

**Forestland and Property Rights in China: Evolution towards Private
Rights and Public Regulation**

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Thesis submitted for the degree of Ph.D.

University College London



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Shin Wei Ng

25 July 2008

Abstract

This thesis examines the impact of the current land ownership arrangement on the use and management of collective forestland in China. Increasingly, the focus of China's forest and forestry is shifting from timber production to the conservation and protection of the forest ecosystem. So far the Chinese government has carried out a number of major programmes that seek to increase the forest cover and to reduce commercial exploitation in its natural forests. These large-scale state-sponsored programmes involved not only the state but also the collective forests.

The government has overwhelming control over the collective forests in relation to the production and use of forest resources. This thesis argues that this is mainly induced by the current land ownership arrangement. Although the collectives are 'self-governing' bodies and democratic elections are practised, the collectives nevertheless act more like the 'agents' of the government than true representatives of the collective members. By retaining control over collective governance, the state manages to assert control over the use of collective forests; in other words, the state has chosen to regulate land and forest use via the ownership structure. With little protection for individual rights, the state imposes rigid and intrusive measures that severely limit the autonomy of land users and create instances of abuse of power by those who are in control. This has resulted in various serious and negative consequences: inefficient use of forest and land resources; slow growth of rural economy; limited and incomplete private rights; increasing wealth gap; and last but not the least, slow development in the rule of law.

As a result, future reforms of collective forests will be futile if the ownership regime is not changed. It is argued that a private ownership regime is now viable and will help China's rural society to achieve further economic, social and legal development. Under a private ownership regime, the government can exercise control over forest and land use via public regulation, which would allow land use to be regulated in a more transparent and efficient way without compromising individual autonomy.

Acknowledgements

I am very grateful to Professor Tim Swanson for his supervision and the guidance that he has given. I would also like to thank him for his patience and support throughout the difficult and challenging years. I am thankful to my colleagues at the UCL Faculty of Laws, especially Dr Eva Pils, Dr Emmanuel Voyiakis and Dr Riz Mokal, for the wonderful discussions and conversations on various subjects. I am also grateful to all my friends, especially Dr Chin Won Khoo, Dr Mijin Cha and also Dr Elli Groner for their support and inspirations.

I would also like to thank my parents and sisters without whose moral and financial support any achievement would be impossible. The same goes to Adam Wright, who has been wonderfully supportive. I am thankful to Joanne Wright and David Mason for proof-reading my chapters, and to Yue Peng for helping me to get access to Chinese articles. I am also very grateful to the Lee Foundation, which has funded my education for a decade.

Lastly, I would like to thank Professor Tim Swanson and Professor David Pearce for giving me the opportunity to get involved in the project in China. I am also thankful to all those who have worked with me such as Tao Wendi, Katrina Mullan, Dr Ben Groom, Dr Andreas Kontoleon, and Professor Zhang Shiqiu.

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Chapter 1

Theory of Property Rights and China's Forestland: An Overview

1. Introduction

This chapter gives an overview of China's forests and the role of property rights in addressing the difficulties related to its existing forest regimes. We shall see that in the face of the intensive industrialisation and urbanisation processes that are taking place in China, whilst cropland area has been decreasing, forestland area has been increasing consistently over the past decade. This has been achieved after years of neglect and exploitation of the forest in the early years of the establishment of modern China. Deforestation was particularly severe during the Great Leap Forward period (1958-1962), the Cultural Revolution period (1966-1976) and in the 1980s immediately after forestland de-collectivisation. As China develops at a breathtaking pace, its demand for timber and other forest products has greatly increased, for both the local and international market. As a result, China's forests have been under substantial pressure. To meet the demand shortfall, China has increased its forest products imports and investment in plantation forests.

On the other hand, as the demand for forest environmental services has also increased, China's forest policy has altered significantly in the last decade. Ecological forests have been established all over China under various state-sponsored schemes, including the Natural Forest Protection Programme and the new forest ecological benefit fund scheme. The latter aims at compensating the efforts of private entities in providing forest ecological benefits to the public. The long-term target of the Chinese government in relation to its forestland use is to source timber solely from commercial forest plantations whilst protecting and conserving its natural forests. In addition, man-made forests in strategic areas such as the sloped land and riverines are also protected by government policy. A logging ban that was introduced by the Chinese government in response to two severe natural calamities that took place around Yangtze and Yellow Rivers is now effective in large tracts of forests, both natural and plantation forests. In essence, since the last decade, the focus of China's forest and forestry has shifted from timber production to environmental protection. This shift of focus is reflected in the newly re-organised forestry department, whose

mandate is now almost exclusively about forest protection. Lastly, the number of nature reserves in China has also increased greatly since the establishment of the People's Republic of China.

In 2003, the State Council adopted the Decision on Acceleration of Forestry Development, which provides the blueprint of government's long-term policies on forestry. The Decision contains eight main points, all of which point in the direction of sustainable development of China's forest base and industry. The Decision requires the involvement of all people to develop and manage forests, and the use of science and technology. It also requires that the ecological benefits of forests should be given priority over the economic and social benefits. It also reiterates the aim to increase total forestland to above 26 per cent of the landmass by 2050. It emphasises the importance of continuing the effort to rebuild the ecology by planting trees in both rural and urban areas, and to protect the existing environment that hosts valuable biological resources. In relation to the forest industry, the government further emphasises the need to develop downstream wood processes, and the diversification of forest product markets. It also requires government guidance and control of the forest industry with reference to the needs of the market; this includes giving incentives and assistance to local enterprises.

The Decision also states the need to reform the current structure of forestry. Apart from securing the land use tenure, it also asks for further liberalisation of the land market to facilitate the transfer of land use rights. More importantly, it highlights the need to have different management regimes for public benefit/ecological and commercial forests: the state should be the main financial supporter and manager of the former, whilst the market should regulate the latter. The Decision also requires the government (both central and local) to increase investment in forestry, especially in silviculture and forest protection. In addition, it requires the reduction of forestry taxes and abolition of various fees and charges; the financial shortage caused by this should be the responsibility of the Treasury. Lastly, the Decision further emphasises the use of legislation, and science and technology to regulate the use, protection, management, development and monitoring of forests. It reiterates the civic duty of every citizen to help the government to attain the targets and to implement the policies set out.

Despite the adoption of the policy, many things still need to be done if the aims and targets listed above are to be achieved. In particular, the government needs to provide more detailed and comprehensive regulations on forestland use; the existing policy ‘declaration’ is in itself not enough to bring about the changes. In addition, the nature of forestland governance has to be changed from centrally controlled to one where users have more say as to how and when to use the resources. The government also needs to change its role in forest and resource management: instead of acting as a ‘manager’ of forest resources actively involved in its management, it should work as a guardian of public land by providing guidance and necessary controls via policy and regulations. Given the still very strong ‘top-down’ character of China’s forest governance, the core of forest and forestry institutions needs to be overhauled before any sustainable changes can take place.

One of the important components of China’s forest and forestry that has had a great impact on forest management is forestland ownership. As will be discussed below, property rights are social, political and economic tools that govern the human relations with regards to resource use. The legal and political system of a state provides the framework for the specific form or forms of property rights; the property rights institution will in turn dictate the economic activities within the state. In some circumstances, however, the economic system will influence the property rights institution as economic actors push for change. Currently, China’s forestland is subject to only two types of ownership: state and collective ownership. Generally, the owners of collective forest are the ‘self-governing’ village units that are supposedly independent and do not form part of the government’s administration. In reality, however, these village units are ultimately responsible to the government, despite the fact that the village representatives are elected by the members of the collective. The vitiation of the collective ownership rights is compounded by the fact that in many cases the definition of the ‘collective’ itself is vague. In short, although collectives are the *de jure* owners of the land, in many situations the state actually usurps the role and acts as the *de facto* owner.

The implications of a ‘weak’ collective ownership are substantial. It not only impacts on the legal and political rights of the collective members who are also the land users,

but also the investment in and production of forest resources. Although private land use rights have flourished and have gained legal recognition and protection, they still face some fundamental difficulties or restrictions due to the ownership arrangement. As the state has control over the ‘weak’ collective ownership of land, it is able to impose various restrictions on forestland use, some of which would have been deemed unacceptable if the land were indeed privately owned. The prohibition on selling and transferring land for non-agricultural use is one example. The logging quota system that arbitrarily restricts the right of tree owners to harvest the timber is another example. In addition, the negligible compensation given to users of protected forest may also be the result of the attenuation of ownership rights. More recently, the logging ban that has been imposed in some of the collective forest without compensation shows the vulnerability of collective forestland users. Lastly, continued land reallocation and a short land use period may discourage long-term land use planning and sustainable use of forest resources. As will be discussed in the following chapters, these restrictions have created an unfavourable environment for the land users and damped forest users’ enthusiasm for investment.

In addition to the impact on the investment in and production of forest resources, the current forestland ownership arrangement also has serious social and legal implications. The ‘weak’ collective ownership rights can hardly be relied on by collective members to defend their rights against the encroachment by the state. More importantly, the government is able to control the socio-economic aspects of the rural population via the control over land. For example, control over access to land ties individuals and families to the rural areas. This not only denies rural population the freedom to move, it also puts discretionary power in the hands of the decision-makers. In addition, strictly controlled land exchanges also hold back economic growth and increase the wealth gap between rural and urban populations. More importantly, the absence of secure property rights has exposed the rural population to the abuse of power by government officials, who may escape supervision by the central government. Without the assurance of rights, and without the right to protect their interests, forestland users are not able to take direct action against government officials or even village representatives who have abused their position and harmed the interests of the collective members.

Property rights of rural land (forestland more specifically) thus have huge implications for China's rural economy and society. Despite the fact that private land use rights are now prevalent in rural China, they nonetheless exist within the framework of the 'weak' collective ownership. It can be argued that future reform of collective forests would be futile unless it takes into account the need to reassess the current property rights arrangement. This thesis analyses not only the extent of private land use rights, but also the nature of collective governance and collective forest management in depth. The conclusions that are derived from the discussions inevitably point to the need to introduce a more secure and independent forest property rights regime, a regime that could offer better protection to the rural population's social, economic and legal rights.

This introductory chapter proceeds as follows. The next section of this chapter takes a brief look at the theory of property rights, which offers an insight into the relationship between property rights, resource use and social development. The subsequent section examines the present state of China's forest and forestry. These are the 'stylised facts' of forests in China. Section four is a discussion of the main problems faced by forest users, including the logging quota, ineffective law enforcement, the logging ban, inadequate compensation for environmental services, and tenure insecurity. The last section summarises the purpose of this research, and outlines the discussions of subsequent chapters.

2. Methodology

This thesis seeks to analyse the various aspects of rural land property rights in China. It discusses not only the legal characteristics but also the economic, social and political implications of land property rights. Essentially, it aims to take an integrated approach in looking at how land property rights have impacted and will impact on China's forest and forestry. The existing literature takes a less integrated approach when it comes to analysing the impact of tenure security and property rights on the use of forest resources. They usually only focus on one particular aspect of land and land use, and have failed to make empirical analysis in the context of the wider picture. In addition, the majority of the existing literature focuses on arable land or agricultural land in China generally, rather than on forestland exclusively. The latter

issue, however, is not an impediment to the research due to the fact that forestland and arable land share many similarities and have been treated in a similar fashion by the Chinese government until recently. The discussions of the general characteristics of agricultural land (or more precisely arable land) have provided a valuable source of information regarding the issue of forestland property rights and use in China.

This research is based on primary and secondary sources, and includes both English and Chinese language materials. Although the research focuses mainly on empirical discussions of what actually happened (and are happening) on the ground, sections on theoretical discussions of Chinese law are also included. This focus, however, means that the thesis relies mainly upon the various reports and case studies that analyse the current state of affairs of forestland use, rather than on Chinese legal sources that discuss the development of Chinese law from a theoretical point of view. Nevertheless, a section on the theory of property rights is included at the beginning, which is mainly based on the mainstream Western legal and economic analysis of property rights. This section is particularly relevant to the discussions of the instrumental value of property rights in a market system and also the inherent value of property rights as an aspect of human rights and as a defining feature of the role (and power) of the state. The primary sources relied on come from two surveys carried out in China in which the author participated. Although the outcomes of the case studies are not directly employed in the thesis, they nevertheless provide important background understanding of the relevant issues covered in this research and have informed the scope and direction of the thesis.¹ The methodology employed in the surveys will be further elaborated at the end of this section.

The secondary sources used for the account of China's current state of affairs in relation to forest and property rights include textbooks, contributions to periodicals, reports by international organisations, seminar papers and newspaper reports. Newspaper reports provide a particularly valuable source of information on current cases that involved land disputes and abuse of power by local officials. Both media

¹ The surveys looked at the impact of two forest-related programmes on local communities. The results from the surveys provide information about, *inter alia*, the involvement of the members of local communities in forest protection and forestry, the income sources and changes, the property rights structure and use patterns of forestland, and the impact of the two environmental programmes on local livelihood. These information give an overall understanding of the main issues or problems faced by the collectives and the structure of forestland use governance.

inside and outside China are used, and to overcome the problem of inaccurate or biased reporting, the most reputable media outlets are used, such as the British Broadcasting Cooperation (for overseas coverage) and the Nanfang Daily (for mainland China coverage). With regards to statistics, the data in this thesis is derived from primary and secondary sources, which include mainly statistics released by the Chinese government and international organisations such as the Food and Agriculture Organisation of the United Nations.

Due to the fact that the communist/socialist ideology is still profoundly relevant in China, at least at the theoretical level, bias resulting from ideological orientations can be found in some Chinese literature. The majority of the works relied on, however, are non-biased and are based on objective empirical studies. The results of these empirical studies are particularly relevant to this research. Due to the fact that practices vary from place to place in China, it is important to have case studies that covered as wide an area as possible in China in order to grasp the overall picture. As it would have been impossible for the author to gather information of such abundance personally, the reliance on the various case studies by different scholars has proved invaluable. Most of the case studies were carried out at the household level, although some have also included village level research. These case studies not only provide the foundation of analysis in this thesis, they also give a comprehensive insight into the existing land ownership and use arrangements in China. As a consequence, the existing literature will form an integral part of the thesis and will be fully referenced.

Most research on China rural land use carried out so far has studied the economic consequences of land tenure improvement on the investment in and the use of agricultural land including forestland.² Various case studies have been carried out in the 1990s to assess and quantify the changes in people's behaviour following changes in tenure arrangements. Behavioural changes are mainly captured by the change in investment decisions and productivity. The results from these empirical studies show that households have reacted positively to the improved security of tenure. In

² For a few examples, see Rozelle, S., Huang Jikun and Benziger, V. 2003; Schwarzwälder, B. et al., 2001; Sun Yan, Xue Jintao and Li Ling, 2006; Hyde, William et al. (eds), 2003; Rozelle, Scott et al., 2000; Ho, Peter (ed), 2005; Liu Fengqin, 2005; Niu Ruofeng et al., 2004; Whiting, Susan. 2001; Yao Shunbo, 2005; Cheng Yunxing, 2004; Lu Xueyi, 2002; Kung, James Kai-Sing, and Cai Yong-Shun, 2000

particular, it was found that investment in economic forest such as bamboo forest and other cash crops such as fruit trees have increased. In addition, household income changes are also used as indicators of the impact of tenure reform on rural welfare. Generally, rural land tenure reform in China has played an important role in reforming rural economy that has released millions of people from poverty.

However, nearly all of these studies have only looked at the impact of the early rounds of the property rights reforms, which started from the adoption of the household responsibility system in the late 1970s and early 1980s. They have not assessed the continuous impact of property rights on land use, especially the impact of the gradual and more subtle changes in land use rights. For example, private use rights have been afforded more legal protection following the adoption of several major legislations, and the increase of commercial value of land has increasingly pitched the interests of private land users against the interests of local governments who rely on the sale and development of agricultural land for income. These changes, coupled with the rapid urban expansion in China, have also had a huge impact on investment and land use decisions. The only land-use related issue that has been looked at in the context of the ongoing economic changes is land use transfer. Some studies analysed the impact of economic development on the pattern of land use transfer and vice versa. Apart from this, the impact of the existing property rights arrangements on the future of economic growth in rural China has not been subject to scrutiny.

Some literature, on the other hand, looked at the social significance of rural land.³ For example, it has been found that land plays an important role as the main form of social security for the rural population, and that the social significance of land differs from less developed regions to more developed regions. These findings have mainly come from research that looked at the practices of land reallocation and land use transfer in rural China. These research show that there is currently indeed a real and serious conflict between tenure security and the need to provide social security to the members of the collective; and in many cases, especially in less-developed regions, the social importance of land prevails. Recognising the importance of land, many

³ Ho, Peter, 2005; Ho, Peter (ed), 2005; Liu Fengqin, 2005; Niu Ruofeng et al., 2004; Whiting, Susan, 2001; Cheng Yunxing, 2004; Lu Xueyi, 2002; Kung, James Kai-Sing. 1995, 2000, and 2002; Kung, James Kai-Sing and Liu Shouying, 1997; Rozelle, Scott and Li Guo, 1998

papers have come to the conclusion that although the existing collective ownership of land may not promote efficient land use, it is nevertheless necessary in order to maintain the social order among and social well-being of the rural population. Some even went so far as to argue that collective ownership of land is necessary for the achievement of the egalitarian goal.

These studies, however, have not typically looked into the alternatives to the current arrangement. Furthermore, these studies have not actually assessed the impact of the rapid social changes that have been taking place in rural China on the value and use of land. For example, access to off-farm employment is now the number one factor that has vastly increased rural income and as a result, has also become the main source of income disparity among the rural population. An egalitarian goal of access to land is no longer attainable by just controlling the ownership of land. The studies have also failed to illustrate that the current rigid land arrangement may no longer reflect the social changes that are taking place. Discussions of the social importance of rural land not only should be set against the background of the rapid economic and social changes that are taking place but should also include the implications of the current tenure arrangement on the establishment of a viable social welfare system in rural China in the future.

