

181. Briggs, *supra* note 22, at 327.

182. *Id.* at 329.

183. CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA (CECC), 2005 ANNUAL REPORT 88-89, available at http://www.cecc.gov/pages/annualRpt/annualRpt05/2005_5c_judicial.php (last visited Mar. 28, 2008). According to Supreme People's Court statistics, only forty percent of Chinese judges had earned a four-year university degree in 2003, despite the mandatory requirement adopted in the 1995 Judges Law. *Id.* at 88.

184. *Id.* at 89.

185. Briggs, *supra* note 22, at 327.

Filing a suit also has its problems. For instance, because judge's evaluations are tied to the number of disputes they process and close,¹⁸⁶ rather than the reasoning and accuracy of their decisions, judges in the past have demanded that a class action suit be filed separately in order to get a fee for each individual suit, as opposed to one fee for one class action.¹⁸⁷ This reduces the impact of the case and requires repetitious discovery that reduces the number of cases a lawyer can take on and thus reduces plaintiffs' access to counsel. Another problem with trying to get a case filed in court concerns the issue of standing. In China, in order to have standing, the plaintiff must be "directly affected" by the alleged action.¹⁸⁸ A plaintiff who cannot show direct physical or economic harm, therefore may find it difficult to be heard.¹⁸⁹ Even if a plaintiff does have standing, the filing fees for a case are tied to the amount in dispute.¹⁹⁰ Therefore, those who are most severely harmed may not be able to afford the filing fee necessary to be heard in the first place.¹⁹¹

Once a plaintiff has miraculously filed his case, the issue of trying to prove his case is another task altogether. Access to evidence will be difficult to obtain, because the legal culture does not recognize a party's inherent right to comprehensive disclosures.¹⁹² Discovery problems will be exacerbated if the plaintiff is unlucky enough to have to obtain discovery from the corrupt official who allowed the pollution to occur in the first place. Furthermore, once in court, in an attempt to thwart the adjudicatory process, some defendants (the administrative departments) do not bother appearing at trial so they are unable to be questioned, nor forced to answer to anyone.¹⁹³ Also, the judge himself may be a prominent member of the local party officials, or a member of the local government. If this is the case, a judgment may sway on the side of the nonenforcing officials due to political ties or *guanxi*.¹⁹⁴

186. CECC, *supra* note 183 ("Chinese courts frequently evaluate judicial efficiency and assign bonuses or sanctions by using 'case closure ratios'—the ratio of closed to filed cases during a given year. To generate high ratios, Chinese courts often resort to unscrupulous means, including pressuring parties to agree to mediated outcomes and refusing to accept cases filed late in the year.").

187. Briggs, *supra* note 22, at 327.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 328.

193. See O'Brien & Li, *supra* note 134, at 84.

194. "Guanxi" in Chinese means "personal relationships." STANLEY B. LUBAN, BIRD IN A CAGE, LEGAL REFORM IN CHINA AFTER MAO 114 (1999).

In the end, even orders issued against a polluter may not actually change the enterprise's practices, as exemplified in the tragedy of Sugai village. Here, the two mills in question had previously been sued, fined, and ordered to upgrade their pollution equipment after a major spill into the Yellow River in 2004.¹⁹⁵ However, instead of enforcing the court order, local officials allowed the mills to build a temporary wastewater pool, as opposed to installing the mandatory equipment.¹⁹⁶ After winds threatened to break the pool walls—which would have resulted in the wastewater flowing into the Yellow River, and in turn, would have revealed that the officials defied the court order—the officials decided to break the wall themselves.¹⁹⁷ This action diverted the toxic waste into the waters of Sugai and concealed the officials' own corrupt practices.¹⁹⁸

IV. SUGGESTED SOLUTIONS

From the concerns discussed above, it is clear that entrusting the rights and interests of the rural population in the hands of local government, and other grass-roots decision makers, does not necessarily protect such interests. Rather, the decentralization of the government has weakened controls over the different administrative departments and has allowed for corrupt practices to take place both against the individuals and the government these officials have a duty to serve. If the government wishes to pacify the rising rural unrest, therefore, instead of simply imposing idealistic mandates from above, it must recognize and understand that the current system in operation actually undermines its goals.

The approach suggested below aims to remove some of the loopholes in the law and incentives in the system that allow this undermining to occur. The first area in need of further reform is the lack of transparency in both law and procedure. By making laws and the decision-making process known to the public, individuals have actual knowledge of their substantive rights, the standards to which decision makers should be held, and thus the ability to pinpoint any violations. Individuals will also have the procedural knowledge of how to seek redress in the event a violation occurs. Also, local officials who are forced to publish the decisions they make, and the reasons for them, can then be held accountable to both the citizens and the courts for such determinations, reducing the risk of clandestine arrangements and

195. Yardley, *supra* note 25.

196. *Id.*

197. *Id.*

198. *Id.*

suspect judgments. Finally, when laws and procedures are written down and available as evidence presented to a court, judges are able to enforce such determinations with more accuracy and confidence, and less able to legitimately make decisions contrary to the evidence for personal or political gain.

The second area in need of serious reform is in the independence of local government and judges from both political pressure and private enterprise. This remedy calls for the restructuring of financial compensation to an impartial body before distribution is made to employees, and also removing the political and monetary incentives that currently influence grass-roots decision making. Creating impartiality and independence works to increase the legitimacy of these decision makers among the rural population and thus to encourage greater acceptance of such decisions and reduce the likelihood of resort to riots and extrajudicial redress.

The third area for consideration involves a focus on creating specific methods of preventing the abuse of laws and regulations by clarifying provisions that currently allow for loopholes in enforcement, and adding some supporting measures to prevent the ability to circumvent these laws in the future. Specifying the meaning of existing laws narrows the scope of discretion of local decision makers who have in the past been able to escape scrutiny because they were the only authority on the law at the local level.