Some of the existing literature has also analysed the implications of legal reforms on land ownership and use.⁴ These legal papers mainly outlined the existing laws and policies that are affecting land ownership and land use, and discussed the legal implications of the main provisions. In particular, these legal discussions highlighted the rights and obligations of the parties involved in land use, which are the collective (acting as the owner) and the households (acting as land lessees). Apart from a few legal papers that focused mainly on the issue of rural land use and ownership, the majority of the literature discussed the general state of China's legal system. The main reference books used in this research are critical of the current state of China's legal system, which reflects the ongoing legal and judicial reform that China has embarked on since the transition from a planned to a market economic system. The legal

⁴ Prosterman, Roy et al. 1998; Prosterman, R., Schwarzwalder, B., and Ye J. 2000; Schwarzwalder, B., Prosterman, R., Ye J., Riedinger, J., and Li P., 2002; Chen Xiaojun et al. 2003; Chen, Albert 1999; Chen, Albert, 2000; Peerenboom, Randall, 2002.

analysis also involved the discussions of parallel issues such as law enforcement and judicial reform.

Policy makers and legislatures sometimes assume that the letter of the law will be duly adhered to while in reality they are not. This could be due to the underestimation or ignorance of the existing problems that make enforcement ineffective, including the less than desirable collective governance structure. As a whole, there have not been many critical assessments of the legal aspects of land ownership in China. This could be because land ownership is still a very sensitive issue in China and the discussion of which will evoke emotional ideological debates. In addition, many may have regarded that legal reforms of land rights have stagnated and that any significant and radical reform in land ownership is not to be expected in the near future.

This last paragraph briefly outlines the methodology used in the two case studies in which the author participated.⁵ The surveys were carried out in the Ningxia and Guizhou Province in 2005 and 2006. The main purposes of these surveys were to assess the impacts of the Sloping Land Conversion Programme (SLCP) and the Natural Forest Protection Programme (NFPP) respectively on the local communities. Generally the two surveys were executed by using the same methods, namely interview and questionnaires. Both surveys were coordinated between the teams from Peking University, University College London and University of Cambridge. Both surveys started with reviews of the existing literature on the subjects in order to understand the background of the two programmes and to look for issues that have not been dealt with. Once the literature reviews were done, all the participants in the survey met up to discuss about the relevant issues and information available; conclusions of the discussions led to the formulation of the questionnaires. The questionnaires were formulated according to the information the case study groups would like to obtain from the interviewees. For example, a huge section of the survey on the NFPP consisted of questions that were aimed at retrieving information about property and land use rights. For the SLCP case study, a theoretical farm household model was developed that would clarify how households who have taken part in the

⁵ The author was involved in the general discussions and background research phase for the Sloping Land Conversion Programme survey, and also in the drafting of the questionnaires and data analysis phases for the Natural Forest Protection Programme survey.

SLCP and which have been subjected (with varying degrees) to different types of market and institutional constraints would respond with respect to their labour and land allocation choices. Both the SLCP and NFPP surveys developed separate questionnaires for households and for village leaders. A pilot survey was carried out in late June 2004 in Zhangbei County, Hebei Province for the SLCP survey. It was aimed at extracting as much information as possible to be used for the formulation of the questionnaire used in the subsequent survey.

3. Theory of Property Rights

The theory of property rights is central to the discussion of China's forest regime because it explains how different governance systems allocate rights and responsibilities for land between users, officials and others. These rights and responsibilities affect how the different entities perceive the value of the land and its resources; this in turn influences how land resources are used (method and rate of exploitation). In addition, the institution of property rights also has a great bearing on the political and social development of a society as it defines the boundary of the rights and power between those that are governed and those that are governing. Essentially, property rights are social instruments which govern human relations with regards to the use of resources. As such, the implications of property rights permeate every aspect of our society. The significance and relevance of property rights will be explained in detail in this section.

The study of property rights and natural resources is well researched. In Western literature, jurists had attempted to understand the meaning and implications of property rights. As society evolved, the interpretation of property rights had become more and more liberal, which ultimately resulted in the predominance of private property rights. The development of private property rights not only reflected political development, but also the rising capitalist economic system following the industrial revolution. Since then, the studies of property rights have continued to flourish and the different property rights theories have greatly contributed to our understanding of the role of property rights.

This discussion of the theory of property rights in this section is divided into two main groups: the socio-political and legal studies of property rights, and the economic analysis of property rights. The former looks at the philosophical and jurisprudential discussions of property rights, which associate property rights with the theory of government (and society) and more recently with human rights.⁶ In particular, these theories aim to explain how ownership right and allocation of resources affect the achievement of justice and equity between individuals and societies. On the other hand, the latter focuses on the role of property rights in influencing economic behaviour. Economists generally see property rights and allocation of natural resources as important determinants of efficiency in resource use.⁷ Hence, this analysis of property rights is a combined analysis of both equity and efficiency.

3.1 Socio-Political and Legal Analysis of Property Rights

The notion of property rights was first explored during the time of ancient Greece: Aristotle wrote about property rights as a means of achieving a good life as a citizen.⁸ Since then, political philosophers and other social theorists have discussed property rights and their relationship to human and social life. According to Macpherson, there are two main directions in the discussion of property rights in the Western literature of philosophy and social studies, i.e. property as the means to some other end and property as an end in itself.⁹ For example, to Rousseau, property is the means to individual freedom. On the other hand, John Locke and Bentham regard the accumulation of property as the end in itself, meaning that property ownership is the aim that everyone should pursue.¹⁰ This latter theory is the essence of a free-market capitalist society where wealth accumulation is the norm.

⁶ According to some philosophers such as Emmanuel Kant, property rights are part of the ‘social contract’ that governs the relationship between individuals in a society. Property rights are also associated with self-reflection, self-advancement and self-projection, which turn the rights into one form of human rights.

⁷ The two main textbooks on natural resource and environmental economics are: Tietenberg, T., 2003; and Perman, R. et al, 2003. According to Tietenberg, the characteristics of private property rights are exclusivity, transferability and enforceability. Property rights affect the marginal cost of production and the discount rate, which in turn influence the decision of how and how much to produce.

Environmental problems arise when property rights are ill-defined, where these rights are not exchanged under competitive conditions and when social and private discount rates diverge, *ibid.*

⁸ Mathie, W., 1979

⁹ Macpherson, C.B., 1979

¹⁰ To Bentham, the ultimate end of all social arrangements was the maximization of the aggregate utility or pleasures of the members of a society. Wealth ‘was so essential to the attainment of all other pleasures that it could be taken as the measure of pleasure of utility as such’ (*ibid.* p 5). Locke’s theory

Apart from this dichotomy, there are also disagreements over the extent of property rights: limited and unlimited rights. As we shall see, most of the philosophers have adopted the idea of social contract or reciprocal consent, and accepted that property rights are limited for the purpose of the security and stability of the society. In fact, most economists base their theories on this assumption and recognise that property rights are not absolute. Consequently, the state/government has the power to regulate, *inter alia*, the use and allocation of property. On the other hand, there is a minority group of philosophers who see property rights as one of the main cornerstones of liberty, which are inviolable and unlimited. Robert Nozick¹¹ and other libertarians have advocated the ‘minimal state’, which corresponds to the importance they assign to private property rights. However, the fiercest debate on the issue of property rests upon the subject of the distribution of wealth. In a capitalist society where goods and money can be exchanged freely, accumulation of property is tantamount to the accumulation of wealth. As a result, property ownership and allocation has direct implications on wealth distribution. Different jurists use varying approaches to address the issue of distributive justice. Despite the proliferation of the different approaches, each of which is equally persuasive, a universal consensus is still lacking and the debate continues.

3.1.1 Property Rights as Natural Rights

John Locke in his *Second Treatise of Government* put forward the theory that individuals have natural rights to unlimited property.¹² According to Locke, in the state of nature, all things belong to the common where ‘God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life, and convenience’.¹³ Individuals are entitled to appropriate (and to own) things with which they have mixed their labour.¹⁴ This ‘labour-mixing’ argument is the essence of Locke’s natural rights theory where it explains and justifies

focused on individual ownership of property, which was used to rebut ownership right of the Monarch and was justified on the ground of the right to sustain life.

¹¹ Schmidtz, D., 2002

¹² Macpherson, C.B., 1980

¹³ Ibid. p 18, paragraph 26

¹⁴ Ibid. p 19, paragraph 27

how a person acquires ownership of a thing.¹⁵ As a natural right, ownership can exist before the establishment of a government, and the government has a duty to protect it. Accompanying the ‘labour-mixing’ argument are two provisos that Locke inserted as the conditions of ownership: first, one should leave as much and as good for others (sufficiency rule)¹⁶; and second, one may appropriate only as much as he can use before it spoils (no-spoliation rule).¹⁷ These provisos restrict the unlimited right to exploit un-owned natural resources by individuals to ensure that fairness is achieved and over-exploitation by an individual is avoided.

Another prominent advocate of property as a natural right is a 20th century libertarian philosopher, Robert Nozick. According to Nozick, along with the rights to life and liberty, right to property is an inviolable right that is to be afforded the greatest protection from third party interference.¹⁸ This is so because, according to Nozick, men have exclusive right to self-ownership, and self-ownership gives rise to property rights in other resources through individuals “mixing their labour” with un-owned resources.¹⁹ Basically everyone is surrounded by a ‘sphere of rights’ with which no one may interfere;²⁰ this is recognised as individual’s rights to non-interference (negative rights). If a property was obtained entirely as a result of a transaction or series of transactions, which was freely entered into and without the use of force or fraud, then it was a fair distribution and the ownership right should be recognised and not interfered with.²¹ According to Nozick, property rights are not *prima facie* rights but unlimited rights, which should be respected by others, and should only be interfered by the state under very limited circumstances.

3.1.2 Property Rights as Creation of Law

The prevailing social theories nowadays do not see property rights as natural rights, but rather as rights created by law. John Stuart Mill regarded property rights not as

¹⁵ *Ibid.* p 25, paragraph 40. However, this ‘value-adding’ argument was criticised by Robert Nozick in his book, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) pp 174-5. Nozick used the example of spilling a can of tomato juice into the sea to rebut the argument that the mixing of labour with something makes one the owner of it.

¹⁶ *Ibid.*, p 21, paragraph 33

¹⁷ *Ibid.* p 24, paragraph 38

¹⁸ Wolff, J., 1991, p 9

¹⁹ Simmonds, N.E., 2002 p 78

²⁰ *Ibid.* p 8

²¹ This is Nozick’s ‘Entitlement Theory of Justice’, *ibid.* p 90

natural liberties but as social privileges conferred by law on the ground of general utility,²² whilst according to Rousseau, property rights cannot antedate political constitution.²³ Both Rousseau and Kant were of the opinion that property rights exist because the law creates and sanctions them. For example, Kant wrote that 'men only have property in external things when a legal order gives them that property and provides remedies for its loss'.²⁴ According to Rousseau, property in goods refers to a legal power and right, supported but also regulated by the state.²⁵ A state exists to protect property and where this protection is not upon fair terms, the state is illegitimate.²⁶ Apart from legal legitimacy, to Rousseau, morality also plays an important role in the regulation of property rights.²⁷ Moral became a guiding principle in order to avoid property relations to swallow up and stand in the place of human relations, a process of which referred to as 'alienation'.²⁸ On the other hand, Kant paid more attention to the concept of 'social contract'. According to him, the constitution of a society is founded on a will binding everyone, and this 'contract' guides the behaviour of the society so that everyone is bound to leave another's property untouched.²⁹ A state is founded on, and exists to serve private property, and the duty of the state is to regulate the dealings of independent possessors of property.³⁰ More importantly, a state must also possess some kind of reserved authority to alter the principles on which property is held, and property rights are inviolable only against other private citizen but not against a legitimate state.

Another important school of philosophy that has offered extensive discussions on the nature of property rights is the utilitarian school of thought. According to utilitarianism, property rights are not natural liberties but social privileges conferred by the law on the ground of general utility. The two main concerns of property rights under utilitarianism are the welfare of everyone, and the secure expectations that will

²² Ryan, A., 1984, p 144

²³ Ibid. pp 54-55

²⁴ Ibid. p 79. However, Kant also uses the notion of 'natural right' to appropriation in the state of nature as a logical fiction for juridical purposes to explain how somebody would have originated the property rights in the first place, *ibid.* pp 79-80.

²⁵ MacAdam, J., 1979, p 194

²⁶ Ryan, A., 1984, p 63

²⁷ Ibid. p 196. In fact, in his view, property should be regulated by moral values of liberty, equality and fraternity

²⁸ Ibid. p 192

²⁹ Chadwick, R., 1992, p 394

³⁰ It prevents each man from exercising his freedom in such a way as to impede the free actions of others, and it employs coercion to defeat coercion and nothing more.

induce people to work productively and effectively.³¹ According to Jeremy Bentham (who is generally regarded as the Founder of utilitarianism), property rights increase utility as expectations are fulfilled when rights are protected, and fulfilment of expectations is a form of happiness. At the same time, property rights are not absolute, and the legislators should make sure that the general welfare of the people is maximised. In relation to property, the role of the state is to guarantee security, subsistence, abundance and equality.³²

Lastly, Hegel provided a theory of property rights that accentuates the anthropocentric approach in relation to the relationship between man and objects or things. To him, ownership of things promotes and reflects self-advancement. Properties provide sentimental value to the owners as people can identify with and express themselves in things they make, control and use. Hegel's view was that property is the first embodiment of freedom and is in itself a substantive end.³³ To him, placing one's will into an object and making it a possession makes the inward properties of the mind to turn toward the outside world. These rights are substantiated in civil society through positive law.³⁴ However, this freedom is not unqualified and we are not entitled to do whatever we want with what we own. Individuals' decisions are subject to the larger purpose of their society. Reciprocally, in order to achieve the larger purpose, the society must take into account the multitudinous plans of the individuals.³⁵

The two approaches (natural rights versus creation of law) have also taken different views on the role of the state. For Nozick, property rights exist irrespective of the existence of the state. His theory of non-interference or negative rights does not advocate a state or government playing an active role in regulating individuals' property rights; on the contrary, it requires the least interference from the state, which is called the 'minimal state'. A minimal state, or the 'night-watchman state', exists to protect people against force, fraud and theft, and to enforce contracts.³⁶ Another

³¹ Ryan, A., 1984, p 92

³² Ibid.

³³ Whelan, D., 1998

³⁴ Ibid.

³⁵ Ryan, A., 1984, p 133

³⁶ Wolff, J., 1991, p 10. The state will be deemed to violate rights if it undertakes any more extensive programmes, such as collection of taxes for income redistribution purposes or for the purpose of provision of health service. Individuals' rights are made inviolable and are protected against interference by the state.

natural rights advocate had taken a less rigid view on the role of the state. According to John Locke, people surrender their rights to a sovereign civil society; however, this sovereign state will not possess arbitrary and absolute power. For example, distribution of wealth through taxation can be carried out with the consent of the majority of people through their representatives but no government has the right to take a man's property without his consent.³⁷ On the other hand, as already discussed above, for those who see property rights as something conferred by the law, the state is given a more active role to play to safeguard some fundamental ideologies that are deemed important such as general utility (utilitarian), moral values (Rousseau), and self-management (Mill).³⁸

In reality, the extent of a state's power over private properties very much depends on the socio-political structure of a country. For example, in a democratic country where government is elected by the majority, state power is subject to more rigorous scrutiny and private properties are, as a result, afforded more safeguard against the encroachment by the state. On the other hand, if a country is governed by an authoritarian government, private property is more vulnerable to the power of the state. Equally, in a country that practises socialism, the state will have more power to redistribute properties, which inevitably means that the scope of protection for private properties will be less extensive.

3.1.3 A Bundle of Rights

Lay people usually associate property rights with the relationship between the owners and things, whilst most academics accept that the notion of property rights is actually about the relationship between the owners of things and other people.³⁹ According to Pejovich, property rights are defined as the 'behavioural relations among men that

³⁷ Macpherson, C.B., 1980, p xviii - xix

³⁸ The role of the state is even more prominent in relation to the governance and use of natural resource and the environment as the issue of public interest is ever-present when it comes to common goods. Apart from regulating exercise of property rights via legislations, an extreme power that the state uses to frustrate property rights is expropriation. One argument provides that changes in social expectations/interests (such as a shift in environmental awareness) are part of the idea of property. According to this concept, 'property represents individual interests, fluid in time, established and re-established as circumstances warrant', and sometimes individual interests have to give way to the collective change, Underkuffler, L., 2003, pp 46-51.

³⁹ However, many economic analysis of property rights still treat property rights as the relationship between a person and a thing. For example, Yoram Barzel's notion of economic right refers mainly to the relation between the possessor and the thing. More detailed discussions of this aspect can be found in Cole D.H. and Grossman P.Z., 2002

arise from the existence of things and pertain to their use'.⁴⁰ One of the most widely referred to definition of property rights is provided by Hohfeld. Hohfeld's *Fundamental Legal Conceptions* provides an explanation to the nature of the relations between people with respect to things.⁴¹ Hohfeld's 'jural relations' lists out the possible property relations, which encompass claim-right, privilege, power and immunity, and these relations are explained by correlatives and opposites.⁴² According to Hohfeld, rights are always accompanied by the corresponding duties to do or to abstain from doing something. If there is no corresponding duty on others not to interfere with the enjoyment of the thing, then the possessor of the thing does not have a right over it, but only power or privilege. By referring to the 'correlatives' and 'opposites', one can find out the nature of the relations between the thing and the possessor, hence the relations between the possessor and other people. Hohfeld's theory of property relations is one of the few property rights definitions that are widely recognised and used, references to his 'jural relations' are commonly found in state and federal case law in the United States.⁴³

Another widely used definition of property rights was presented by Honoré, according to whom ownership is 'the greatest possible interest in a thing which a mature system of law recognises'.⁴⁴ Honoré treats property rights as a 'catalogue of things'. This catalogue includes the rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment.⁴⁵ These are the 'sticks' in the bundle called property, and ownership of a thing need not contain all 'sticks', it all depends on the extent of rights. This description of property rights is useful in the sense that it avoids the need to produce evidence of absolute components of rights, and it gives a general range of the possible rights and power to use a thing without specifying all the possible uses or the actual or possible limitations.⁴⁶

⁴⁰ Pejovich, S., 1972, p 40

⁴¹ Munzer, S., 1990, pp 17-22. These ideas were present in Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, *Yale Law Journal*, 23 (1913), 16-59

⁴² Ibid.

⁴³ Some examples of these cases can be found in the article by Cole D.H. and Grossman, P.Z., 2002, pp319-322.

⁴⁴ Taken from A.M.Honoré, Ownership, in Guest, A.G., 1961, p 108

⁴⁵ Ibid.

⁴⁶ Keeve, A., 1986, p 18

On the other hand, some economists usually refer to property rights as a ‘bundle of rights’, which include the right to use, right to derive income, right to transfer and right to exclude others. This is in a way a ‘watered-down’ version of Honoré’s definition, which specifies only the four main features of property rights that are deemed vital. Others prefer to make a distinction between legal and economic property rights, with economic property rights usually consisting of much simpler and straightforward definition of rights.⁴⁷ For example, Yoram Barzel defined economic property rights as rights ‘an individual has over a commodity (or an asset) to be the *individual’s ability, in expected terms, to consume the good (or the services of the asset)* [original emphasis] directly or to consume it indirectly through exchange.⁴⁸ In other words, these direct and indirect links to benefits establish property rights. This form of explanation of definition of property rights is ‘consequential’, meaning the status of the thing or relation is directly linked to outcome of the use. It avoids the discussions of duty, right, power, privilege and etc. as elaborated by Hohfeld. This ‘consequential’ approach is akin to the utilitarian approach, which gives emphasis not to the content of the right, but the result produced, i.e. the amount of utility. In fact, Posner has tried to show that law and economics are both after the same aim, namely efficiency,⁴⁹ which in the legal world is known as ‘utility’. According to Posner, the ‘greatest utility’ of Bentham is the same as the ‘efficient solution’ sought after by economic analysts.⁵⁰

3.1.4 Distribution: Justice and Sustainability

Theories of distributive justice are concerned with two things: intra-generational and intergenerational equity. Both of these have a great impact on what and how resources of the world are consumed. Intra-generational distributive justice addresses the issue of the distribution of wealth and resources among people of the same generation. Intra-generational distributive justice is important because while poverty leads to

⁴⁷ For discussions of legal and economic property rights, see Cole, D.H. and Grossman, P.Z., 2002, and Keeve, A., 1986, *ibid.* Chapter 2.

⁴⁸ Barzel, Y., 1997, p 3. While Barzel’s economic rights seem not to be confined by legal rights, Sheehan J. and Small G. defined economics rights as rights dependent on, and are subsidiary to, the capacity of legal rights to permit and to allow the holder to enjoy as a benefit from the thing in question, in Sheehan J. and Small G., 2002, p 11.

⁴⁹ Harris, J.W. , 2004, pp 45-50.

⁵⁰ *Ibid.* p 46.

ecological degradation and resource depletion⁵¹, extreme wealth encourages people to engage in the unsustainable consumption of resources. As such, equity will be achieved when these two extremes are reduced or eliminated. Intra-generational distributive justice aims at reducing the gap between the rich and the poor, and a more equitable allocation of resources so that everyone can have a fair share of the world resources. Intergenerational equity addresses the issue of justice between generations. It refers to the concept that each generation should 'use and develop its natural and cultural heritage in such a manner that it can be passed on to future generations in no worse condition than it was received'.⁵² This concept is closely related to the notion of sustainable development, which is now treated as the guiding principle for the use of the world's resources. Even though the concept of intergenerational equity has become more established during the last two decades (especially in the international law field), the applicability of the different theories is still questionable and far from certain.⁵³

In a market economy where most goods and services can be freely exchanged for value, accumulation of property equals to accumulation of wealth. As a result, distribution of property has a direct impact on the issue of justice. Most philosophers and economists are resigned to the fact that in a market economy, absolute equality of wealth or property is not attainable. Bentham's utilitarianism provides a theory on distribution of income. Utilitarianism does not aim to achieve equality; the crux of utilitarianism as a whole is the maximisation of welfare. According to Bentham, the needs of those in distress are more urgent and exacting than the needs of the better off, that anything transferred from the latter to the former will do more good to the recipients than the loss of it will do harm to the better off. In other words, due to the

⁵¹ The link between poverty and ecological degradation has been widely recognised and many studies have been carried out to look into this matter. For example, the UNEP established a 'Poverty and Environment Unit' (http://www.unep.org/dpdl/poverty_environment/index.asp), which carries out projects in partnership with a few countries in Africa. The aim of the projects is to promote sustainable development and reduce poverty; the overall objective of the projects is to help developing countries' capacity to mainstream environment into their development strategies. Another official programme is the Poverty Environment Partnership (PEP), which is a organised donor group set up by the European Union Commission of Development.

http://europa.eu.int/comm/development/body/theme/environment/env_int_Pov_Env.htm

⁵² Birnie, P.W. and Boyle, A.E., 2002, p 89.

⁵³ Inter-generational equity will not be discussed in more detail in this section. For more information on the topic, see Birnie, P. and Boyle, A., 2002, pp 89-91; Redgwell C., 1999; Jamieson, D., 2000; Alexander Gillespie provides a detailed account of all the international environmental law instruments that contain the principle of intergenerational equity, Gillespie, A., 1997, pp 107-114; Thompson, J., 2003; Weiss, B., 1989; Rawls, J., 1999, pp 251-258.

different units of utility enjoyed by different groups of people, total utility can be maximised if some wealth from the rich is transferred to the poor. This is known as the theory of diminishing marginal utility.⁵⁴ Under utilitarianism, a welfare state is advocated, partly because the government can then help to 'redistribute' income or wealth through government policies, such as taxation. Re-distribution of wealth is necessary to increase the total welfare of the society.

On the other hand, utilitarians do not accept the constant redistribution of wealth. According to Bentham, one of the main roles of the state is to provide security of property or income. Constant redistributive efforts by the state to achieve equality would frustrate expectations and cause insecurity that even those who get the least out of the existing system and might anticipate doing well out of greater equality would suffer over the long run. As a result, total utility will be diminished. Utilitarian sees inequality as a necessary feature for the security of property rights, and may even be desirable for a small group of people to hold an 'abundance' as these resources can be of great use in time of trouble. Nevertheless, the utility of the population or society as a whole must be maximised through the use of a welfare state, where the government adopts various policies to divert wealth from the rich to the disadvantaged.

Robert Nozick offers an alternative theory of the distribution of property or wealth. Unlike Bentham and other earlier philosophers, he is of the opinion that distribution of property should not be based on moral judgment (such as equity or justice), but should be based on entitlement. The entitlement theory suggests that the holding of a property is justified if and only if it came to the possession of the individual by the correct procedure.⁵⁵ Nozick divides justice in holdings into three: justice in acquisition, justice in transfer and justice in rectification. In essence, Nozick's

⁵⁴ Bentham's distribution theory has been subject to many criticisms. In particular, the utilitarian theory focuses on the maximisation of utility or happiness, it does not address the issue of justice, especially individual justice. It has always been argued that utilitarianism achieves the utility of the majority at the expense of individual rights, Simmonds, N.E., 2002, pp 44-45. In addition, the issue of the practicality and desirability of inter-personal comparisons of utility is ever present. Apart from the difficulty of quantifying happiness, individuals have different perceptions of what is good and derive different levels of satisfaction from the same thing. An objective comparison of happiness is hence impossible.

⁵⁵ Nozick distinguishes patterned historical theory from unpatterned historical theory. Patterned historical theory refers to a theory that advocates distribution to be made according to some pattern, such as according to needs, or according to ability etc.. Nozick's entitlement theory is an unpatterned historical theory because according to the theory, just distribution is a matter of procedural correctness.

position is that the justice of one's holding of a particular item of property depends entirely, and solely, on how it came into one's possession. Thus, the state has no right to carry out redistributive efforts except in cases where rectification is needed because goods have been obtained by fraud or force. Property rights are almost inviolable under Nozick's libertarian theory and distribution of property is only subject to the justice of holdings and nothing else.⁵⁶

John Rawls published *A Theory of Justice*⁵⁷ in 1971, offering a new perspective on the understanding of justice.⁵⁸ Unlike other philosophers, John Rawls did not provide a theory that emphasises a certain political value as the ultimate aim to be achieved. Instead, he advocated a theory that provides an objective process through which conclusions about justice are arrived at, and that this process is neutral between different conceptions of goods. According to Rawls, ideally conclusions about justice should be deduced from a starting point from which rational agents could not dissent. This is the so-called test of 'reflective equilibrium' where people are asked to choose a set of principles that will govern the basic structure and institutions of their society behind a 'veil of ignorance', meaning that individuals are to choose the principles on the grounds of rational self-interest and without certain types of knowledge about themselves. They should also be aware that the principles they have chosen will be binding upon them.⁵⁹ A person in this 'original position' does not have the knowledge of all those features that distinguish him from another, and even though he knows that he has his own conception of a good life he does not know what that conception is. However, the person would have the knowledge of what is valuable and worth pursuing which are called the 'social primary goods' (this is theoretically the same for everyone), such as liberty, income, wealth, opportunity and so on.⁶⁰ Rawls believed that this 'veil of ignorance' enables individuals to set aside personal interests and to

⁵⁶ Nozick's theory can be criticised on the ground that 'procedural justice' is achieved at the expense of 'substantive justice': it does not address the substantive issues of justice and fairness in relation to acquisition and distribution of property. The issue of distribution has become more prominent as human population has increased and world resources have become more and more scarce. If the entitlement theory were used as the basis of distribution, it would seem inevitable that the gap between the rich and poor would become much greater.

⁵⁷ Rawls, J., *A Theory of Justice* (Oxford: Oxford University Press, 1971)

⁵⁸ Rawls' theory of justice is applicable to both intra- and inter-generational distributive justice.

⁵⁹ Rawls uses the hypothetical contractarian or the social contract approach to explain the formulation and functioning of a society.

⁶⁰ This is referred to as 'the thin theory of the good'. The criticism to this concept of Rawls is that the 'thin theory of the good' is inherently biased in favour of the bourgeois individualist conceptions of the good life.

judge the matter from a more impartial point of view. According to Rawls, a rational person in the original position will choose two principles of justice. First, each person is entitled to the most extensive system of equal basic liberties that is compatible with a similar system for everyone else. Second, social and economic inequalities are just only in so far as they work to the advantage of the least advantaged people in society.⁶¹

Rawls's theory of justice offers a different approach to the understanding of a just society but it is not without criticisms. It is questionable whether or not the 'original position' or 'veil of ignorance' will ever be attainable in real life. In reality, everyone is conscious about his or her own status and interest, and will always make choices that will maximise self-interest. Furthermore, everyone has a preconception of what a good life is and which values will help him or her to achieve a good life. Thus, choices made by individuals will always be biased toward their meaning of what constitute a good life. Second, Rawls's attempt to provide a means whereby individuals can make choices free from preconceptions of what a good life means is itself questionable. Rawls's idea of social primary goods, such as liberty, opportunities, wealth, income, self-respect and so on are by no mean neutral.⁶² Rawls assumes that people want these goods and they prefer more of them to less (preconceptions of what a good life is). However, it is arguable that while these goods are particularly suitable for life in a modern capitalist society, such as countries in the West; they might not reflect what people strive for in other parts of the world with different cultural, political and economic background. For example, there could be non-commercial, more communal, forms of existence, and in these circumstances, income and wealth might have a lesser role to play. Thus, Rawls's theory of justice is not as objective and free from bias as he wishes it to be.

3.2 Economic Analysis of Property Rights: The Issue of Efficiency

⁶¹ The interests of the least well off are given special consideration because justice requires that everyone to have the same opportunity to strive in life, and success should be based on merit or hard work, rather than on natural talents and abilities or parents' wealth. Rawls thinks that we do not deserve the fruits of our natural talents, and those natural talents do not give us particular claim to a social system that would reward us for possessing them. As a result, we should choose the social arrangements that do not reinforce and exaggerate the inequalities stemming from such talents.

Simmonds, N.E., 2002, p 59-60

⁶² Simmonds, N.E., 2002, pp 69-70; Wolff, J., 1996, pp 187-189

One of the earlier works on the relationship between property rights and production was by Karl Marx.⁶³ Both Marx and Engels link property rights to production and view economics as the study of property rights over scarce resources where the emergence and allocation of property rights is endogenously determined.⁶⁴ Production without exchange would be rendered meaningless. In fact, the primary purpose of capitalist production is to carry out exchanges, where property rights change hands. Property rights are defined as claims over future income from assets⁶⁵ and the purpose of trade is to exchange bundles of property rights. According to Marx and Engels, property rights are the impetus for social (relationship between man and nature, and between man and man) and technological changes. More specifically, the emergence of private property rights enables man to achieve production efficiency through more intensive and efficient use of the accumulated wealth. In addition, the logic of the theory of production and exchange shows that property rights are in turn influenced by the productive forces, i.e. technology, labour forces, education and so on.⁶⁶ However, Marx concludes his analysis with the demise of private property rights (and the beginning of communism) as a result of the collapse of capitalism and the revolt by the proletariat against the owners of the means of production.

Ronald Coase's paper⁶⁷ in 1960 highlighted the role of property rights. His Coase Theorem,⁶⁸ as it was later called, basically contended that if the transaction cost is zero, market allocation of resources would be efficient regardless of how property rights are initially assigned. This concept brought the relationship between property rights and transaction costs to the surface. Following Coase, many economists started to take interest in the issue of property rights and economic performance. Harold Demsetz tried to shed light on why property right changes took place by looking at the case study of Native Americans' fur trade at the end of the 19th century.⁶⁹ Douglas North took a step back from property rights analysis to look at the structure of

⁶³ Marx's most famous work on political economy is *Das Kapital* where he explored the nature of capitalism and the employer-employee relationship.

⁶⁴ Pejovich, S., 1972, p 48

⁶⁵ Helberg, R., 2002

⁶⁶ A more recent analysis of the factors influencing the context of property rights is provided by Libecap in his book *Contracting for Property Rights*, Libecap, Gary, 1989.

⁶⁷ Coase, R., 1960

⁶⁸ For a recent detailed analysis of the Coase Theorem, see Medema, S. and Zerbe Jr, R., 1999.

⁶⁹ Demsetz, H., 1967.

property rights or the so-called institutions.⁷⁰ He concluded that property rights allocation is governed by the relevant institutions, and institutions are controlled by people who may or may not want to adopt the most efficient allocation of property rights for the purpose of self-interest. Gary Libecap⁷¹, on the other hand, emphasised the importance of property rights in providing economic incentives that shapes resource allocation. Yoram Barzel⁷² followed the footsteps of Libecap and carried out an intensive analysis of property rights in relation to market and economic performance. In addition, the theory of the firm, which was also first elaborated by Coase,⁷³ has also been used to explain the consolidation of property rights. These different aspects of property rights will be discussed below.

3.2.1 Transaction Costs

As already pointed out, Coase contended that when the transaction cost is zero, allocation of resources would always be efficient irrespective of the original allocation of property rights or the structure of law.⁷⁴ In Coase's world, there is no predetermined rule of liability; the original assignment of rights should be of no concern. In addition, Coase did not make a distinction between personal and social gains⁷⁵; instead, he argued that every choice of property rights assignment/allocation involved social costs that must be balanced against each other. Thus, in order to maximise social gains and to minimise social cost, any arrangement should not be predetermined by the existing property rights allocation or the structure of the law, which might not represent the most efficient allocation of resources. Coase gave examples of the arbitrariness of assignment of rights in the decisions of the court that used the conventional rule of liability.⁷⁶ To Coase, what has to be decided is 'whether

⁷⁰ North, D., 1990

⁷¹ Libecap, G., 1989

⁷² Barzel, Y., 1997

⁷³ Coase, R., 1937. The firm theory has been elaborated by economists such as Coase, Alchian, Demsetz, Williamson, Hart, Grossman, Moore and so forth.

⁷⁴ For different interpretations of the implications of Coase Theorem see Medema, S. and Zerbe, R. JR., 1999, pp 837-838

⁷⁵ Contrast this view with Pejovich, S., 1972, p 42. According to Pejovich, from the social point of view, property rights allocation is necessary for more efficient allocation and use of resources within the society, while from the individual's point of view, the specification of property rights is associated with the search for more personal utility.

⁷⁶ Coase, R., 1960, pp 8-15. However, this alleged arbitrariness might be the result of Coase's lack of understanding of the legal definition of property rights, which is very different from the definition used by economist and other social theorists. Consequently, his analysis might be biased as he focused only on economic, not legal, implications of the cases. For an analysis of the differences between legal and economic definition of property rights, see Cole, D.H. and Grossman, P.Z., 2002.

the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.⁷⁷

Coase, however, acknowledged that in reality, there would always be transaction costs involved in carrying out market transactions. These transaction costs may be so high in certain cases as to prevent the market transactions to be carried out. In the world with transaction costs, people always look for ways to minimise transaction costs. Coase gave two examples of how transaction costs could be minimised: the theory of the firm and state regulations.⁷⁸ According to the theory of the firm, property rights are coalesced under one entity so that costly individual bargains can be avoided. Thus, costly negotiations are substituted by administrative decisions. This will be discussed in further detail in the following section. Secondly, according to Coase, the government is, in a sense, a super-firm.⁷⁹ Thus, it acts in the same way by internalising costs if negotiations are too costly. But unlike the firm, the government has more power and is able to conscript or seize property. The state may act like a monopoly and can allocate and use factors of production in a way that would minimise costs. In addition, the state can also minimise transaction costs at the market generally by imposing regulations that clarify the assignments of rights (and liabilities), set out clear transaction procedures, make information exchange more transparent and more available to the public, and so forth.