Combined with transparency and the independence of government entities, government accountability will remove some of the current ambiguities that local decision makers use to legitimize and legalize their activities, and ultimately the ability to shield themselves from public and political scrutiny.

A. Transparency in the Law and Procedure

Government accountability needs to be increased in order to give full force and effect to land use and environmental protection laws in China. Transparency in the law and procedure will increase government accountability, and thus improve the public's confidence in the legitimacy of government actions, which will likely result in less distrust and tension, and thus less rural unrest.

Specifically, transparency should be used to place public pressure on decision makers not only to act according to the letter of the law, but also in alignment with the spirit of the law. As noted above, following the words of the law can invite manipulations and abuse of ambiguities in the text and result in suspicious activities contrary to the state and

individual's interest. While ambiguity in laws and procedures could be used to shield ineffectuality from scrutiny, publicity will reveal inconsistencies and remove the loopholes provided by ambiguity and lack of accountability, which are currently used to circumvent national goals.

1. Public Participation in Land Registration and Compensation

With the rise of the mass media, the internet, and cell phones, bad news travels fast. In fact, China is now the world's largest market for cellular phones at a staggering 461 million users.¹⁹⁹ According to foreign reports, "China's 'new media' appear to be reaching a critical mass."²⁰⁰ Therefore, while the media at one point could be used by the government to inculcate the masses with only its own ideals,²⁰¹ now the mass media has opened up the Chinese public, including increasing rural phone users, to not only foreign news and current events, but also news and stories of disputes across the nation.²⁰² Rather than try to crack down on the use of the mass media and its content—which may be close to impossible given the sheer volume of mobile phones and internet users in China's increasingly consumer society—the government should use the media to encourage public participation as a way of creating government accountability and legitimacy.

In the land use context, as Zhu Keliang and his coauthors suggest,

[a] combination of TV, publicity cards, newspaper, village meetings and other publicity forms should be utilized to generate maximum educational impact. Any public information campaign should focus on the rural land use rights that are created or defined by the RLCL, especially those land rights about which farmers frequently have mistaken beliefs . . . [and] . . . should continue over an extended period of time.²⁰³

However, rather than leave the responsibility of disseminating the publication of laws with local villages, the central government needs to require implementation at a national level. Local dissemination has not been effective in the past, as local officials who feared such publications

199. See China Claims 400M Mobile Phone Users (Feb. 23, 2006), <http://www.msnbc.msn.com/id/11519322/>.

200. Paul Mooney, China Faces Up to Growing Unrest (Nov. 16, 2004), <http://www.atimes.com/atimes/China/FK16Ad01.html>.

201. *Id.* ("While news of unrest is usually blacked out of the Chinese media, word is now spreading quickly via the widespread use of modern communications, including mobile phones, faxes, instant messages and the Internet, reaching Chinese nationwide.")

202. Chinese Embassy U.S., More than 431 mln Cell Phone Users in China (Aug. 22, 2006), <http://www.china-embassy.org/eng/gyzg/t268615.htm>.

203. Keliang et al., *supra* note 10, at 825.

would affect their ability to perform illegal activities have ordered such publications to be confiscated and destroyed.²⁰⁴ In addition, while the adoption of the RLCL was a great aspirational move toward transparency in requiring all land contracts to be in writing, the registration of all land contracts has not materialized to date. In order to ensure true transparency, this law must be stringently implemented and enforced.²⁰⁵

To do so, the central government should impose a five year amortization period for the registration of all land contracts to be implemented immediately, or incorporated in the next five-year plan in 2010.²⁰⁶ The current RLCL requires all farmers to negotiate land contracts with their respective collectives, register such contracts with the village collective, and retain a copy of the contract for themselves.²⁰⁷ However, the law lacks force and effectiveness because both parties feel they have little to lose if they do not comply.²⁰⁸ Therefore, in addition to the requirements of the RLCL, a five year grace period may induce more households and village collectives to comply if farmers and the collectives risk losing their land if they do not affirmatively act to comply in time. First, any land not registered by this time should become property of the state. In this way, if the collective refuses to grant a farmer a written lease during this period, the collective will lose its rights as owner of the land. However, farmers should still be able to petition the state for a standard land contract allowing farmers to enforce the law, even if the collective refuses.²⁰⁹ The contract could be issued by an

204. See O'Brien & Li, *supra* note 134, at 78.

205. Ping Li, *supra* note 16, at 11.

206. Amortization in the land use context refers to a period in which a nonconforming use or structure is given time in order to make changes so that it complies with the new laws or regulations. I am using this term in the sense that farmers should be given a five-year grace period to conform to the new suggested law requiring contracts for all land. See DAVID L. CALLAIS ET AL., CASES AND MATERIALS ON LAND USE 129-30 (4th ed. 2004).

207. See *generally* Rural Land Contracting Law (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* http://english.gov.cn/laws/2005-10/09/content_75300.htm.