Despite some of the criticisms⁸⁰, Coase Theorem has indeed shown the significance, or insignificance, of property rights. By first showing that property rights do not matter in a world without transaction cost, it subsequently explains why and how property rights matter in reality where transaction costs exist. It has shed light on the relationship between transaction costs, property rights and efficiency. Secondly, it highlights that property rights affect transactions costs, and are part of transaction costs. Since transaction costs affect efficiency, property rights are an important factor

⁷⁷ Ibid. p 27. According to Harold Demsetz, the legal system should 'improve the allocation of resource by placing liability on the party who in the usual situation could be expected to avoid the costly interaction most cheaply', Demsetz, Harold, 1972, pp 13-28.

⁷⁸ Coase, R., 1960, pp 15-19

⁷⁹ Ibid., p 17

⁸⁰ For example, it has been criticised for not taking into account the moral dimension of ownership. Coase Theorem explains the nature of market transactions solely on the basis of efficiency; it does not take into account the sentimental value of the thing to the owner, or the issues of equity and justice. For more detail, see North, G., 2002.

to be taken into account when one looks at the issue of the use and allocation of resources, and the issue of liability. Thirdly, it gives examples of how property rights can be exchanged in order to minimise transaction costs, such as by incorporating property rights into the realm of a firm to reduce the cost of constant negotiation. Coase Theorem has in fact successfully made a powerful insight into the significance of property rights in market transactions.

3.2.2 The Theory of the Firm

The theory of the firm was used by Coase to explain how economic players use the firm as a means to economise on transaction costs in the market. According to Coase, a firm is an alternative form of economic organisation which could curtail transaction costs and subsequently increase the value of production by altering and combining rights through the market.⁸¹ In a market, it is common that different people own different factors of production and negotiations have to be carried out to make the production process possible. If the transaction cost is zero and parties are fully informed about the price and costs, exchange will be carried out to achieve the most efficient use of resources. However, in reality, transaction costs are positive and there is also asymmetry of information. Negotiations between parties will inevitably involve costs and the outcome achieved may not be the most efficient one (the positive transaction costs and asymmetry of information enable those who possess more information and medium of exchange to have an upper hand). By altering and combining property rights of the various factors of production, bargaining or negotiation is substituted by administrative decision, which is made within the firm. In short, Coase viewed the firm as a means to economise on the use of prices. Thus, the difference between an employer-employee relationship and one between independent contractors is that in the former relationship, not only can the firm retain residual rights of control over the factors of production, it can also tell its employee what to do (thus saving on transaction costs), while it can only persuade the independent contractors to do what it wants with the use of price.⁸²

Grossman and Hart, and Hart and Moore focus on the issue of asset ownership in relation to the theory of the firm. By combining the ownership over array of assets,

⁸¹ Coase, R., 1960, pp 16-17.

⁸² Hart, O. and Moore, J., 1990, p 1150.

the firm saves on contracting costs with the individual asset owners. Through this transfer of assets, the firm (or rather the manager of the firm) will have an incentive to increase the productivity of the assets so as to increase the *ex post* surplus.⁸³ Asset ownership not only gives the owner the residual claim right over the assets and their products, but also the ability to exclude people from the use of the assets. This authority over assets translates into authority over people; Hart and Moore theorise that an employee will tend to act in the interest of his boss.⁸⁴ This theory argues that vertical integration of property rights within a firm will not only save transaction costs, but will also give incentives to both the manager and employees within the firm to make the assets more productive.

The theory of the firm shows that integration of assets and resources is aimed at achieving and maximising production efficiency. It has also been used to explain management of common resources. Elinor Ostrom carried out various studies on community forest management, and on collective management of common resource generally.⁸⁵ She referred to the market firm theory as an example of collective action, where individuals come together to solve the problem of ‘independent action in an interdependent situation’.⁸⁶ According to Ostrom, an entrepreneur puts in effort to coordinate the actions of independent individuals, and each of these individuals voluntarily chooses whether or not to join the firm. Due to the fact that the entrepreneur retains the residual profits after paying each of the agents, he is motivated to organise the activity in the most efficient manner, and the entrepreneur can terminate the contract of an agent who does not perform to his satisfaction. More importantly, because the agents are free to choose whether or not to join the firm/organisation, it is considered private, voluntary and perhaps also non-exploitative.⁸⁷ She also drew an analogous example from the theory of the state where the state is likened to a ‘super-firm’, and acts like a firm in responding to incentives and costs.

⁸³ *Ibid.*, p 1120

⁸⁴ *Ibid.*, p 1150

⁸⁵ Ostrom E., 1990

⁸⁶ *Ibid.*, p 40

⁸⁷ *Ibid.*

However, the question remains whether or not the market and the management of common resources are analogous. Even though generally individuals or a society tend to be motivated by incentives and would strive to avoid costs, there are specific features in natural resource management that may make the theory of the firm inapplicable. Firstly, activities in the market are profit-driven, while in many cases, the main aim of natural resource management is to provide sufficient and sustainable services to the community. This is particularly true in places where either the resource is near depletion (so no more exploitation is possible), or the resource is tightly controlled and no economic exploitation is allowed. In these cases, there will be no incentive for individuals to become entrepreneurs and organise management in an efficient way. Secondly, property rights over common resources may not be as clear-cut as assets traded in the market. The basis of the firm theory requires that individual property rights over the assets are relatively clear and unambiguous so that exchange can be carried out, and without too high a cost. In many cases natural resources are commonly owned and individual shares of the resource are impossible to define. Thirdly, the asymmetry of information in natural resource cases is much more severe than in a market. For example, the true value of much of the resources remains unknown, some are even impossible to ascertain. Libecap's analysis of the unitisation of oil fields in the West of the US gives a good example of this problem.⁸⁸ In addition, the exact value of biodiversity and the environmental services provided by the forest is difficult, if not impossible, to determine.⁸⁹ Without some relatively accurate information about the true value of the goods, transactions are bound to encourage the behaviour of advantage-taking and produce severe deadweight loss.

3.2.3 The Evolution of Property Rights

The final strand of the economic literature looks at the development of property rights as an institution through some case studies. Demsetz's article *Toward a Theory of Property Rights* discusses property rights by primarily referencing the concept of externalities.⁹⁰ According to Demsetz, when a transaction is concluded in the

⁸⁸ Libecap, G., 1989, pp 93-114.

⁸⁹ Attempts have been made by economists to value the functions of forest and its biological diversity, see Adamowicz, W.L. et al., 1996, *Forestry, Economics and the Environment* (UK: CAB International), and Pearce, D. et al. (eds), 2002, *Valuing the Environment in Developing Countries: Case Studies* (UK: Edward Elgar).

⁹⁰ In his following article *Toward A Theory of Property Rights II*, Demsetz further elaborates the competition between private and collective ownership. According to him, specialisation of production

marketplace, two bundles of property rights are exchanged. Property rights are a social instrument, and they give the owner the right to exclude interference from the others. With this exclusive right to deal with the thing, the owner is able to exchange or transfer the rights for a value. Furthermore, property rights also specify how persons may be benefited or harmed, and this recognition subsequently leads to the main essence of his article, which is that the role of property rights is to internalise externalities. Activities entail externalities, which include external costs and benefits; externalities exist because the activity has a ‘spill-over effect’ outside the boundaries of the owner’s right. ‘Internalising’ externalities means that the owner is made to bear the side effects from the use of the property; and internalisation usually takes place when the gains from internalisation are greater than the cost. If property rights can be exchanged freely and easily, then these externalities can be ‘internalised’ through the exchange of property rights (the ‘maker’ of the externalities can ‘buy’ the spill-over effects so that they can be properly included within his realm of responsibility). Alternatively, new property rights can be created in order to reach a new benefit-cost equilibrium.

To illustrate that, Demsetz uses the studies of fur trade of the Montagnes American Indians at the end of the 19th century by Eleanor Leacock.⁹¹ Before the beginning of the commercial fur trade, hunting was carried out by the Indians mainly for food. Because the externalities were insignificant (due to the large stock and relatively small demand), hunting could be practiced freely and the animals were treated as common stocks. However, when the prices of fur rose significantly, hunting was intensified and as a result, the animal stocks were threatened and conflicts between hunters occurred more frequently. As a consequence of this, two actions were taken by the communities involved. First, tribe members started to husband fur-bearing animals and set up farms. Second, the ownership of animals was established and was allocated to community members according to defined agreements. In short, private ownership over the animals was established. Demsetz explains that this happened because intensive hunting of animals under the original communal ownership regime produced great externalities. For example, under communal ownership, hunting was

process (and ownership) influences productivity, the compactness and complexity of exchange, which helps to explain the need for private ownership.

⁹¹ *The Montagnes “Hunting Territory” and the Fur Trade*, a memoir by Eleanor Leacock.

not controlled and the animals were over-exploited. This happened because the tribe members had every incentive to kill every animal they could find before it was taken by others; as a result, the number of animals dwindled rapidly. Under private ownership where the community recognised the owner's right to exclude others, hunting became more sustainable and the concentration of benefits and costs on owners created incentives to utilise resources more efficiently.

Another theorist who has tried to explain the nature and creation of property rights is Gary Libecap. Libecap's book *Contracting for Property Rights*⁹² seeks to explain in more detail why property rights take the form they do, and how property rights affect resource allocation and economic performance. Libecap first sets out the basic characteristics of property rights: property rights institutions are determined through political process and are enforced by political entities; property rights reflect the conflicting economic interests and bargaining strength of those affected (this is defined by precedent and expectations; negotiations may involve side payment scheme to compensate those who would otherwise oppose the change in property rights); and lastly, history matters because today's choice is often constrained by yesterday's decisions. Libecap uses the word 'contracting' to describe efforts by individuals to assign or to modify property rights.

In his book, Libecap also asserts that the nature in which property rights are defined and enforced has an impact on the performance of an economy for two reasons: firstly, the property rights structure affects the way in which resources are allocated and exploited, which in turn affects the efficiency of the production process; secondly, the prevailing property rights arrangement determines who the key actors or decision-makers are in the economic system. He also explains that contracting of property rights will only take place either where the interested parties see that their welfare will be improved or at least they are not made worse off, or that the pressure for change is so great that they have no choice but to agree to change (for example the threat of riot or a coup). Each interested party will seek to maximise the share of the rent under the new arrangement. According to Libecap, the primary motivations for contracting for property rights are common pool losses: individuals decide to establish or modify

⁹² Libecap, G., 1989

property rights to limit access and to control resource use when motivated by the aim of capturing a share of the expected gains from mitigating common pool conditions. As already mentioned above, uncertainty or lack of property rights arrangements increase transaction costs, and may inhibit efficient use of resources.

According to Libecap, three factors may create a situation in which individuals are motivated to change the existing property rights arrangement: shifts in relative prices; changes in production and enforcement technology; and shifts in preferences and other political parameters.⁹³ This is not dissimilar to the 'production forces' described by Marx that have a constant impact on the production process. When one or more of these factors is present, it is often the case that the status quo is not sustainable or too costly, so changes of the existing property rights arrangement are inevitable. Despite the fact that according to neoclassical economists, the existing arrangements will always 'adjust' to achieve efficiency, Libecap recognises that adjustments are largely subject to the self-interest behaviour of the interested parties, and may not necessarily be geared towards efficiency.⁹⁴

Furthermore, Libecap identifies a few factors that influence the likelihood of agreement on institutional change; sometimes these factors may even inhibit contracting for property rights from taking place at all even though the status quo is no longer sustainable or efficient. First, the size of the aggregate expected gains: the greater the expected gains, the more likely a politically acceptable share agreement will be achieved. Second, the number and heterogeneity of competing interests: the greater the number and the heterogeneity of the parties involved, the more difficult it is for an agreement or agreements to be arrived at. Third, information problem: distrust and advantage-taking tendency are more likely to be present in situations where information (such as information about the value of the resources, or the bargaining strength of the parties and etc) is incomplete, making negotiations more difficult. Fourth, the skewness or concentration of the current and proposed share distribution: all things being equal, very skewed rights arrangements lead to political pressures for a redistribution of wealth; changes will also be more popular if the

⁹³ Ibid., pp 16-19

⁹⁴ Ibid., pp 19-26

proposed distribution within the new rights arrangement is not concentrated in the hands of a few people.

Libecap concludes by pointing out that because of distributional conflicts, which may present political risks, politicians tend to propose legislations that do not seriously upset the status quo rankings and that offer only limited relief from common pool losses; rational and swift institutional responses to common pool losses cannot be taken for granted. The scope within which an institution can act is restricted by the various political, legal, social and economic constraints, making the adoption of rational decisions to maximise efficiency difficult, if not impossible. Libecap's analysis provides valuable insight into the theory of institutions, which seeks to explain the institutional aspects of property rights including the structure, vested interest, historical path dependence and so on.

Both Demsetz and Libecap have illustrated the evolution of property rights in the context of natural resource exploitation. A few observations can be made with regards to the results of their studies. Firstly, property rights are vital for the development of resource exploitation. To be economically viable, resource exploitation needs to be carried out in an environment where expectations of gains are fulfilled and with relative stability so that resources will not be wasted on guarding against constant interference with the possession. Without property rights, the cost of safeguarding possessions from the intrusion of others will be too high and makes the exploitation activity not profitable; in short, without property rights, large scale exploitation will not likely to take off. From the examples above, property rights of an un-owned resource evolves towards private property rights.

Secondly, property rights are used as an economic incentive to encourage efficient exploitation and management of natural resources. By allocating ownership and exploitation rights to individuals, the problems of over-exploitation and free-rider can be stopped. With secured private property rights, individuals not only can plan for the current and future use of resources, but are also motivated to invest in improving the cost-effectiveness of the exploitation process. Thus, property rights encourage rational and efficient utilisation and management of natural resources. Thirdly, property rights can be analysed as an institution which consists of a structure, legal rules and a group

of individuals with vested interests. Interactions between the institutions and outside factors, and within the institution itself, are defined and constrained by not just the outside physical forces, but also forces within the institution. The history or path dependence of the institution also influences how it reacts to any change of circumstances. Thus, changes of property rights are not just determined by one or two factors, but are the result of an interplay and mixture of the different elements.

Fourthly, the case studies seem to show that property rights will always evolve towards the direction of private ownership in the process of development of resource exploitation. This gives the assumption that for large-scale commercial exploitation of natural resources, private property rights will help to achieve efficiency and optimum utilisation. Demsetz has set this out clearly in his first article and explains it as if that is the natural evolution of property rights once large-scale commercial exploitation began. Whether or not this is a general tendency in all situations still needs to be investigated. Fifthly, these case studies again point out the relationship between transaction costs and property rights. Transaction costs in the form of information have a significant impact on the contracting or exchange of property rights: the more incomplete the information, the less likely that contracting for property rights will take place. Lastly, the literature shows that in all market transactions individuals are motivated by self-interest and act accordingly, this is of no exception to the management and use of natural resources. According to Libecap, distributional conflicts arise because of the competing pursuance of self-interest by individuals.

Following the analysis of the literature, many authors have actually advocated that in order to achieve efficiency and sustainability, natural resources should be privatised.⁹⁵ On a similar note, many authors have felt that it is necessary to use property rights as an incentive to encourage better utilisation of natural resources, based on literature like those by Demsetz and Libecap, which inevitably come to the conclusion that private ownership is essential for the attainment of efficiency. However, many other authors have since looked at cases where natural resources are managed by communities. Here, private ownership is the exception rather than the norm, and in many places in the world, common management and ownership of natural resources

⁹⁵ Such as Harold Demsetz and Svetozar Pejovich.

has worked. Common management of resources will be discussed in more detail in Chapter Four below. Suffice it to say that concerns for justice and equity are usually prominent in situations where common management or ownership of resources is present, and that the viability of the common resource regime is contingent on various political, social, cultural and historical factors. The nature of the resource itself rarely dictates the type of property rights adopted.

The issues and theories discussed in this chapter have significant bearing on the use and management of natural resources. In particular, they show how the extraction and use of resources are dictated by or related to property rights. Property rights affect transaction costs and as a result a change in property rights would induce a change in individuals' behaviour in relation to the withdrawal and use of resources. Apart from their role in influencing economic behaviour, property rights also have huge social significance. The regime of property rights not only reflects the sharing of power between the state and its people, it also reflects the extent of individual freedom enjoyed within a state. The right to own property is regarded as one of the fundamental components of human rights as it facilitates or promotes self-expression and independence. As a result, private property rights are regarded as indispensable in a liberal democratic society.

4. An Overview of China's Forest and Forestland

Before we turn to the problems and hypotheses explored in this dissertation, we first set out some of the basic facts of forests and forestry in China. Even though China's total forestland area is the fifth largest in the world⁹⁶, forest cover per capita is only 0.1 hectare, which is only one sixth of the world's average of 0.6 hectare per capita. This reflects the reality of China's large land mass and population, with a relatively small forest resource base. Table One below shows the changes in forestland area in China over a period of three decades. Both the figures of forest cover and standing forest volume have increased consistently from the end of the 1970s.⁹⁷ This is mainly due to the many large-scale afforestation projects carried out by the government, and

⁹⁶ Even though it is only 16.55 per cent of China's total landmass, well below the global average of 27 per cent.