208. See Larson, *supra* note 13, at 841-43.

209. The contract should include: the names of the parties; name, location, area and quality grade of the contracted land; the term of the contract; the purpose of use; the rights and obligations of the parties; liability for breach of the contract; and signatures of both parties. This is modeled on the standard land contract stipulated in article 2 of the RLCL. However, this provision states that only the party giving the contract needs to sign it. To avoid the issue of "noncompliance contracts," I suggest that both must sign the contract. See Rural Land Contracting Law, art. 2 (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.), *translated in* http://english.gov.cn/laws/2005-10/09/content_75300.htm.

existing state body such as the Ministry of Land and Resources, or another local body created solely for this purpose.²¹⁰

This proposal is aimed at motivating two actions, both of which are complimentary to enforcing farmers' rights and in reigning in the village collective's ability to violate long-term lease contracts by claiming that the farmer's rights are ambiguous, or that no enforceable contract exists. First, farmers will likely be more enthusiastic and take a more active role in complying with the RLCL by demanding that a land contract be drawn up if they believe an enforceable contract is possible, rather than feel apathetic about the process, as seen currently under the RLCL. Second, the collective will also want to comply with this mandate because even though they have to recognize that farmers have enforceable long-term land rights, the collective's inherent right to readjust land for "special circumstances" means they ultimately still have control over land registered as part of their village. If unregistered land goes to the state, the collective will lose this control and also suffer financially as it will accrue less land revenues each year from the lost land. This, therefore, creates an economic incentive for collectives and farmers to draw contracts.

Furthermore, public knowledge of legal rights deters corrupt officials from violating these rights, as they are no longer the only ones who hold the knowledge and power to enforce such rights. Even when violations do occur, with a written contract, the rural plaintiff may be more willing to take his case up in court, rather than in the streets, given that he has strong evidence of the contract terms. Written contracts will reduce the frustration that used to result from the lack of tangible evidence that such rights exist.²¹¹ Once all contracts are registered and made available for review by the land-leasing farmer, the collective, the state and the courts, any ambiguity over the asserted terms of the lease can be resolved more efficiently and effectively, and public and intra-

210. One of the duties of the Ministry of Land and Resources is "[t]o develop and implement the regulations for the assignment, lease, evaluation, transfer, transaction and governmental purchasing of the right to the use of land." See Ministry of Land & Res. P.R.C., Responsibilities of the Ministry of Land and Resources, http://www.mlr.gov.cn/pub/mlr/english/t20050125_73069.htm (last visited Mar. 28, 2008).

211. See Ho, *supra* note 12, at 64-66. Ho suggests that in the context of state claims on land allegedly owned by the collective, the general rule that the state owns all land unless the collective proves such land is registered to it, provides a strong instrument for the state to dismiss all customary land claims. *Id.* Ho also predicts that such action will become a seed-bed for ongoing social conflict. *Id.* This scenario can also be applied to the individual's claim to land against the collective. Without tangible enforceable rights, the inherent right of the collective in land ownership allows it to dictate or deny protection, and to reclaim land for itself, in much the same way the state claims ownership over ambiguously owned land from the collective. *Id.*

government scrutiny will likely lead to less opportunity for unreasonable judicial decisions.

Public participation must also be adopted in the distribution of compensation. As indicated above, discrepancies over the inadequacy, and misappropriation of compensation has resulted in rioting as a way of redress. To reduce the likelihood of these tensions, one suggestion is the reform of how compensation is calculated for land takings. Currently, the collective is essentially given the discretion to negotiate and divide compensation in a way that does not necessarily involve the input or knowledge of the land-losing farmer.

The Rural Development Institute suggests that two changes are necessary to appease rural unrest. First, the division and calculation of compensation should be better structured to meet the needs of the land-losing household rather than the collective.²¹² Compensation should be based on the term of the lease; and therefore, because a thirty-year leased property would represent seventy-five to ninety-five percent of the economic value of the property if it were privately owned, the farmer should receive at least seventy-five percent of the compensation, as opposed to the lesser portion currently required by law to cover lost crops.²¹³ Also, the amount of compensation should not be determined by the “original living standards” test, but rather, it should take into account the money invested in the land and improvements made to property to reflect actual loss to the farmer.²¹⁴ Finally, compensation should not be “primarily used” for the land-losing household, but rather “primarily paid to” such household to ensure the funds actually go to the affected household, and not to the collective to be disposed of in their discretion.²¹⁵ In practice, this could be achieved by requiring the potential nonvillager enterprise wishing to lease land to negotiate with the farmer directly as to the value of the property, rather than having the nonvillager enterprise negotiating with the collective or local official only.²¹⁶ Farmers find it difficult to challenge compensation payments because they were not involved in the negotiation process and cannot know for sure how much the nonvillager enterprise paid for the land.²¹⁷ Thus, if the nonvillager

212. Keliang et al., *supra* note 10, at 826-27.

213. *Id.*

214. *Id.* at 826.

215. *Id.* at 827.

216. Ping Li, *supra* note 16, at 9.

217. *See supra* note 49 and accompanying text. Villagers were denied any answers or redress after they suspected officials had misappropriated compensation funds, but when an inquiry was made into the allegations, no one could prove what happened to the money or how much money was missing.

enterprise is forced to negotiate with the farmer, the farmer knows how much is due, allowing for discrepancies in the amount agreed to and paid out to be more easily revealed. This, in turn, will increase the likelihood of the farmer receiving fair compensation for the value of his land and will increase the accountability of the official or collective who accepts the compensation and pays it out to the farmer.

2. Narrow the Scope of Discretion in Environmental Evaluations

For the protection of land in the environmental context, reforms to promote transparency exist in the form of the highly anticipated public participation rules adopted by SEPA in March 2006.²¹⁸ These new rules focus on the inclusion of public participation in the EIA process and clarify “the rights and obligations of the public, developers, and environmental groups in the EIA process . . . [and also require] these assessments [to be] clear, concise, and widely available to the public.”²¹⁹ Specifically, the EIA public participation rules require an enterprise to make two rounds of public disclosures before drafting and approving the report.²²⁰ Such disclosures must be subject to public input and opinion via public surveys, expert consultation meetings, and public hearings.²²¹ This uses the pressures of the market and public opinion to force polluters and their supporters to reign themselves in for their own reputation and protection. In theory, multinationals and large domestic enterprises will lobby for stricter enforcement rules because they recognize that environmental accidents resulting from incorrect EIAs will damage their image and expose them to lawsuits.²²² As well as protecting themselves from a lawsuit or publicity disaster, by encouraging stricter rules for all enterprises, larger foreign enterprises also protect their investment interests and their ability to compete with smaller domestic enterprises who may be saving on production costs by evading environmental protection schemes and technology.²²³ As a result, self-regulation due to public pressure will ultimately be aligned with government efforts to regulate.