⁹⁷ Lu, Wenming et al, 2002, p 11

also the plantation forests established in the Southern collective forest areas. China ranks first in relation to the areas of plantation forests established in the world, with a total of 45 million hectares of plantation area.⁹⁸ However, only 5 million hectares of these plantations are fast-growing high-yielding forests, the rest consist of either slow-growing marginal forests⁹⁹ or non-commercial forests.¹⁰⁰ Whilst forest cover and standing volume in collective forests (usually in the South of China) have increased significantly, comparatively state forests (mainly in the Northeast and Southwest of China) have suffered from slow and sometimes negative growth.¹⁰¹

Table 1 Forest resources expansion 1973-2003

Year	Area of forestland (million ha)	Volume of standing stock (million m ³)	Area of land with forests (million ha)	Volume of forests (million m ³)	Forest cover (%)
1973-1976	257.60	9,530	121.86	8,660	12.7
1977-1981	267.13	10,260	115.28	9,030	12.0
1984-1988	267.43	10,570	124.65	9,140	13.0
1989-1993	262.89	11,790	133.70	10,140	13.9
1994-1998*	263.29	11,306	153.63	11,267	16.6
1999-2003**	284.93	13,618	174.91	12,456	18.21

Source: The First of Fifth China National Forest Resource Inventory (1973-1998). Forest resource inventories have been undertaken every five years, except for a gap between 1982-1983. (Obtained from Lu Wenming et al, 2002, p 11).

* The data for 1994-1998 was assessed by the new criterion that the crown density of the forest is at least 20 per cent. In previous years forests were associated with a crown density of at least 30 per cent. Figures exclude forest resources in Taiwan

**Source: Sixth China National Forest Resource Inventory (1999-2003)
http://www.allcountries.org/china_statistics/12_16_forest_resources_by_region.html

All forestland in China is divided into five different categories, namely timber, ecological, economic, fuel-wood and special purpose forests. Timber forests are forests that are used for timber harvest purposes. Protection forests include forests that are deemed important for the ecological services they provide. Many of these forests are situated in important areas such as riverine and coastal areas, and they provide protection against soil erosion, desertification and so forth. Harvests of forest

⁹⁸ Bull, Gary, 2006

⁹⁹ 17 million hectares

¹⁰⁰ 23 million hectares

¹⁰¹ Hyde, W.F. et al., 2003, 110

resources, especially timber, in these forests are heavily regulated (no commercial timber harvest is allowed). Economic forests consist of bamboo forest, fruit orchards, and other cash crops. Timber is not the principal product from economic forests. Fuel-wood forests provide energy supply to both the rural and urban residents. In fact, the forests of China provide 40 per cent of the country's rural energy.¹⁰² Lastly, special purposes forests include forests used for scientific research or military purposes, and nature reserves. Commercial timber harvest in these forests is also prohibited.

China is seeking to increase its forest cover from 16.6% in 1994-98 to 19.4%, 24.4% and 26% of the total land area by 2010, 2030 and 2050 respectively.¹⁰³ The government has embarked on several large-scale afforestation projects since the end of the 1970s, starting with the Three North Shelter Belt project that stretches from the Northeast to the Northwest. This was then followed by other area-specific afforestation projects including the Central Plain Afforestation Project, Taihang Mountain Afforestation Project, and Coastal and Pearl River Protection Projects. The most recent forest protection and afforestation projects include the Natural Forest Protection Programme and the Sloping Land Conversion Programme. The latter project has so far converted two million hectares of cropland into forest- and grassland.¹⁰⁴ In recent years, silvicultural investments have accounted for approximately 70 per cent of state investment in forestry.¹⁰⁵

4.1 Timber Trade and Timber Market in China

China's timber market has increasingly been dominated by timber products imported from the neighbouring countries in Southeast Asia and Russia. This is mainly due to the dwindling mature forest stock and the increasing demand for timber for construction and other purposes. The timber market has been for decades dominated by the state, which owns about 50 per cent of the total forest cover and accounts for 70 per cent of production forest reserves.¹⁰⁶ Furthermore, most timber harvests were carried out in state-owned forest farms by state-owned forest enterprises. State-owned

¹⁰² Rozelle, S. et al., 2000, p 5

¹⁰³ Lu, Wenming et al, 2002, p 11

¹⁰⁴ For a breakdown of these different projects and the areas of trees planted, see Zhang Daowei, 2003.

¹⁰⁵ Ibid. p 87

¹⁰⁶ Richardson, S.D. 1990, p 113

forest enterprises also carried out timber harvest and processing in many non-state forestland, effectively controlling the whole timber market. In 1995, the central government's share of state investment in the forestry sector alone (not including investment from other levels of government) stood at 35 per cent, compared to only 5 per cent in all state-owned enterprises.¹⁰⁷ These state-owned forest farms and enterprises mainly concentrated in the Northeast and Southwest parts of China¹⁰⁸, which contain most of the natural forest in China. Forest stocks in these forests have started to decline due to unsustainable logging and lack of afforestation efforts. Mature and over-mature timber forest area and volume have shrunk overall, although most of them are still found in state-owned forests.¹⁰⁹ The area of mature and over-mature timber forest has shrunk from 48 million hm² pre-1949, to 22 million hm² in 1981 and 13.31 million hm² in 1998.¹¹⁰ Mainly due to the shrinking timber stock and inefficient management, a lot of the state-owned forest enterprises and farms were suffering losses. Apart from the dwindling stock, state dominance of the timber market was reduced first by the introduction of the household responsibility system in the early 1980s, and then the adoption of the Natural Forest Protection Programme in 1998.

Since the devolution of forestland use rights to the household level in early 1980s, production from collective or privatised plantations and secondary forests assigned to households was subject to less state control. The unified procurement system was officially ended in 1985¹¹¹; but in 1987, the central government introduced a quota system for both commercial and non-commercial timber harvest. The quota system was adopted in order to curb excessive logging in 1987 and has remained in place since. Under the quota system, anyone who wants to cut down trees (except trees on

¹⁰⁷ Zhang Daiwei, p 87

¹⁰⁸ Such as the provinces of Jilin, Heilongjiang, Sichuan and Yunnan.

¹⁰⁹ State-owned forests have 71 per cent of the mature and over-mature timber forest area, while the collective forests have 12 per cent and Tibet has 15 per cent; in relation to the volume distribution of mature and over-mature timber forest, state-owned forests have 66 per cent of the overall volume, while collective forests and Tibet have 6 per cent and 27 per cent respectively, Zhang L. et al., 2005.

¹¹⁰ Cheng Yunxing , 2004, p 4

¹¹¹ This system was put in place for the central government to control both the production and sale of timber, and also the price. Under the unified procurement system, most timber was sold to the state at a price stated by the government; not surprisingly, the price was usually lower than the market price. However, due to the concern of over-logging, the procurement system was re-established in major timber-producing counties in 1987. All price controls were finally lifted in 1993, Richardson, S.D., 1990, p 168.

family plots) needs to get a permit from the local forest bureau;¹¹² a permit is also required for transporting logs.¹¹³ The annual quota is set by the central government every five years and is stated in the forest five-yearly plan.¹¹⁴ The quota system works in a hierarchical way: central government allocates quota to the provincial level, the provincial level then assigns the quota to the county level, and lastly the county level further distributes the quota among the township governments.

Officially the Natural Forest Protection Programme was adopted as a response to the severe drought and flooding that took place in the Yellow River and Yangtze River areas in 1997 and 1998 respectively. However, it has been suggested that the programme was adopted by the central government to reform the ailing state forest industry, which was suffering from inefficient management and dwindling forest stock.¹¹⁵ The programme involves 17 Provinces, Areas and Cities, 734 Counties and 167 state farms and enterprises. The 17 Provinces (and Areas and Cities) encompass 73.37 million hectares of natural forests, which consists of 69 per cent of the total 106 million hectares of natural forests in China. Under the programme, most commercial timber harvest in state-owned natural forests (in the Northeast and Southwest) has been stopped, and the nature of operation in these forest farms and enterprises has been changed from commercial timber production to forest management and protection. Hundreds of thousands of state workers were either re-assigned or made redundant. A lot of the re-assigned workers are now engaged in tree-planting and tree-tending projects. The government of China has reported an annual reduction of 19 million m³ of timber production from the affected areas due to the logging ban.¹¹⁶

To solve the problem of supply shortage, China has increased its wood import greatly. It is now the world's second largest wood product importer after the United States, and is the world's largest importer of lumber and plywood.¹¹⁷ Another solution to the problem of timber shortage is the establishment of commercial forest plantations. Plantations in the Southeast collective forest region increased from 6.8 million ha in

¹¹² Article 32 of the Forest Law 1984 (amended 1998)

¹¹³ Article 37 of Forest Law

¹¹⁴ Article 29 of the Forest Law states that annual quota should be set based on the principle that harvest should be less than the growth volume.

¹¹⁵ Private communication from a Professor from the Peking University.

¹¹⁶ Zhang Zhida. 31 October 2005

¹¹⁷ Sun Xiufang, Katsigris, Eugenia and White, Andy, 2004, p 26.

the 1984-1988 forest inventory to 8.7 million ha in the 1989-1993 period; those in the Southwest increased from 1.3 million ha to 1.75 million ha over the same period.¹¹⁸ The annual rate of increase in both these areas was around 6 per cent, which was almost double the rate of the increase in state-owned forests.¹¹⁹ The majority of the newly established forests consist of timber plantations, commercial forests and shelterbelts.¹²⁰ Although investment in non-state forests has increased, evidence suggests that many forests that have been clear-cut for timber have not been reforested.¹²¹ This, coupled with the popularity of the single-species fast-growing trees, may result in a decline in diversity and the associated environmental services provided by forests in China. Apart from tree-planting, investment in the secondary sector, mainly processing products from commercial forests such as bamboo and fruits, by non-state entities has also increased.¹²² However, direct involvement of farmers and rural households in the processing sector is little: most of the collective members act merely as the providers of raw materials or receive rent from the use of land. Furthermore, many of the non-state forest enterprises are small and produce low-grade, non-specialised forest products.¹²³ Lastly, forest investment by non-state entities so far has taken place within the 70-year time-frame of the land use agreement between the collectives and their members. Whether or not investment will still be consistent once the end period is approaching is still open to question.

5. Problems with the Existing Regime

The various problems related to forestry faced by China today indicate that the current regime is not adequate and needs to be reformed. Furthermore, as China's forestry is moving towards the strengthening of private ownership, the regime has to be adapted to accommodate private interests. This section will look at a few problems related not only to unfavourable policies but also to forest law/policy implementation. All these problems impede development of the timber market and act as disincentives to private investment. In addition, protection and conservation of forests in China also faces enormous challenges, in particular in relation to the new public payment scheme for

¹¹⁸ Liu D.C. and Edmunds, D., 2003, p 32. Sourced from China Forestry Yearbook 1990, 1995.

¹¹⁹ Ibid.

¹²⁰ Rozelle, S. et al., 2000, p 18

¹²¹ Ibid.

¹²² Yao Shunbo, 2005, p 127

¹²³ Cheng YunXing, 2004, p 157

forest environmental services. The core of these problems is the prevalence of the top-down approach, where orders and commands are passed down from the central government, regardless of what the situations are like on the ground and the quality of governance that differs from place to place. There is also a lack of a local and central monitoring mechanism in place, which is made worse by the absence of public scrutiny and accountability.

5.1 Timber Harvest Quota

China's timber harvest quota, or annual allowable cut system, was adopted in 1987¹²⁴, two years after the Unified Procurement System for timber was scrapped. The main purpose of introducing the quota was to limit timber harvest to a sustainable level and to protect the environment. The annual timber quota is set every five years by the central government on the basis of 'sustainable harvest', meaning that the rate of harvest must be slower than the rate of growth of the forest. The annual allowance is allocated by the central government to the provincial governments according to the requirements of the different provinces; the quotas are then broken down to be allocated to the different prefectures in the province, and are subsequently divided among the counties. Except timber harvest from homestead land and family plot, all other harvests need to be approved by the forestry bureaus, which makes sure that the harvest quota is not exceeded. Logging without permission or exceeding the permitted volume may be a criminal offence and the perpetrator can be prosecuted.

The effectiveness of the annual allowable cut system in China is questionable, especially given that in 1998, a decade after its implementation, the government felt the need to take emergency measures to impose a logging ban in most of the forest areas to stop further degradation of forest resources. Furthermore, the timber harvest quota system has not proved to be successful in controlling excessive logging, as up to 56 percent of the annual logging volume was without a permit in 1998.¹²⁵ These problems may be due to two reasons: flawed planning and ineffective implementation that led to rampant illegal loggings. Timber harvest quota is not unique to China. However, it is usually adopted in protected forests owned by the state; and where it is

¹²⁴ Timber harvest quota was first introduced by the Forest Law 1984 but only officially commenced in 1987.

¹²⁵ China Forestry Yearbook 1998, 106-107

taking place in private-owned forest, some sort of payment scheme would be put in place to compensate for the public services provided by the private entities.¹²⁶ In China, the timber harvest quota is imposed not only in state-owned forests, it also applies to all other collective-owned forests and forests managed by private entities.

The first issue related to the harvest quota system is the problem of implementation. Cutting with permission or within the permitted volume needs to be monitored and verified, which means that a reliable system and adequate human resources need to be in place. In 1998, there were more than 3,000 county-level and above forestry enforcement offices, with more than 30,000 officers. The total number of checkpoints (roadside, river and so on) approved by the provincial governments amounted to 4,230, with 35,000 workers working at the checkpoints.¹²⁷ To support and fund this huge workforce is not an easy matter; as a result, many local governments have imposed high charges and fees on forestry that are used to sustain the local forest managers and workers. The high percentage of illegal logging showed that even the existing arrangement was inadequate.

The second problem related to the annual allowance system (AAS) is its impacts on the timber market. The annual quota set every five years is highly likely to fail to reflect the ever-changing market for timber. One of the main requirements of the functioning of a market is flexibility, which is essential because the suppliers need to be able to adapt according to the market's timber demand, in an efficient and quick manner. If demand for wood has increased, the supplier needs to be able to increase the supply to fulfil the requirement of the market. Similarly, when the timber market is unfavourable, the supplier needs to be able to hold back the timber supply. Under the AAS, the supplier needs to apply for a permit in advance and the process may take a while to complete. It is possible that the supplier may apply for the permit when the market is favourable, and get the permit when the market has changed to be not profitable. Also, the annual allowance set by the central government for all timber harvest cannot be carried forward. Hence, suppliers are not able to hold on to their permits and wait indefinitely for the market to turn favourable again. This causes the

¹²⁶ Xu Jintao and White, Thomas A., 2002

¹²⁷ Yao Shunbo, 2005, p 36

market to function in a distorted way and may lead to inefficient use of timber resources.

The third problem relates to the issue of property rights. The State Council's Decision on Issues Regarding Forest Protection and Development 1981 and the Forest Law 1984 gave households and individuals use rights over forest resources. This devolution of right has since been recognised and strengthened by the 1998 amendment to the Forest Law, the Land Management Law 1998, and the Rural Land Contracting Law 2002. The recently adopted Property Law further strengthens the protection of private rights. The AAS restricts households' rights to use and to derive income from timber. It effectively prohibits the right holders from exercising the rights unless approved by the government.

In addition to the incomplete ownership right, the AAS also increases the cost of timber harvest. Logging permits are issued by the County Forestry Bureaus, which are usually situated in towns. This creates problems for households or farmers who live in remote villages which are far away from the towns. Households may find it impossible to travel every time they want to carry out logging and the cost of transportation could also be high. This not only adds to the cost of timber harvest, it also causes hardship to poor households who may be the ones that have the greatest need to use the timber resources. A case study in Tageba Administrative Village in Guizhou Province¹²⁸ showed that the over-restrictive harvest quota not only has discouraged people from investing in forestland, it has also caused households to behave in a way that was not beneficial to the sustainable management of forestland. Tageba Administrative Village is a Hmong ethnic minority and forest dependent community; the harvest quota was reduced from 1.6 million m³ per year in 1998 to 210,000 m³ per year after 1998 (this was most likely the result of the Natural Forest Protection Programme which limits timber logging). According to the study, the local elite and middlemen obtained more benefits from the AAS, and state-owned enterprises had easier access to the quota. The study also found that as a consequence

¹²⁸ Yang Congming, 2004

of the harvest quota, many timber forests had been converted to fruit tree cultivation and there was frequent illegal logging.¹²⁹

Last but not the least, the harvest quota system puts a lot of discretionary power in the hands of forestry bureau officers. This increases the risk of corruption and abuse of power by the decision-makers. As the case study in Tageba Administrative Village shows, not only do state-owned forest enterprises had easier access to the quota, the local elite and leaders also gained more benefits from it in the same way. Abuse of power and corruption are rife mainly because of the lack of effective monitoring both from the upper level of government and scrutiny from the people. It could also be due to the absence of the concept of private ownership right, which would have given more say to the right holders as to how and when their rights should be exercised.

5.2 Excessive Taxes, Charges and Fees

Taxation in rural China consists of various agricultural and rural development taxes. The most important ones are the Agricultural Tax, Special Agricultural Product Tax, and Value Added Tax. Forestry charges are forestry fees collected by local forestry authorities and are earmarked to be spent on forestry.¹³⁰ These charges include afforestation charge, maintenance and upgrading charge, and forestry protection and construction charge. In addition, there are many different types of local charges that are used to pay for local amenities such as health care and education. Only the central government can impose taxes; local government collects taxes and impose local charges and fees on top of that. The Chinese government has for decades levied heavy taxes on its rural population to support the economic development in the cities. Until recently, tax paid by a rural household was one or two times higher than tax paid by an urban household.¹³¹ High taxes and price control have long put farmers in a disadvantaged situation: taxation and charges in certain areas ate up more than 50

¹²⁹ Ibid.

¹³⁰ Reform in the general charges system is being carried out where revenue is now fed into local government budget, and application must be made to use this fund by the forestry sector, Lu Wenming et al., 2002, p 60.