Despite the promise of increased public participation in the process, however, certain provisions in these new public participation rules

218. Yingling Liu, WorldWatch Inst., SEPA Releases New Measure on Public Participation in Environmental Impact Assessment Process (Feb. 24, 2006), <http://www.worldwatch.org/node/3886>.

219. *Id.*

220. *Id.*

221. *Id.*

222. Briggs, *supra* note 22, at 319-20.

223. *Id.*

actually allow for the exclusion of the public from the process. Under article 13 of the rules, only “information relating to the receipt of applications”—not the reports themselves—are subject to publication, and public consultations are only required for cases involving “significant public objections.”²²⁴ Here, there is no true accountability as, again, officials are given the discretion to decide what to reveal to the public, if anything at all.

For instance, some commentators have argued that one of the main problems in environmental regulation is the lack of resources to monitor and regulate small enterprises that pop up frequently, and in large numbers, across the nation.²²⁵ The cumulative effect of letting these small enterprises operate under the radar has a huge effect on the environment, but under the language of the new rules, the practice of ignoring, or at least not requiring public accountability for these smaller, less impact enterprises is permissible. That is, all that an unscrupulous official has to do to avoid being bound by article 13 is to determine that an enterprise will not have “significant public objections,” and given that a small enterprise may have less impact than a large enterprise, the exercise of discretion in this way is not implausible. Without clear definitions of what constitutes “significant public objections”—and one must consider that it is essentially impossible to gage the public’s objections without even allowing the public to review the report—such a provision allows any enterprise to evade public scrutiny and will undermine the purpose of public accountability.

Therefore, rather than put the power and authority back into the hands of the officials that the central government is trying to regulate, SEPA should remove the “significant public objections” language altogether and require all applications to be published and subject to public opinion in order to ensure that discretion is not being used as a mask for corruption. For example, initially, every new business or enterprise, regardless of its size or perceived impact, should undergo an EIA and have the results published. After a thirty-day notice and comment period, the local government can decide whether to proceed given public sentiments. Over time, a substantial amount of accurate information will be gathered on the patterns of certain types and sizes of enterprises and the correlating environmental impact to expect. With this information, local boards may then be able to confidently introduce rules that limit the requirement for EIA reports. For example, EIA reports

224. Chen, *supra* note 160, at 75.

225. Briggs, *supra* note 22, at 317.

may no longer be required for certain sizes and types of enterprises that have similar characteristics as those enterprises in the data that consistently have little environmental impact. In addition, rather than re-adopt the words “significant public objections,” it may be more efficient to create a list of pre-approved enterprises classified by type, size and estimated impact, so that local officials are not given any unnecessary discretionary power, but can still work efficiently by merely applying the list to the applicant enterprise.

This may delay the EIA process, require more resources, and increase costs because some enterprises will be deterred from operating given the strict rules and potential public scrutiny. However, given that environmental degradation causes between eight and twelve percent loss in annual GDP, while income only increases by an average of eight to ten percent, China is already losing more than it is gaining from allowing these industries to continue operating in this way.²²⁶ Thus, the immediate cost is worth the future benefits.

B. Independence of Local Governments and Courts from Each Other and Private Enterprises

It has been argued that “corruption thrives where temptation coexists with permissiveness.”²²⁷ While the Chinese government has been making concerted efforts to crack down on corruption among both lower level and higher ranking officials, and while it has removed the “permissiveness” aspect of corruption, it has not yet tackled the “temptation” embedded in the customary use of *guanxi*, and the structure of human resources in the government.²²⁸ Although the number of officials convicted of corruption has increased markedly, it is unclear whether this indicates that attempts have been unsuccessful in eliminating corruption because the number of incidents of corruption keeps rising, or whether the crack downs have been successful in

226. See CECC, *supra* note 11, at 101.

227. Transparency Int'l, Frequently Asked Questions About Corruption, http://www.transparency.org/news_room/faq/corruption_faq (last visited Mar. 28, 2008).

228. In the 1980s and 1990s the Commission for Disciplinary Inspection of the CCP Central Committee drew plans to combat economic crimes such as corruption and bribery. The Standing Committee, in 1988, enacted the Supplementary Regulations on Punishing Corruption and Bribery setting out policies against corruption. Anticorruption reporting centers were set up, and procuratorates were directed to make economic crimes such as corruption and bribery their primary target. Cadres were encouraged to perform self-criticism, self-examination, and mutual examination and verification by the organization. See Ye Feng, *The Chinese Procuratorate and the Anti-Corruption Campaigns in the People's Republic of China*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 113, 119-21 (J. Chen et al. eds., 2002).

catching more violators.²²⁹ What is clear, however, is that corruption still occurs, and thus more effective means of implementing the government's policies against corruption need to be created. While it will be difficult to ensure against bribery and embezzlement outside the official recorded system, this is a problem faced by many countries, with or without independent government entities and courts, as seen in the various Tyco, Enron, and WorldCom scandals in America alone. These suggestions do not purport to eliminate all corruption, but address the current loopholes in the way corrupt practices seem permissible under the guise of officialdom and local protectionism.²³⁰