¹³¹ Before the tax reform, a farmer paid an average of 140 yuan as tax per annum compared to a city resident who paid only 30 yuan, Chen Guidi and Chun Tao, 2004.



percent of the forest product value¹³², seriously affecting profitability of investment.¹³³

One of the problems caused by excessive taxation is tax avoidance. Tax avoidance takes the forms of illegal extraction and bribery of officials.¹³⁴ To curb tax avoidance, the government has to hire more manpower to oversee tax imposition and collection. In fact, it is said that in some counties, over 50% of manpower and resources is assigned to the collection and management of forestry charges.¹³⁵ For example, in Fengyi County in Jiangxi, staff salaries took up 20% of the total revenue from forestry charges in 1985; in 1999, it had risen to 78% of the total revenue of forestry charges.¹³⁶ To cover the cost of the manpower, many counties imposed excessive charges, thus creating a vicious circle where ultimately the investors have to bear the heavy burden of taxes.

High taxation and charges have brought negative economic, social and environmental impacts on local communities. Although household incomes had increased significantly since the tenure reform and the abolition of the Unified Procurement System in the 1980s, incomes from forestry investment have subsequently been slashed down by the excessive taxation burden.¹³⁷ High taxes reduce the value of forestland and forest stands as they result in a decrease in profitability. Low profitability also leads to constrained forest industrialisation and increasing illegal harvesting.¹³⁸ In terms of social impacts, high taxation increases poverty in forestry areas and accentuates rural-urban inequality. Ironically, a lot of the revenue collected is spent on forestry management in townships or is channelled into the urban areas to carry out development projects.¹³⁹ When taxes and fees are high, existing forests are harvested without subsequent reinvestment.¹⁴⁰ Furthermore, it also causes conversion

¹³² In the Southern Collective Forest Region, tax burden could be as high as 60%-70% of farmers' gross profit from timber, Yao Shunbo, 2005, p 39

¹³³ Zhang Shiqiu et al., 2005

¹³⁴ Liu J.L. and Landell-Mills, N., 2003, p 49

¹³⁵ Lu Wenming et al., 2002, pp 73-74

¹³⁶ Ibid.

¹³⁷ Liu J.L. and Landell-Mills, N., 2003, p 53

¹³⁸ Ibid., p 53-54

¹³⁹ Ibid.

¹⁴⁰ Ibid.

of forestland into cropland and fruit orchards, which are more profitable economically but do not provide as full an environmental service as forests.

As the wealth gap between city dwellers and rural farmers became wider, rural tax reform became inevitable. In relation to forestry, in 2000, the State Forestry Administration (SFA) permitted provincial forestry authorities to deduct forestry charges by a certain percentage.¹⁴¹ Different provincial governments have responded to this devolution of power to various degrees. For example, in the Guangdong Province, 50-70 percent of the fees for afforestation and for maintenance and use can be returned to foreign investors after their enterprises have reforested the harvested area.¹⁴² Also, up to 85 percent of the forest protection and construction fee can be returned after the foreign enterprises afforest more than 33,000 ha to support a pulp-making facility or other facility producing fine wood products.¹⁴³ In the Jiangxi Province, the forestry authority is piloting a scheme that lowers the price base used for calculating charges by half.¹⁴⁴ Furthermore, the Province has also abolished Special Agricultural Tax for all agricultural products (especially timber and bamboo) except tobacco, and has allowed the county government to keep most of the charges received.¹⁴⁵ Similar attempts are also taking place in the Hebei Province, which, like a few other provinces, is currently carrying out collective forest reform.¹⁴⁶ In the Hunan Province, Huaihua Prefecture, local forestry authority has attempted to eliminate all unofficial forestry charges.¹⁴⁷ All of these initiatives are aimed at providing incentives for forestry investment.

Forestry tax reforms are still in their early stages and the consequences of these reforms are yet to be affirmed. However, some lessons can be learned from the agricultural tax reform that has been carried out for a few years now.¹⁴⁸ At the start of

¹⁴¹ Ibid., p 49

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid., p 50. However, this reduction has been offset by increases by lower level authorities, which usually set forest product charging price bases much higher than that approved by the provincial authority.

¹⁴⁵ Liu D.C. et al., 2007

¹⁴⁶ Hebei Province People's Government's Opinion on the Further Reform of the Collective Forest Property Rights, 2005, Number 97

¹⁴⁷ Cheng Yunxing, 2004, pp 183-188

¹⁴⁸ The central government reviewed the rural taxation policy in 1999 and a pilot scheme was carried out in the Anhui Province and three counties in other provinces in 2000. The three main components of

the pilot scheme, farmers' lives had improved dramatically as the farmers themselves could keep a large portion of their production incomes.¹⁴⁹ However, as time passed, some problems started to appear that could potentially jeopardise the reform. One consequence of the decentralisation of production control that took place in the 1970s was that villages have been made more financially independent, meaning that they were responsible for raising their own revenue. In addition, since 1994, the Chinese government has restructured its tax allocation system, where the township government gets a percentage of the tax collected instead of having everything subsidised by the government.¹⁵⁰ A result of this reform is that central government's revenue from rural taxation has increased significantly whilst township government's revenue has decreased.¹⁵¹ As the tax burden on farmers decreases, local authorities are faced with an ever increasing shortage of income sources. Many township governments and villages have also built up huge debts¹⁵² as a result of the decrease in income. This has put constraints on the ability of local authorities to pay salaries to their staff and to provide public services. As a result, some local governments have continued to increase fees and charges after the initial reduction following the tax reform.¹⁵³ To overcome the problem, some local authorities have attempted to either diversify income sources or to carry out institutional/administrative reforms within the government structure to reduce expenses and to increase efficiency. The gap between incomes and expenses of local governments, however, continues to widen.¹⁵⁴

Similarly, some evidence has shown that forestry tax reform has also harmed local government finances. Without alternative revenue sources, some local governments have no choice but to defy central government policy. For example, in the Hebei Province, even though some unofficial forestry charges had been eliminated, new

this were: (i) the reduction, elimination and conversion of fees and charges into taxes; (ii) the centralisation of tax and charge collection; (iii) the reduction in government overstaffing. Lu Wenming et al., 2002, p 66

¹⁴⁹ A review carried out by the Anhui Province Statistics Bureau at the end of 2000 showed that the average tax paid by every farmer had fallen from 123.98 yuan to 83.14 yuan, a clear indication that the farmers' tax burden had been eased, Chen Guidi and Chun Tao, 2004, p 134.

¹⁵⁰ Lu Xueyi, 2002, 101-103; Wo Wenbo, 2003

¹⁵¹ Ibid.

¹⁵² For an example of the difficulties faced by local governments in the Jilin Province, see Wang Xiaoming, 29 November 2005

¹⁵³ Chen Guidi and Chun Tao, 2004, p 164

¹⁵⁴ It was estimated that the gap could reach up to more than 400 billion yuan for the whole country, ibid., p 149.

unofficial charges re-emerged later.¹⁵⁵ And in the Jiangxi Province, local authorities set forest product charging price bases much higher than that approved by the provincial authority to offset the reduction in charges. Until, and unless, the central government assists local governments to develop and to find more alternative income sources, the problem of financial difficulties faced by the local governments will make reduction of rural taxes and charges very difficult if not impossible.

Some researchers have offered another way to explain the problem of rural taxes (including local charges and fees). According to the theory, under the household responsibility system, the relationship between the collective and the households is equivalent to the relationship between a landlord and a tenant.¹⁵⁶ Instead of paying rent, households are subject to the different charges and fees imposed by the local authority.¹⁵⁷ Due to the fact that demand for land is much higher than supply (mainly because of population congestion in rural China and labour immobility)¹⁵⁸, the cost of land use is high. As a result, local authorities exploit the vulnerability of farmers (their reliance on land) and impose extortionate charges and fees.¹⁵⁹ It is argued that until and unless the degree of farmers' reliance on land is reduced significantly, charges and fees will always be high, reflecting the high land rental in the land market.¹⁶⁰

5.3 Forestland Tenure and Land Use Rights

As the issue of rural land tenure will be looked at in more detail in subsequent chapters, this section will only give a short introduction to the subject. During the last 50 years, major reforms have taken place in rural China regarding rural land ownership, management and use. Rural land ownership has moved from private to collective since the mid-1950s when compulsory large-scale collectivisation took place, and most of the land has remained collective-owned since. Unlike urban land¹⁶¹, rural land is presumed to be owned by the collectives unless the law provides

¹⁵⁵ Lu Wenming et al., 2002

¹⁵⁶ Liu Fengqin, 2005, pp 170-180

¹⁵⁷ Ibid.

¹⁵⁸ Demand for agricultural land does not always outstrip supply in all places. In places where off-farm employment is available and farming is not profitable, land are abandoned by farmers who have opted to take up off-farm employment, Chen Xiaojun et al., 2004, p 16.

¹⁵⁹ Liu Fengqin, 2005, pp 170-180

¹⁶⁰ Ibid.

¹⁶¹ According to the Chinese law, the state owns all urban land. Article 8 of the Land Management Law 1998 stipulates that all urban land belong to the state, while rural and suburban land belong to the

otherwise (state ownership). Private bodies (including individuals, households and enterprises) cannot own land although they can obtain land management and use rights either from the collective or the state. In relation to forestland, many collectives were hesitant to allocate or contract out forestland to households and many had taken back the forestland use right when mass loggings took place immediately after de-collectivisation.¹⁶² As a result, unlike the cropland, the collective still manages a large tract of forestland in China.¹⁶³

Currently, forestland tenure and use rights are plagued with problems, most of which will be discussed in detail in subsequent chapters. Here, the author would like to highlight three problematic areas in relation to forestland tenure security, which are the characteristics of the law, the power of state, and land registration. Firstly, the government adopts the ‘one rule fits all’ approach in relation to rural land use arrangements. This approach is impractical and causes hardship because there are great differences across China in relation to the geography, people-land ratio, economic development, off-farm employment opportunities and so forth. The importance and use of land varies according to the factors mentioned above. By trying to apply one set of rigid rules for all agricultural land, the government has created both unsatisfactory implementation results and the opportunity to disobey the law. A comprehensive survey of hundreds of households across China found that more often than not local governments flouted the law on contractual period, issuance of land certificates, and land reallocation.¹⁶⁴

Secondly, the overwhelming power of state over collective land in rural China not only symbolises the socialist nature of the Chinese state, it also has a deeper implication on the meaning of collective ownership of land. Individual households in a collective are not in fact ‘co-owners’ of the collective land; rather, collective land is

collectives unless the law provides that the land belong to the state. However, Article 2(1) of Regulations on the Implementation of Land Management Law provides that forestland is presumed to be state-owned unless collective ownership can be proven.

¹⁶² This took place mainly because of the uncertainty in the long-term nature of the policy reform due to frequent changes in government policy led to rapid harvest of timber by the farmers. This problem was particularly prevalent in the Southern Collective Forest Region. Liu D.C. and Edmunds, D., 2003, pp 31-38.

¹⁶³ The collectives still manage around 20 percent of the collective-owned forests, Hyde, W.F. et al., 2003, p 10.

¹⁶⁴ Chen Xiaojun et al., 2003

owned by the collective as a single entity. In other words, collective ownership of land is not the aggregation of individual ownership of the different parts of the land. It is inseparable and is owned as single unit by the collective body. The collective is in turn subject to the supervision of the state in terms of fulfilling political targets and production quotas. Many Chinese scholars have in fact described the collective as a mere ‘production arm/tool’ of the state¹⁶⁵, despite its apparent independence. As a result, even though collective ownership of rural land is separate from state ownership, the state in effect controls the use of collective land.

Thirdly, collective forestland in China still faces the problem of incomplete land registration. Theoretically, all collective land ownership and private land use have to be registered with the local land administration offices.¹⁶⁶ This is reiterated in the new Property Law¹⁶⁷, which aims to further strengthen collective and private rights. Furthermore, the new law also pronounces rural land contracting rights as real rights. One of the important requirements of the establishment of a real right (over an immovable thing such as land) is the registration of title. Hence, the need to register private land use rights is even more important following the introduction of the new law. In addition, registration of ownership of collective land would also help to alleviate the problem of ‘identity crisis’¹⁶⁸ and prevent encroachment of rights by the state.¹⁶⁹ Registration of land use rights, however, is not complete in most places; in some places more than half of the households have not registered their rights.¹⁷⁰ This is usually intentional due to impracticality of registration of rights.¹⁷¹ According to Peter Ho, incomplete registration of collective ownership rights is an intentional act by the government. This is because of two main reasons: firstly, it will facilitate economic development by allowing land to be requisitioned frequently; and secondly, it avoids widespread social conflict over land by not having to deal with contested

¹⁶⁵ Liu Fengqin, 2005; Zhou Qiren, 2004.

¹⁶⁶ Article 3 of Land Management Law 1998 and Article 23 of Rural Land Contracting Law 2002

¹⁶⁷ Article 9 and Article 127 of Property Law

¹⁶⁸ This refers to the lack of a clear definition of ‘collective’ mentioned briefly above, and which will be discussed in more detail in subsequent chapters.

¹⁶⁹ This is particularly important given the fact that forestland is deemed to belong to the state unless collective ownership can be proven. In other words, unless the collective can prove ownership by showing ownership certificates or registration, the land is owned by the state. This has caused hardship and injustice to the collective, Ho, Peter, 2005, pp 118-122.

¹⁷⁰ Ibid., pp 17-43; Chen Xiaojun et al., 2003

¹⁷¹ Frequent land reallocations make it impractical to register land use right for a period of 30 years for arable land and 70 years for forestland. This issue will be discussed in Chapter Two.

ownership claims at the lowest level.¹⁷² Currently the problem of incomplete land registration is not perceived to be fatal due to the fact that land transactions are tightly controlled and infrequent¹⁷³; however, it is highly likely that serious disputes will arise in the future when the land market is opened up further.

The problems of tenure insecurity and land use rights will be discussed in detail in the subsequent chapter. In fact, it is the main focus of this thesis, which looks at the underlying forestland tenure problems and the viability of a regime change in China. Apart from the issue of tenure insecurity, the ownership structure also has an indirect impact on how collective forests are governed. In particular, the incentive to invest is hampered by various restrictive government measures, such as the harvesting quota system and the logging ban. It can be argued that the existing ownership structure has enabled the state to adopt these restrictions. A change in the property rights regime will have far-reaching impact on all the forest-related discussed in this and subsequent chapters.

5.4 Inadequate Compensation for Forest Ecological Benefits

In 2004, the Chinese government set up a Forest Ecological Benefits Compensation Fund (FEBSF) under which the central government pays out money to entities that manage the ‘public benefit’ forests. These forests are usually natural forests or forests in strategic areas that provide various ecological services to the community. The current rate of compensation is 5 yuan per mu (approximately USD 9 per hectare), with 4.5 yuan to be allocated to the forest management units and 0.5 yuan for fire and disease prevention efforts. Even though this marks a major step forward for forest conservation and protection in China in the sense that private efforts are compensated via a public benefit scheme, its effectiveness is not at all clear.

There are several issues related to the forest ecological benefit scheme. Firstly, the subsidy provided is negligible and inadequate. The subsidy given covers only the tending/management cost of the forests whilst lost revenue resulting from restricted forest use is not compensated. In reality, it is likely that the 5 yuan per mu is not even sufficient to cover the full tree tending and planting costs, let alone the opportunity

¹⁷² Ho, Peter, 2005, pp 17-43

¹⁷³ Chen Xiaojun et al., 2003

costs, which can be high in certain areas. According to the suggestion of the Workshop on Payment Schemes for Environmental Services in relation to the environmental payment scheme in the Guangzhou Province, the compensation level should be in the range of 30 yuan per mu for ecological forests.¹⁷⁴ In addition, it is argued that regional differences and ecological characteristics should be taken into account when deciding on compensation levels.¹⁷⁵ The small compensation payment could greatly compromise the viability of the Programme, especially if the price for timber is comparatively much higher.¹⁷⁶

Secondly, the scheme has not adopted the 'beneficiary pays' principle. The FEBSF was officially commenced nationwide in December 2004. However, the regulations do not specify how long the scheme will last and how long the government will keep paying money out of the central budget. The subsidy is allocated from the state budget and no contribution is collected from the beneficiaries of forest ecological benefits. One advantage of this scheme is that it has avoided the need to establish the market value of ecological services, and the link between the benefits accrued and services provided. These two things are particularly difficult to establish without detailed and long-term economic valuation studies. As a result, it has made expedient implementation of the FEBSF possible. On the other hand, considering that the government has only limited resources, it is not certain at all that the FEBSF scheme under the current format will be carried out indefinitely. Hence, in the long term, contributions from beneficiaries are desirable as they not only reflect the market value of the environmental services but also relieve the state from the financial burden.¹⁷⁷

¹⁷⁴ CCICED, *In Pursuit of a Sustainable Green West*, 2002, p 9

¹⁷⁵ Ibid.

¹⁷⁶ A case reported in the paper serves as a warning shot to the long-term sustainability of the scheme. In 2000, a pristine forest area in the Fo Gang County in the Guangdong Province was designated as a 'public benefit forest' and was included in its Ecological Compensation Scheme. The farmers received 8 RMB for every mu of forestland. However, since the end of 2006, 1,000 mu of timber has been illegally logged. This was mainly because the price of logs had increased a few folds (due to shortage of supply): timber could be sold for between 600-800 RMB per cubic metre. In addition, no forest guard had been hired by the collective since 2004 due to financial difficulties. As a result, illegal logging was rampant and enforcement was ineffective. The timber production sanctioned by the local forestry bureau was said to be double the amount set by the county forestry bureau due to the lucrative income the forest bureau could earn from transport permits and management fees, both of which depend on the volume of timber transported. Xiang Zhenzhong, 29 March 2007.

¹⁷⁷ For in-depth discussions of examples of the use of market-based mechanisms in forest ecological services compensation, see Pagiola, S., Bishop, J. and Landell-Mills, N. (eds), 2002.

Thirdly, there appears to be no explicit and objectively measurable environmental targets. Without these targets, monitoring and evaluation is difficult if not impossible, and the effectiveness of the scheme cannot be assessed. Fourthly, the chain of implementation is too cumbersome especially in relation to collective-managed natural forests. In the case of state forest farms or state-owned forests, the money is paid out from the central government budget and is delivered to the provincial governments that would then dispense the money. In the case of collective-managed forests, the money has to go through the county and township governments and ultimately to the village authorities. Due to this long chain of implementation, there will always be the risk that some money will get lost or used improperly before it reaches the payee.¹⁷⁸

Ecological compensation is a new and exciting phenomenon in China. However, it is still too early to make a judgment on the success of the scheme, especially when it is generally agreed that the subsidies paid are too low. China can no doubt further fine-tune the compensation scheme. Furthermore, there are plenty of examples of successful ecological compensation schemes around the world that can be used as references.¹⁷⁹ In particular, even though the government may think that it is not viable to pay the market value at the moment, involving those who are benefiting from the environmental services can further increase the subsidy amount. In fact, striking a balance between environmental services providers and users may be the only way to ensure long-term provision of environmental services.

5.5 Implementation of Forest Law and Policy

Another major problem related to the forest and forestry in China is law enforcement. Problems with implementation of law and policies in China are not unique to forest governance; they are indeed embedded within the general governance system. Due to the one-party system and historical reasons, the central government has always possessed the ultimate governing power. Unlike the United States and many other countries, China does not have a federal system, and very little direct power is

¹⁷⁸ One instance of mismanagement by the local authority in Huaiji County was reported in a news article, Luo Y.J. and Mao Z.Y., 14 September 2004.

¹⁷⁹ Pagiola, S. Bishop, J. and Landell-Mills, N. (eds), 2002

devolved to provincial governments.¹⁸⁰ The provincial governments are not independent of the central government and their law-making roles are limited. For example they can only make laws to complement the law and policies already made by the central government.¹⁸¹ To make matters more complicated, laws passed down from the central government are usually aspirational and rather less complex.¹⁸² In fact, most of the supposed ‘laws’ adopted by the central government are actually policies, which lack detailed and elaborate provisions.¹⁸³ This certainly makes implementation of government policies more difficult and more susceptible to misinterpretation.¹⁸⁴

Even if the laws promulgated by the central government are clear, there is still a rather erroneous presumption that sub-national units of government have the will and resources to properly implement the laws. Ultimately, the interests of central government may differ from those of sub-national government: sub-national government most probably will be more concerned with local economic development, compared to central government which may be more concerned with the environmental welfare of the nation.¹⁸⁵ Furthermore, the difficulty of coordination (both horizontal and vertical) within the government has not been highlighted enough.¹⁸⁶ In 1988, Ross summed up forest governance in China in the following sentences: The state system is essentially bureaucratic and largely relies on hierarchy commands to secure compliance, the collective sector features campaigns alongside plans, and the private sector largely relies on material incentives organised through

¹⁸⁰ However, increasingly more power is transferred from the central to local government mainly due to the economic reform. For example, provincial governments are now allowed to adopt ‘experimental legislations’ that, if proven successful, will be endorsed and sometimes implemented nationwide by the central government, Peerenboom, R., 2002, pp 189-190.

¹⁸¹ In fact, provincial and lower level legislative enactments are only valid insofar as they are consistent with national measures, Alford, W.P. and Shen Y.Y., 1997, p 128

¹⁸² Ibid.

¹⁸³ Bledsoe, D. and Prosterman, R., 2000

¹⁸⁴ Beyer, Stefanie, 2006

¹⁸⁵ The ‘interests incompatibility’ situation can be found in the USA, which illustrates the different priorities of the federal and state governments in relation to forest governance, Koontz, T., 2002

¹⁸⁶ In China, forest governance involves departments such as land, water, wildlife and conservation, mining, and forest to name a few. These different departments have their own mandates and govern uses of forest and forest resources. Given that coordination across departments is notoriously complicated, it is even truer in China where the legal and political systems are still yet to mature, Alford, W.P. and Shen Y.Y., 1997, p 140.

market-type mechanisms. The prominence of each at any given point in time is largely a reflection of broader political dynamics.¹⁸⁷

Another major problem of land and resource management in China is the effectiveness and fairness of law implementation. Due to the lack of an open and transparent monitoring system, corruption and abuse of power often have plagued all levels of government in China, including the highest level of governance.¹⁸⁸ The presence of rampant corruption in the country's administration means that laws and policies are not properly implemented and the goals of the central government cannot be achieved. At the lower level of government, local officers are usually stationed in one place for an average of five years. These short periods of service make long-term devotion to a specific place almost impossible; as a result, local officials are more concerned with short-term results. A report published recently on the development of non-state enterprises¹⁸⁹ (including village enterprises set up or supported by local governments) shows that the average 'survival' period of a non-state enterprise is three years. It has been suggested that this could perhaps be connected to the office term of local officers who play an important role in establishing non-state enterprises, especially in the rural area.¹⁹⁰ In addition, promotion (and demotion) is highly reliant on the achievement of targets set out by the government. Officials thus feel obliged to appease the higher level of government, which sometimes leads to disregard for the welfare of the people.

Lastly, enforcement of law is usually 'top-down', meaning that sanctions and penalties are imposed on the people by the authorities. It is very difficult, and against the norms in many places, for the people to bring action against the authorities or the collective.¹⁹¹ This not only means that the authorities, including the village leaders, can most likely get away with malpractice, it also highlights the insignificance of private rights, including private property rights. Partly due to the fact that many

¹⁸⁷ Richardson, S.D. 1990, p 179

¹⁸⁸ In year 20001 alone, the Communist Party has 'disciplined' more than 175,000 officials for crimes including bribery and corruption, 'China Punishes Thousands of Officials', 23 January 2002. Recently, Shanghai Party boss was sacked and investigated for corruption charges, Sommerville, Quentin, 28 September 2006.

¹⁸⁹ China's Non-State Enterprise Development Report, from 'How to Seize Government's Resources and Opportunities' (Sina Finance News) 30 August 2006

¹⁹⁰ 'How to Seize Government's Resources and Opportunities' (Sina Finance News) 30 August 2006

¹⁹¹ Li Ping, 2003, p 66

officials do not believe in the legitimate entitlement of private households' use rights over the land (or in the case of village leaders, they may be more concerned with fulfilling administrative targets than individual rights), they frequently give little thought to private rights and put public interest over the private interest. More worrying is that in some places, local courts have issued orders that exempt the courts from adjudicating on issues that are deemed administrative, but have great implications on private rights. For example, the High Court of Jiangsu Province issued a memo in 2001 that prohibits the courts within the Province to handle cases involving major land use contract disputes.¹⁹² In addition, some courts would refuse to get involved in land requisition cases (which usually involve disputes about compensation); instead, these cases are handled by representatives of the government.¹⁹³ Given the fact that the majority of these cases involve disputes between government officials and the people, this kind of dispute resolution is hardly satisfactory.

6. Conclusion: Approach of the Research

The dynamic relationship between the state, collectives and individuals in relation to the collective forest regime in China presents an interesting topic for research. First and foremost, the studies of existing property rights structure will shed light on the allocation of power between the three entities. The shift from a communist to a socialist economy has brought about many changes, including the perception of the role of the state and the legitimacy of private ownership. Although private ownership of land is still forbidden, private land use rights are now prominent in rural China. The growth of private enterprise and ownership means that the Chinese government increasingly has to rely on the power of regulation rather than the ownership structure to govern resource use and allocation. This has potentially decreased the arbitrariness in the decision-making processes regarding land use. Public regulations arguably are also open to greater scrutiny by the public and make enforcement more straightforward. In short, the socio-economic changes in China have led to changes in property rights, which in turn have shifted the power from the state to the collectives and their members.

¹⁹² Chen Xiaojun et al., 2003, p 91

¹⁹³ Ibid.

Secondly, the current land ownership structure demonstrates the role of land in China's rural society: the state uses land control to achieve socio-economic targets which include agricultural production, egalitarian allocation of wealth and migration control; land is also a central feature of the collective system, which defines both its identity and physical boundaries; and lastly, ordinary households use land not only for agricultural production but also as the main source of social security. These different roles can complement each other but they can also come into conflict. For example, the use of land as the main source of social security would entail limited land exchanges; this may inhibit efficient use of land as an economic resource. Only by understanding the different roles of the land can one make informed choices about land ownership and use policies. Formulation of land policies without a deep understanding of the socio-economic significance of the land to the different stakeholder risks causing serious social problems that can potentially destabilise the rural community or retard rural economic growth.

Thirdly, the studies of land property rights are also essential for the understanding of the investment potential of China's collective forest. Property rights provide economic incentives for right holders to invest in either establishing plantations or to manage the existing forest resources. Given the various reforms that have already taken place in China's forest sector in the past two decades, particularly where emphasis has been given to preserving the natural forest and establishing more commercial plantation forest, it is important to find out how the existing property rights have enhanced or inhibited the achievement of these goals. The underlying tenet is that tenure security will provide the necessary incentives for right holders to adopt long-term resource utilisation and investment plans as there is no obvious need to exploit the resource quickly and in a wasteful manner. Arguably, however, the outcomes are context-dependent and will be contingent on the existence of certain prevailing conditions. It is therefore interesting to find out if property right reforms in China have indeed resulted in improvement in collective forest use and resource production.

Lastly, China's collective forest in the context of the well-established theory of the common resource management regime will be discussed. It provides an opportunity to

critically analyse the viability and adequacy of China's collective forest regime. It will provide some indications as to what form the future collective forest reforms in China would or should take. A comparison with an actual working example of a relatively successful community forest management regime will provide an even better insight into the likelihood of success of China's collective forestry. In order to make the comparison viable, the comparative regime must share some basic features, which include the composition of the collective, the nature and power of the collective and also the level of economic and social development. Although the conditions may differ and that a perfect comparison may not be possible, a comparison is still helpful in order to find out the weaknesses and strength of China's collective forest management regime.

The body of the thesis consists of detailed discussions on the different but important components of collective forest such as the private use rights, collective ownership and governance structure, and collective management of the forest. The focal point for Chapter Two is the private land use rights. The chapter focuses on the development of land use rights of agricultural land in China generally, rather than focusing only on forestland. This is because not only forest and cropland have not been treated too differently in China, but also because development of forestland was greatly influenced by the development of agricultural land as a whole. The first section begins by discussing the evolution of forestland use rights in China, which started from the pre-1949 (establishment of the People Republic of China) period. The turning point of China's agricultural production (and arguably the economy as a whole) came in the form of the devolution of the private land use rights to the households in 1978. It is fair to say that it was the single most important event that transformed the social and economic landscape of rural China. In relation to contemporary land use arrangements in rural China, the chapter discusses in detail the content of the private land use rights. It will become clear that although land use rights enjoyed by the collective members have been greatly enhanced by legislation introduced by the government, many restrictions still exist that not only create tenure insecurity but also cause social injustice. In the last section of the chapter, the new Property Law that came into force in October 2007 will be discussed. This would be the first time that land use rights are unequivocally announced as 'real' rights. And although the question of whether or not

the new law will immensely enhance land use rights is still far from clear, it nevertheless represents one more step towards better protection of private rights.

Having looked at private land use rights, Chapter Three then analyses the composition and implications of collective ownership of forestland. The first section looks at the possible justifications for collective ownership of land in China. It lists out a few possible reasons why the Chinese government would want to maintain the status quo. These include high population-to-land ratio, migration control, use of land as social security, egalitarian concern of land use, and lastly the ideology behind collective ownership. The chapter highlights, however, that these justifications are either incorrect or are no longer valid in modern day China. The substance of collective ownership is very much related to the governance structure of the collectives. Given the fact that 'bottom-up' participation in the making of government policies is virtually non-existent, in most situations the collectives have become the mere executors of government orders or policies rather than active representatives of their members. Given the extensive power the state has over the collectives, it is widely recognised that while in many instances the collectives are the *de jure* owners, the government acts as the *de facto* owner of land. As a result, collective members benefit very little under the collective ownership regime.

Chapter Four takes a break from the legal and social analysis of the ownership structure and looks at the issues of collective management of the forest. Although many collectives in China have devolved use rights to households, some still retain the authority to manage the collective forest on behalf of their members. Given the sizes of the forests and the large management costs involved, it is inevitably that in some places the collectives would have to bear the management responsibility. To find out the strength and viability of collective forest management in China, it is important to look at the general theory on common resources management and compare the case in China with other community forest management regimes around the world. One particularly relevant comparison is with the community forest regime in Mexico. Mexico has a relatively successful and more versatile community forestry compared to China. This is based on the fact that the community forestry regime in Mexico has the following features: voluntary association of forest communities; more active stakeholders' involvement in decision-making; direct involvement of

community members in forestry activities; and more effective judicial redress. These features are absent in China. Although the latest collective forest reform in China has introduced measures to increase investment in forestry (by lowering taxes) and to promote more flexible and diverse management regimes (by allowing different forms of private and collective management), some inherent limitations that have not been addressed may inhibit the development of collective forest.

The last and concluding chapter discusses the possible property rights reforms that the Chinese government can undertake in order to improve its forest currently under collective ownership. Essentially the suggestion is for the Chinese government to allow privatisation or the establishment of permanent leasehold over forestland. Although it may sound controversial, privatisation of agricultural land has been called for by scholars within and outside of China. Reform of agricultural land ownership is not only necessary for economic growth but it also has significant social and legal implications. Given the characteristics of China, it is necessary, however, to control the pace of privatisation so that it will not cause sudden and severe social disruptions. In particular, two control mechanisms can be employed at the initial stage of privatisation, which are the restrictions on the privatisation itself, and the restrictions on the land market. A more gradual approach to land privatisation also needs to be accompanied by other equally important reforms in areas such as the social welfare system and the judiciary. Ultimately, the chapter concludes that the state should forsake exercising control over land use via the ownership structure; instead, forestland use control should be achieved by using the state power to regulate. Provided that the laws are clear and enforcement is effective, control of land use via public regulation should promote efficiency and openness or transparency in governance.

Chapter Two

Rural Land Rights in China

1. Introduction

This chapter will look at one of the most important issues in the collective forest reform, namely rural land tenure in China. Due to the fact that in China, forest and arable land both fall into the category of 'farm- or agricultural land' and had been given the same treatment until recently, discussion of the issue of land in this chapter include both arable and forest land. In addition, as most of the literature on rural land issue focus on arable land, they can be used to shed some light on the discussion of forestland.

Land has always been one of the most important and contested issues in China. Despite the impressive economic growth fuelled mainly by industrialisation since China adopted the 'open door' policy in late 1970s, almost 61 percent of its citizens are still registered as rural residents.¹ China embraced communism half a century ago and even though it has gradually turned to the market and capitalist ideology in many respects, it still retains flavours of a communist/socialist statehood in many others such as land use. China adopts a very different ideology compared to most of the Western states in relation to land ownership and allocation. In China, state ownership accounts for more than half of the country's landmass. Land in the cities is owned by the state while land ownership in rural areas is divided between the state and the collectives. The collectives are the legacy of China's communist past and continue to play an important role in China's political and economic development, especially in the rural areas. Apart from ownership, land (especially rural land) use is also distinctly different from those in Western societies. In China, rural land allocation is carried out on an egalitarian basis where everyone gets equal and fair share of the land according to needs, which inevitably requires constant re-allocation of land to cater for demographic changes.

¹ Ho, Peter, 2005, p 39

In this chapter, we will first look at the evolution of rural land rights, from just before the establishment of the People Republic of China to the present day. We will see below that the most recent important rural land reform had started without legal sanction by the central government but was gradually approved and adopted by the government. Another characteristic of rural land reform in China is the trial system where the proposed reform would be tested out in a few counties before being implemented nationwide. The discussion of the evolution rural land rights is followed by the current regulations and practices in relation to rural land. It will be shown that in many instances, practices in reality do not reflect the spirit of the regulations and enforcement is ineffective. The subsequent section then looks at the characteristics of private land use rights and the various restrictions imposed on these rights. One particularly important legislation that will be looked at is the Rural Land Contracting Law 2002, which governs the use of all agricultural land. This piece of legislation explains the relationship between landowners and users, and outlines the rights and obligations of the parties. Private land use rights are further strengthened by a new law, namely the Property Law which came into effect in October 2007. This new legislation signifies a new era for the protection of private property rights, although it does not add anything substantial to the content of the rights itself.

The discussions of all the above-mentioned issues are aimed at providing a deeper understanding of China's rural land use structure. The understanding is vital not only for the analysis of current land use practices but also for the discussions of future reforms. As we shall see in Chapter Three, institutions have great bearing on how natural resources are used and owned, and vice versa. Only with the full understanding of how the existing institutions work in China can one hope to provide accurate analysis of the current land rights arrangements and suggestions for improvement. As such, this chapter not only gives an overview of the history of China rural land use arrangement, it also sets out the underlying structure upon which the subsequent discussions on rural land use are based.

2. The Evolution of Rural Land Rights in China

Land has been one of the most important resources in China for centuries, especially in rural China. China has a population of 1.3 billion (21% of total world population)

and 132 million ha of arable land (9% of total world landmass); the land area per capita is less than 1.4mu (around 0.093 hectare)², making the pressure on arable land enormous. Similarly, even though China contains the fifth largest area of forest in the world, forestland per capita is only 0.1 hectare, 1/6 of the world average of 0.6 hectares.³ Apart from pressure on land use, huge population also means that China is constantly looking for ways to achieve and maintain an adequate basic supply of resources to its citizen, both in the cities and villages. To achieve this, China has imposed strict control over land use, especially amid the industrialisation crusade that increasingly eats into rural land, making sure that there is enough arable land to produce grains and crops. The government controls the land market where only the State has the power to sell rural land for non-agricultural uses.⁴ At the same time, the Chinese government imposes production quota and compulsory purchase on farmers in order to procure and store enough food for the nation, especially for the urban dwellers.⁵ The state monopoly of land market plus the production quota severely restrict the land use choices of the collectives and rural households.

Prior to turning to the evolution of land property rights in China, some issues concerning arable land and forestland should be identified. Generally, arable and forestland in China have undergone similar changes and have been governed by the same set of regulations. For example, both types of land experienced de-collectivisation in the late 1970s and beginning of the 1980s where use and management rights were devolved to the households from the collective (although to different extents⁶). Both are also divided into different categories according to their use, such as family and responsibility plots.