Specifically, the Chinese government must tackle the archaic use of *guanxi* in the political and legal sphere by removing it as a mask for backhanded activities, and also make local governments and courts no longer financially dependent on local enterprises for boosting personal compensation, and padding government funding. The focus, therefore, should be on dissolving the environment in which corruption is allowed to thrive, not just on imposing aspirational laws from above.²³¹

1. Remove the Incentive of *Guanxi*.

The benefits of *guanxi* and hierarchy, which formed the basis of the Confucian ideal in China many years ago, should no longer survive in Communist China today while the country claims to adopt the rule of law in place of the rule of man.²³² The problem with the *guanxi* system is summarized by Donald C. Clarke, who argues that local protectionism stems from

229. In 1999, over 6300 leading cadres were punished, and in 2000 the number rose to over 7440 at the provincial level, 177 at the municipal level, and 1709 from the county level. *Id.* at 124; see also NAT'L BUREAU OF STATISTICS (P.R.C.), CHINA STATISTICAL YEARBOOK, 2005, ARRESTS OF CRIMINAL SUSPECTS AND DEFENDANTS UNDER PUBLIC PROSECUTION, available at <http://www.stats.gov.cn/tjsj/ndsj/2005/indexeh.htm> (select "Chapter 23, Other Social Activities"; then select "23-18") (last visited Mar. 28, 2008) (indicating over 22,000 cases of corruption and bribery were accepted and under the prosecution of the Procurator's Office); *100,000 Officials Punished in 2006*, *supra* note 33 ("Of the 97,260 officials who had been disciplined, over 80 percent had failed to carry out duties, taken bribes or violated the party's financial rules, said Gan, vice secretary of the Central Commission for Discipline Inspection.").

230. By "officialdom" I refer to the ways in which local officials can justify and legitimize the charging of excessive fees as a duty and power under their legal and occupational authority. By "local protectionism" I refer to the ability to make preferential decisions to certain enterprises under the veil of "public good" and prosperity.

231. See Feng, *supra* note 228, at 124.

232. See HO, *supra* note 12, at 47 ("Chinese village communities face a great challenge in having their customary land rights recognized by the state as they are generally unwritten. On a different level, the problem of recognition pertains to a cultural confrontation: between a rapidly industrializing society moving towards the rule of law and an agrarian society based on a tradition of the 'rule by man.'").

the fact that local governments rely on local enterprises for revenues and employment, and so are reluctant to allow them to be financially damaged by having a judgment against them successfully executed. In addition, a local enterprise may well be run by a local political leader, who will exert his influence to protect the enterprise. It is not simply some vague notion of respect for local leaders that makes courts reluctant to go against their wishes. This respect has a very specific institutional basis: the dependence of local court personnel upon local government at the same level for their jobs and their finances Every aspect of local courts, including personnel, budgets, benefits, employment of children, housing, and facilities, is controlled by local Party and government organs, as are promotions and bonuses.²³³

Rather than the more accepting view of *guanxi* among traditional Chinese citizens, for many Western observers, such practices now constitute corruption and are antithetical to the rule of law.²³⁴ This is particularly important in the rural land context as “a cultural confrontation . . . between a rapidly industrializing society moving towards the rule of law and an agrarian society based on a tradition of the ‘rule by man’”²³⁵ is being played out in the rural riots today. Therefore, in order for rural rights to be protected in a country asserting the rule of law, the rural population must relinquish its ties to the rule of man. Such a transition should be supported by the government, by not only providing sufficiently independent institutions to enforce these rights, but also removing the incentives to regress to the rule of man.

Making the process of decision making in both the courts and local government transparent will help the slow removal of *guanxi* or at least make it more difficult for officials to engage in corruption. The central government attempted to achieve this goal in 2001, when it decided that all departments of the central government and those at or above the province, region, or municipality level, were to review all matters that had been subject to examination and approval by administrative authorities.²³⁶ The goal was to remove all unnecessary procedure and to establish a system of supervision, but there was an exception for areas where “administrative powers can be substituted by a market

233. Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 41-42 (1996) (quoting Chen Youxi & Xue Chumbao, *The Three Major Reasons Why Courts Have Difficulty in Execution*, ZHEJIANG LEGAL SYSTEM NEWS, Aug. 16, 1990, at 3).

234. See generally Andrew White, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and China and Why Are the Experiences Different in Each Country*, 8 ASIAN-PAC. L. & POL'Y J. 1, 32 (2006).

235. HO, *supra* note 12.

236. Feng, *supra* note 228, at 122.

mechanism;” for example, land-use rights and construction projects.²³⁷ Therefore, because land reclamation falls under land-use rights, and SEPA oversaw construction projects, the two sources of abuse to the rural population were effectively excluded from central checks and balances.²³⁸ However, the central government should make no exceptions for administrative powers that can be substituted by a market mechanism and should hold all government actors publicly accountable by requiring them to publish their decisions,²³⁹ articulate a reasoning for these decisions, and file the decisions and reasons with the administrative department for the public to review. This will likely reveal any discrepancies in rationale as well as clandestine arrangements not permitted by law. At a minimum, the possibility of being discovered by the public, other officials, and higher government entities may be enough to deter the use of *guanxi* in a country that believes that saving face and one’s reputation are of utmost importance.

2. Remove Financial Dependence and Temptation

Removing the financial incentives within the courts and the local governments must be a priority. Once both the courts and local governments are independent from financial and political pressure, courts may feel they can award unfavorable decisions to deserving parties without fear of retaliation from local officials. Local officials can also enforce these court orders without fear of retribution from political leaders.

First, the government will have to restructure the way the courts and local governments are funded. While solutions have been attempted by the government for almost a decade,²⁴⁰ they have not been fully implemented. Currently, judicial resources are financially dependent on

237. *Id.*

238. In an interview, Pan Yue, vice-minister of SEPA, explained the problem with regulation of construction projects. Even though industries are supposed to wait until they receive approval to build after an EIA report, “[a]t present, driven by local and industrial interests, the situation of illegal construction and operation is getting worse. It has severely disrupted the country’s macro-control and industrial structure and put mounting pressure on the environment and resources.” See Sun Xiaohua, *Green GDP To Be Expanded Nationally*, CHINA DAILY, Jan. 18, 2007, http://chinadaily.com.cn/china/2007-01/18/content_786230.htm.

239. *Id.*

240. *Id.* In 1998, The Central Committee declared that all profit-making enterprises set up by the party and government organizations must be separated from the organizations, and they must not have control over the operation of such entities. Income from administrative charges, levies and fines must be handled separately from expenditure in public security organs, the procuratorate organs, people’s courts, and the administrative authorities for industry and commerce. Plus, methods of financial payment and expenditure must be improved, and the implementation of a centralized collection and payment must be accelerated. *Id.*

filing fees, a judge's compensation relies on evaluations based on the number of closed cases, and the fact that court salaries are paid from local government, not national funds,²⁴¹ means there is a disincentive among judges in "biting the hand that feeds them."

To alleviate this dependence of the courts on local government, the central government should restructure the court system so that it is funded by national funds instead of local and private individuals, and bonuses for completed case loads should be removed altogether. This way, judges will not be sidetracked by the budgetary concerns, which may reduce the incentive to require the unnecessary filing of multiple suits where one class action suit would be more efficient. Also, judges may be less motivated to turn away suits that are filed near the end of the year, because they will no longer fear that unclosed cases will affect their evaluation. In addition, because fixed salaries will no longer be paid by the local government, local officials will have less influence over the judges. They will no longer be able to threaten reduced wages and bonuses unless a decision is awarded in their favor. While the government may fear that fixed wages and no bonus incentives may lead to complacent judges with nothing motivating them to work hard, the government should consider making the judges publicly elected by the county in which they sit.²⁴² If judges are accountable to the people, and their careers rest on performing satisfactorily, then each judge will have motivation to work hard and protect rural interests to keep his position. By implementing just some of these suggestions, judges can focus on hearing the cases on its merits rather than worrying about the budget.

In the local government context, financial incentives come from the EIA fee schedule, rent-seeking for expedited services, and rent from nonvillager enterprises. The central government in 2001 foresaw a centralized system of financial payment, expenditures, fee collection, and the regulation of fees.²⁴³ However, such a system did not account for temptations to charge excessive, but permissible, fees and the pressure of success measured by the locale's GDP.

As long as local officials' salaries depend on fees and regional GDP, there is an incentive to further personal and local protectionism within the letter of the law, and against the spirit of anticorruption measures. To avoid this, the government should require all revenues to be paid to an

241. See *supra* note 186 and accompanying text.

242. Similarly to the way village heads are elected in villages that embrace this process, public accountability leads to actions that favor the village interests rather than those of private enterprise. See Thurston, *supra* note 115.

243. See Feng, *supra* note 228, at 122.

external body, such as the central government, which in turn pays out fixed salaries to local personnel. This will reduce the incentive to charge illegal or excessive fees as the local officials themselves will get no additional financial benefit out of doing so. In particular, there will be no incentive to approve a potentially harmful enterprise merely to obtain EIA fees, as the officials will get paid whether the enterprise is approved or not. Additionally, because all fees will be paid to a central fee payment system, and not included in the individual official's salary, there will be less incentive to divert unnecessary resources to expediting an approval.

Although the suggestions above seem to involve a big strain on human resources departments, they will likely receive support from the central government, because the only significant additional cost will be for administration, which was already approved in 2001.²⁴⁴ The budget will remain unchanged for the central government, because court filing fees and revenues collected by the local government will be paid to the national funds and separately disbursed from national funds to each government employee. Even though more resources will be needed to channel funds from local governments and the courts to the national funds and then back out again, the cost is worth the price of doing nothing at all. According to Chinese economist Hu Angang, during 1991-2001, the cumulative annual cost of corruption was between 14.5% and 14.9% of the nation's GDP.²⁴⁵ Thus, if the government intends to continue its route to high productivity, it must tackle the corruption that is undermining it.

C. *Focus on Prevention, Not Just the Cure*

The objective of the following suggestions is to encourage internal changes in the way grass-roots decision makers operate so that such actions are not focused on finding ways to circumvent the letter of the law, but rather work in harmony with the spirit of the law. That is, the focus is on preventing violations instead of waiting for the government to pass laws to cure the damage already done. First, this discussion will address the proposal offered by RDI to narrow the scope of "public

244. *Id.*

245. See Hu Angang, *Public Exposure of Economic Losses Resulting from Corruption*, 4 CHINA WORLD ECONOMY 44, 44 (2002), available at http://old.iwep.org.cn/wec/english/articles/2002_04/2002-4-huangang.pdf; NAT'L AUDIT OFFICE OF CHINA, AUDIT AND INVESTIGATION FINDINGS ON THE FINANCIAL INPUT OF AGRICULTURE-AID IN 50 COUNTIES (2004), available at http://www.cnao.gov.cn/main/articleshow_ArtID_915.htm (finding that 4.95 billion yuan were misappropriated between 2003 and 2004).

interest” in the takings context and then offer some ways to improve the practical effects of this scheme. Next, this discussion will analyze the current plans to implement an expanded regulatory system proposed by SEPA in 2002, and recently revived in 2006. However, rather than merely spreading the responsibility of monitoring environmental violations by increasing the number of new supervisory centers, the central government should also focus its attention on implementing a more effective regulatory system, rather than merely an expanded one.

1. Specify the Uses that Fall In, and Out, of the Meaning of “Public Interest”

One suggestion offered by RDI to ensure against illegal takings is to narrow the scope of “public interest.” This scheme would involve providing a list of approved “public purposes,” and any land that is reclaimed for a purpose not specified on the list would require approval from the State Council.²⁴⁶ The possible problem with this remedy, however, is that given that illegal takings are more frequent,²⁴⁷ if every official decided to challenge the list that is being suggested here, the State Council will be inundated with requests for clarification or determinations of whether that particular taking should be made into an exception and approved. The State Council may then try to relieve some of the burden by creating regional offices or agencies to carry out this approval process. However, by giving local agents the discretion to make these determinations—ultimately resulting in yet another opportunity for corrupt practices—this will lead the rural population back to square one, relying on the excessive discretionary authority of grass-roots decision makers, and unclear and inconsistent rights.

To avoid this scenario, if the list is adopted, the State Council should ensure that it is the only entity that approves each request. This can be done by either approving each request itself as suggested by RDI or having the NPC create a specialized committee to work under the direct supervision of the State Council, whose sole objective is to review and approve such requests. Although this may initially be time consuming and delay the process of approval, over time, the benefits will be evident.

246. Keliang et al., *supra* note 10, at 827-28.

247. According to statistics provided by the Ministry of Construction, between January and June 2004, 4,026 groups and 18,620 individuals had lodged petitions over allegedly illicit land confiscations, compared to 3929 groups and 18,071 individuals for the entire year of 2003. Gregory C. Chow, *Rural Poverty in China: Problem and Policy* 12 (Princeton Univ., Ctr. for Econ. Policy Studies, CEPS Working Paper No. 134, 2006), available at <http://www.princeton.edu/~ceps/workingpapers/134chow.pdf>.

During the process of approving each individual request, the State Council should record both approved uses and all rejected requests and publish them monthly with the village committees and in the mass media. This way both officials and the farmers will be aware of the approved and forbidden uses. A substantial fine should be imposed on any official who requests one of the already forbidden purposes to deter officials who wish to overburden the system with requests in hopes that it will collapse. Over time, officials will be encouraged to exercise self-scrutiny and properly consider whether their intended taking is permissible under the Constitution. The transparency of this scheme will discourage unscrupulous officials from pushing for a dubious purpose in the first place.

The task of preventing land readjustments, however, is more complex. Given the recent approval of the new draft property law, it is clear that the central government has no intention of requiring the collective to relinquish power over land management, which includes readjustments. While large readjustments have been publicly condemned by the government, it has not been made illegal. This is partly because of the benefits of being able to readjust land periodically, which is essential to the per capita formula of land distribution in a “socialist countryside.” Instead of a total ban on land readjustments, the government should permit the collective to make small land readjustments—those necessary for redistribution of land when family members die or when households change residency—at will. However, any large readjustment—such as the reclamation of land to be transferred to an enterprise—should be approved by the State Council, or a specialized committee created by the NPC.

In addition, the State Council or specialized committee should also seek to clarify the meaning of the term “special circumstances” under the RLCL. Rather than leave it up to the village collective to decide its scope in ways that promote their own economic agenda, an independent, detached, and impartial body—such as the State Council or specialized committee—should make these determinations in a way that is harmonious with NPC policies and goals and publish them.²⁴⁸ The body should also apply equivalent sanctions to those suggested for the “public interest” proposal above. This will allow the central government to control the impact of large readjustments on the individual farmer, which will hopefully reduce the incidences of land grabs and thus rural unrest. Meanwhile, the structure of the social countryside is still maintained as

248. *See supra* note 103 and accompanying text.

the collective will still have the authority and freedom to perform its duties in land management, as it still has the power to make small readjustments.

2. Create Economic Incentives To Promote Environmental Protection

In May 2006, SEPA announced its intention to build three more regional supervision centers, adding to the two new centers already built in Nanjing and Guangzhou in 2002. The scheme also included plans to create a three-tier environment supervision system on the national, provincial and city levels, with ninety percent of cities having environmental tip lines, sixty percent of cities having their own response teams, and 80,000 additional staff by the year 2010.²⁴⁹ The problem with these proposals is that they seem only to come into effect once the damage to the environment has already been done. That is, after the enterprise has already been set up, been allowed to operate under lax environmental regulations, and in some cases no regulation at all, and only when an accident or violation occurs, then the tip lines and response teams kick in. Rather than an aim to prevent disasters from occurring in the first place, the goal for the regional centers was to improve the speed at which response teams could handle spills more efficiently.²⁵⁰

Another problem with this scheme is the apparently dubious motivations behind creating multiple regional offices. In the context of environmental regulation, “[c]ross-regional frictions concerning environmental problems are . . . considered a *headache*.”²⁵¹ From this attitude, one could see that the rising number of supervisory centers may simply be an attempt to relieve the case load from the main SEPA office in Beijing by requiring the other five centers—which in turn are expected to do the unthinkable task of supervising roughly five provinces each—to share in the “headache.” However, if SEPA and local officials are actually corrupted by economic incentives, or bound not to act under loyalties to political parties, creating more offices that employ the same mentality will not help the plight of the pollution victims. Rather, in addition to improving the resources of SEPA to allow for fast and efficient responses to violations, the central government needs to also ensure that such employees are not motivated by incentives or opportunities to abuse the resources they have been given. One possible solution to this is the introduction of the “Green GDP.”

249. Chinese Embassy U.S., China To Install 3 More Regional Environment Centers (May 5, 2006), <http://www.china-embassy.org/eng/gyzg/t250617.htm>.

250. *Id.*

251. *Id.* (emphasis added.)

The “Green GDP” is an economic accounting system currently being used to determine China’s actual gross domestic product (GDP) by offsetting the overall GDP with the economic cost of environmental degradation.²⁵² The proposal being considered, but not yet implemented, involves adapting the evaluation system of local officials to parallel the “Green GDP.”²⁵³ That is, the current system of evaluation based on the GDP of that government entity’s jurisdiction will be maintained, but the ultimate success of a jurisdiction will be calculated by evaluating the environmental and ecological costs (determined by public surveys, quality of air and drinking water, forest coverage, etc.) suffered by the jurisdiction. The final GDP will represent the economic growth off set by the environmental cost. This “Green GDP,” if applied to the evaluation of local officials’ GDP success, would maintain the financial incentive for officials to promote economic development and add a new incentive to prevent environmental violations, as their livelihoods now rest on its conservation.²⁵⁴

V. CONCLUSION

The failure to pacify rural unrest in China lies in the government’s failure to address the flaws in imposing its aspirational laws from above, without providing sufficient guidance on the means of implementing them at the grass-roots level. This has led to various abuses of power by lower level decision makers as the entrustment of unbridled discretion in implementing national laws to fit local conditions often results in personal and local protectionism, at the cost of the individual farmer’s interests and the state’s own goals.

252. 2004 CHINA GREEN NATIONAL ACCOUNT STUDY REPORT JOINTLY ISSUED BY SEPA (P.R.C.) AND NBS (P.R.C.), Sept. 9, 2006, http://english.sepa.gov.cn/zwx/xwfb/200609/t20060908_92580.htm (stating that SEPA’s integrated environmental and economic accounting system should cover at least five types of natural resource depletion costs (land, minerals, forest, water and fishery resources) and two types of environmental degradation costs (environmental pollution cost and ecological damage cost)).

253. *Id.* Further tasks include: “first, to improve accounting methods and conduct green national accounting as regular work. SEPA will carry out three basic surveys in succession such as Nationwide Pollution Sources Surveys, Nationwide Groundwater Pollution Investigation and Nationwide Soil Contamination Investigation jointly with other organizations concerned to supplement this accounting basis. Moreover, the National Survey for Ecological Damage Loss will be launched soon in order to lay the foundation for calculation of overall environmental degradation cost; second, SEPA will put stress on researches on how to formulate environmental and economic management policies related to pollution control, environmental revenue, ecological compensation and performance examination of governmental officers by using of calculation results of green national accounting.” *Id.*

254. Giu, *supra* note 26.

Despite promises to secure land rights on paper, persistently unclear and insecure land rights in practice allow local officials and collectives to manipulate land ownership to reclaim land under the constitutional limit of “public interest,” which is still undefined. Also, the inherent right of village collectives to readjust land by essentially exercising a taking without providing any compensation is extremely problematic for the individual farmer. Even when compensation is due, however, the way compensation distribution is structured means that adequate compensation does not reach the people most injured by a taking—the individual household. Instead, the majority of the compensation is paid to the collective, and the collective again is given the authority to use the funds as it sees fit, which may be in conflict with the individual farmer’s interests. Even if a farmer disputes a taking or unpaid compensation, there is no adequate forum for redress, and it is difficult to prove any rights when there is no proof of a contract.

To make matters worse, for those farmers who do have access to land to farm, the investment of time and money into the land is undermined by environmental degradation. While SEPA may have the political support and power to investigate and implement national policies, the effectiveness of these regulations is in the hands of the local governments who not only have the enforcement powers, but also have the authority to mould these national policies into local or regional standards to fit their own needs and circumstances. This unbridled discretion in addressing the gap between the national standard and local conditions often leads to interpretations of regulations which result in environmental neglect in the name of economic advancement. Furthermore, because local officials are evaluated based only on the GDP of their jurisdiction, and many officials tend to prioritize GDP growth over environmental protection.

Transparency of the laws and procedure, independence of government entities, and a focus on means of preventing violations of the law are just three ways that can help remove the loopholes in which corrupt decision makers are able to operate to the detriment of the rural population. To ensure true transparency, a mandatory system of land registration must be implemented with an amortization period to induce compliance. Compensation distribution should also be reformed to include public participation in the negotiation process. Additionally, public pressure should be utilized to induce self-regulation in the environmental regulation context, with all enterprises undergoing an EIA assessment to remove the discretionary power of the local officials to circumvent public participation rules.

The independence of government entities from each other and private enterprises may take longer to implement, but should be made a priority if the government wants to ensure that economic development is not undercut by corruption. The central system of supervision and budgetary distribution, which the government foresaw almost two decades ago, should be maintained and developed. Rather than make exceptions for administrative decisions that can be substituted by a market mechanism, land use rights and construction projects should be reintroduced into the central supervision system. Clearly, market incentives have led to abuse and should not be part of central supervision and accountability. Also, a central system of employee compensation and fee collection should be introduced to remove the temptation of personal gain offered by private parties and political pressure.

Finally, the prevention of violations should be the ultimate goal for future reform. By clarifying permissible uses for land takings and readjustments, and sanctioning violations in procedure, reforms will remove the ability of decision makers to hide behind ambiguity to legitimize illegal activity and may even induce a little self-scrutiny. Furthermore, to ensure local officials fully align themselves with the scientific approach to development, a "Green GDP" should be applied to local government evaluations. Only this way will these officials truly internalize the effects of pollution, instead of treating them as externalities not of official concern.

By promoting public accountability, restricting the scope of discretion and clarifying ambiguity, therefore, the government may begin to fill the disconnect between the aspirations of a developing economy and the reality lived by those within it. As it is clear that rural farmers will not be granted full rights to control and protect their property any time in the near future, in order to appease the rural masses, the government must focus its attention on ensuring that the laws adopted to ameliorate the farmer's situation are both practical and enforceable.