² Niu Ruofeng et al., 2004, p 36. China's population is expected to increase by 10 million per year, hitting a peak of 1.46 billion by 2030, *China's Population Passes 1.3bn*, 6 January 2006

³ Lu, Wenming et al., 2002, p 9.

⁴ Article 43 of the Land Management Law 1998 provides that any unit or individual who needs land for development purposes must apply for use of state land (except where collective land are used by the village to build village enterprises or housing construction for villagers).

⁵ Production quota and procurement of grains will be looked at in more detail below. For general discussions of China's grain marketing system, see Findlay, Christopher and Chen Chunlai, 1999.

⁶ By the end of 1984, 99% of the Chinese rural population were regarded to be farming on an individualised basis, Kung, James K.S., 2002, p 795. There is no reliable data on the proportion of forestland under household management but an example from one case study shows that in some places, collective still retains nearly half of the forestland, Qiao Fangbin, Huang Jikun and Rozelle, Scott, 1998, p 25

As we shall see, the discussions of the division of usufruct rights and ownership rights have come a full circle since the pre-1949 period to the present day. In both periods there have been separation of usufruct and ownership rights to the land itself, and power- and benefit-sharing between the different entities have remained the important features of land use. Discussions of the earlier form of land use arrangements would certainly shed some light on the present debates on land use rights. The primary difference between the two periods is the emergence and the role of the collective. During the post-1945 period, the collective have taken over the role of private entities as owners of the land; in fact, their role as owner is much more extensive than the private owners in the pre-1949 era in that they also controlled agricultural production and other social affairs of the peasant households. Towards the end of the 1970s the role of the collective has been greatly reduced, and comparatively private usufruct rights have become stronger. The progression in the dichotomy of use and ownership rights has again put a strong favour in a more robust private use rights regime, which was already prevalent in China before 1949. It is arguable that the new private rights regime is different from the old one in that the new use rights are subject to more social control so that the wealth gap can be kept to a minimum. In many cases, the aim of social equality is achieved at the expense of economic efficiency, and occasionally environmental protection. In the past century, China had experienced a dynasty, a short-lived democracy, communism and the present socialism. These political upheavals have had major impacts on land ownership rights as well as the social and economic structure of the society.

2.1 Pre 1949

Before communism took hold, most of the land in China was in the hand of a small number of landowners.⁷ Land ownership under the old dynasty regime was in principle very similar to the feudal system in Europe. Even though the Emperor was presumed to have the overriding claim over all land, most land were owned and managed by a small subset of people in the society. This is particularly true with regards to agricultural land on which the majority of people relied for subsistence purposes. In most cases landowners did not work on the land themselves. Most

⁷ Before the revolution of 'new democracy' that toppled the last dynasty of China, less than 10% of the population were owning 70%-80% of the land, Han Mingmo, 2001, p 105.

farmers were renting the land from the rich landowners and were liable to pay rent.⁸ Different land use systems were in place before the establishment of the modern state of China in 1949, with the most prominent one being the 'yong dian' (永佃) system, which denotes 'permanent tenancy rights'. The basic feature of this land use system is that land rights were divided into ownership and usufruct (or surface) rights. Landlords owned the land and the minerals underneath the land, but the tenants owned the use rights and crops or trees planted on the land. The two different parties had respective duties and rights, and they were enforceable by the local magistrates.

Surprisingly, land use during this period was very similar to the current land use arrangement, although there are obvious differences such as the owner entities, length of land use contract and the ideology behind the arrangements. In many ways, compared to land use rights possessed by rural households currently, land use rights possessed by the peasant households at that time were not only more secure but also more robust. For example, they had the right to earn income from the land, to transfer the use rights, to use land as collateral and to bequeath it to the next generation.⁹ In addition, they could also choose what to plant on the land and when to harvest. It has been reported that customary laws had given strong protection to the tenants' rights from abuse from the landlords.¹⁰ For example, unreasonable increase in rent was prohibited and the landlord could only confiscate the land in extreme circumstances.¹¹ Furthermore, there was evidence that use of land as collateral was common, which provided the peasants some financial assistance in difficult times.¹² Farmers who were working on the farm had relatively extensive use rights¹³ although sometimes their rent burden was often so high that they could hardly earn a decent living out of the land.¹⁴

⁸ More than 90% of the population owned only 10%-20% of the land, *ibid*.

⁹ Zhou Rong, 2005

¹⁰ *Ibid.*

¹¹ Furthermore, usually the landlord had no right to ask for rent 'in kind', namely in the form of agricultural products, *Hu Hua*, 25 July 2005.

¹² Zhou Rong, 2005.

¹³ This was recorded in a PhD research carried out by a Chinese anthropologist studying at London School of Economics and Political Science, published in 1939 by Routledge. Fei Xiaotong carried out comprehensive economic, political and social studies on a small village in the Jiangsu Province for over nearly 70 decades, recording the changes that took place, Fei Xiaotong, 2001.

¹⁴ Li Gengyao, 1948

In pre-1949 China, forest landowners included private entities such as local nobles and state officials, and also collective institutions such as temples, schools and the community. Collective owners managed the land for the use and benefit of the institutions or community they represented. They usually had rules that outlined the purpose and manner of use for forestland, which included penalties and punishment in case of rule violations. Violations of rules for personal benefits were not uncommon on collective land, and perpetrators were sometimes punished.¹⁵ With regards to privately owned forestland, the practice was not dissimilar to the use of cropland discussed above. Usufruct and ownership rights on land co-existed and some form of benefit-sharing or rental arrangements were in place.

Given the vast size of the country, it was inevitable that practices differed from place to place. However, in most places incentives were arranged to encourage more efficient land use by usufruct right holders. In certain areas where land was planted with trees, customary law might specify that the term of the tenure should remain open-ended in order to allow enough time for the trees to grow.¹⁶ In the Fujian Province, there was a tenurial system known as 'one field, two landlords' (一田两主) where the land was rented out to a tenant. The tenant could not sell the land itself but was free to mortgage or transfer the surface rights on the land. The ownership of the forestland, usually known as 'hills', belonged to the landlord but the trees planted on the land belonged to the tenant. The tenant needed to pay rent every year but he could mortgage or sell the rights. There was no time limit for the 'tenancy', and the landlord could not take the land back or plant trees for himself. When the tenant voluntarily gave up his rights, he must clear the trees but there would be no other charges would be incurred.¹⁷

There were other examples of benefit sharing arrangements between the landlord and the tenant in relation to forestland use.¹⁸ According to surviving contracts, in some places, a landowner would lease out a hillside to a tenant, who took the responsibility for clearing the land, planting and caring for one crop of trees. The tenure contracts also specified certain species of trees to be planted. Profits were then allocated

¹⁵ Menzies, Nicholas K., 1994.

¹⁶ Ibid, p 97

¹⁷ Ibid.

¹⁸ Ibid., pp 98-99

between the landowner and the tenant after the harvest, with the tenant usually receiving between 50 to 70 percent of the profits. In the Fujian Province, the tenants were given more discretion as to how to establish and manage the plantation, although planting of commercial crop such as timber was usually required. The degree of control by the landlord over the use of forestland seemed to be influenced by the proximity of the land to the landowner. If the land was far away, which made supervision more costly and difficult, tenants were usually given more discretion to run and manage the land.¹⁹

Before 1949, both the Kuomintang and the Communist Party had campaigned on the basis of land use and ownership reform in order to attract the support of millions of landless peasants. More specifically, politicians had promised to vigorously push forward land reform so that ownership of land would not stay in the hands of a small group of people. The debate on the different forms of land use and ownership arrangements was hotly discussed even up until the eve of the establishment of the new People's Republic of China. A reference book on the issues of land use published in 1948 discussed the different options of arrangements at that time.²⁰ Surprisingly, the different options are, in substance, very similar to the different options debated by the present politicians and academics. The three main options of rural land use and ownership favoured by both the present and past academics and politicians are state ownership with private usufruct right, collective ownership with private usufruct rights, and private ownership and usufruct right.

The preferred choice of the author of the book was the collective/state ownership with private usufruct rights.²¹ According to the author, private ownership was not suitable mainly due to three reasons: land is a natural endowment and nobody should have an automatic claim to it; privatisation of land would lead to land fragmentation; and lastly lack of capital among the rural households would impede the development of the agriculture sector.²² Furthermore, it was pointed out that privatisation of land might lead to owner-labour (capitalist) economy when individuals started to sell or

¹⁹ Ibid.

²⁰ Li Gengyao, 1948

²¹ Ibid., pp 85-86

²² Ibid., pp 2 and 15

transfer their land entitlements to others.²³ This was a situation that was deemed unacceptable by the mainstream thinkers at that time as they were trying to change the existing land arrangement under the feudal system.

2.2 1949 – 1956

The new People's Republic of China was established by the Communist Party at the end of 1949 following the end of the civil war. Communist Party won the support of the farmers on the promise that everyone would get the equal right to own land. The idea of 'land to the tiller' (耕者有其田) was a huge attraction to the majority of the farmers who had suffered under the old system. After the Communist Party took power, huge amounts of land were taken from the previous landowners (including rich but not ordinary peasant owners) to be allocated to farmers. These farmers became landowners for the first time and their incentive to work on the land greatly increased.²⁴ However, in order to increase productivity and income from agriculture, and to catch up with the practice of the Soviet Union, the government had opted for collective management just a few years after the initial land reallocation.

In the early 1950s, farmers were encouraged to pool their land and resources together to form cooperatives (these were recognised as 'elementary cooperatives') in order to increase productivity.²⁵ Participation was voluntary and farmers who joined were allocated shares. Benefits or profits were allocated on the basis of the amount of work the farmers undertook and the capital invested.²⁶ This simple form of cooperatives kept private ownership of land alive as the farmers were the decision-makers concerning the use of land and resources, and they could withdraw from the cooperatives if they wished. So, even though the land was managed collectively, ownership still lied in the hands of the farmers, not the collectives. By 1955, the

²³ Ibid., pp 85-86

²⁴ Agricultural productivity and farmers' income also increased greatly. For example, total agricultural productivity increased by 53.5% in 1952 compared to 1949, with an annual increase of 15.3%; farmers' income also increased by 30% in 1952 compared to 1949. Han Mingmo, 2001, p 108.

²⁵ Two Decisions ([Decision of Central Government On Mutual Help and Cooperation in Agricultural Production] and [Decision of Central Government on Development of Agricultural Cooperatives]) were issued by the central government in 1953 to encourage farmers to form cooperatives, ibid., p 114.

²⁶ Niu Ruofeng et al., 2004, p 52.

proportion of rural households that joined elementary cooperatives was no more than 60 percent.²⁷

Collectivisation of forestland holdings was also carried out swiftly. In fact, by 1954, three-quarters of the afforestation was carried out by the cooperatives.²⁸ Collectivisation of forestland was beneficial in many places due to the fact that peasants could now pool their labour in planting trees, harvesting trees and so forth, which would otherwise be too costly for individual households. Few cooperatives were engaged in industrial forestry but many had integrated horticultural crops (such as food and fodder trees) into the agricultural pattern.²⁹ A Resolution on Agricultural Collectivisation was issued by the Central Committee in 1955, which stated that trees owned by collective members should remain under their care and even if the trees were included in collective management, there should not be any change in ownership.

2.3 1956 – 1978

The simple form of cooperatives changed into a more advanced type in 1956.³⁰ The main change accompanied by the adoption of the ‘advanced cooperatives’ was that the land and major farming equipments were taken from individual farmers and turned into collective assets. Farmers no longer had the discretion of not joining the cooperatives and profits were allocated according to the amount of work they put in. Even though farmers could still own scattered fruit trees, other non-timber trees planted around the homesteads and small farming equipment, and had alternative employment, they had virtually lost their ownership right of and right to income from the land and agricultural assets. Decision-making became centralised and involved hundreds of households (total number of households in an advanced cooperative).³¹ This was the beginning of the real ‘communisation’ of land, both arable and forest land.

²⁷ Liu Dachang, 2001, p 243

²⁸ Richardson, S.D., 1990, pp 170-171

²⁹ Ibid.

³⁰ By the end of 1956, 96 percent of rural households in China had joined cooperatives, Liu Dachang, 2001, p 243

³¹ Ibid.

Trees and forests were also consolidated and managed by the collectives. In addition to the means of production, ownership of the existing trees on the forestland was also reverted to the collectives. The policy at that time in general provided that young forests, nurseries and blocks of 'economic' tree and industrial timber species should be collectively owned, and the previous owners of these trees should be compensated where appropriate.³² However, this was not adhered to in many cases and peasants were either under-compensated or not compensated at all.³³ The role and power of collective forest farms were further strengthened by the adoption of an even stronger version of collective agricultural organisations, namely the 'People's Communes'. People's Communes were higher forms of farmers' cooperatives, and were formed via the merger of the advanced cooperatives.

People's Communes were adopted during the 'Great Leap Forward' in 1958 and lasted until the end of 1970s. Under the people's commune system, all production assets were collectivised and were owned by the collectives.³⁴ Collective forest farms emerged under the new system. By May 1958, there were 1,455 collective forest farms in China and by 1960, there were 80,000 with a total labour force close to one million.³⁵ In addition to collective ownership of production assets, collective sales and purchase were also established³⁶ and the urban and rural residency permit system was adopted.³⁷

Under the People's Commune system, farmers lost their autonomy and became mere units of production. Morale and motivation were low among the workers. This was

³² Richardson, S.D., 1990, p 171

³³ Ibid.

³⁴ All communes were created in a short period of three months in 1958 and all rural households were involved, Liu Dachang, 2001

³⁵ Richardson, S.D., 1990, p 171

³⁶ The collective or compulsory purchase and sales of agricultural produce was adopted in 1953 and was only changed in 1990s when the market for crops was opened up. For timber, compulsory purchase was in place until 1985 when timber market was opened. However, in an attempt to reduce illegal logging and deforestation, free timber market was shut again in 1987 and only forest departments and state timber companies were allowed to collect timber from farmers and act as wholesaler, ibid., p 255. Timber cutting in China is also subject to a quota system, and anyone who wants to cut down the timber needs to get a permit from the forest bureau.

³⁷ In 1958, the Household Registration Regulations was adopted and it cancelled out the right to migrate between the urban and rural guaranteed by the Constitution. The residency permit system is controversial and is said to be the main cause of the wide wealth gap in China. There have been plans to scrap the system in certain Provinces, especially the coastal provinces, Luard, Tim, 10 November 2005

because even though collective income was supposed to be allocated according to one's work contribution to the team output, the subsistence nature of China's village economy had obligated many production teams to distribute a large proportion of their income according to needs, based on household size.³⁸ In addition, land in the cities and towns were turned into state ownership.³⁹ During this period, collective control over arable land was strengthened and land ownership and decision making power were concentrated in communes that consisted of thousands of households each.⁴⁰ This era ended in the late 1970s when de-collectivisation of land replaced the hugely inefficient production arrangements.⁴¹ Farmers in China suffered extreme poverty and starvation under the people's commune system, amid the notorious the Great Leap Forward period.⁴²

2.4 1978 – 1998

De-collectivisation of land started to take place at the end of the 1970s. Due to widespread poverty and low productivity, some local officials in Anhui Province started to experiment with a new arrangement⁴³ of land management rights in 1978 (by doing so without the express authorisation of the Central Government, they risked being persecuted).⁴⁴ The local officials devolved arable land management and use rights (ownership of land still belonged to the collectives) to the household level with the hope that it would give the much-needed incentives to farmers to increase productivity. This was soon followed by other provinces and was subsequently endorsed by the central government;⁴⁵ this system is now officially known as the Household Responsibility System (土地承包责任制).

³⁸ Kung, James K.S., 2000

³⁹ Xu Hanming, 2004, p 130

⁴⁰ By the end of 1958, 90% of rural households were incorporated into 23,400 communes across China, each consisted of an average of 4,800 households, Liu Dachang, 2001.

⁴¹ Agricultural productivity decreased rapidly between 1959-1961. Annual grain per capita dropped from 306 kg in 1957 to 215 kg in 1960, a 29.7% reduction. Niu Ruofeng et al., 2004, p 70.

⁴² Estimates of people died from starvation run from 16.5 million to 41 million, *ibid.*, p 72.

⁴³ In fact, the 'Households Responsibility' system was not new at that time. It had been adopted several times since 1957 but it did not last long each time due to unfavourable political climate. Not incidentally, Anhui Province was taking the lead in contracting out land to rural households, which resulted in many local officials being persecuted when political climate turned unfavourable, *Rural China in the 21st Century: The Land Resources*, 2000.

⁴⁴ Han Mingmo, 2001, p 117

⁴⁵ In September 1979, Central Committee of the Chinese Communist Party issued the [Decision About Issues on Accelerating of Agricultural Development]. Under this Household Responsibility System, farmers manage the land as individual units and have the power to make decisions about production. In addition, farmers can keep the surplus after shares are given to the state and the collective. The essence

Following the success of the Household Responsibility System (HRS), reform in collective forestland management and use rights followed suit. Decentralisation of collective forest management rights officially commenced in 1981 with the adoption of the 'Three Fix' policy.⁴⁶ This policy outlined the three main reforms to be adopted for forestland tenure: 1. stabilising land tenure; 2. demarcating family plots; and 3. defining the household production responsibility system. This policy guideline defined the tenure and forest use right reforms subsequently adopted. At present, almost all of the arable land have been devolved to the household level⁴⁷ whilst close to 80% of the collective-owned forests has been contracted out to households under the new Contract Responsibility System.⁴⁸ In the Fujian Province, use and management rights of most collective land had not been allocated to the households; instead, some collectives had opted for the share-holding system where a 'board of directors' or equivalent were established to manage the forest for all members of the communities, who were issued shares and paid dividends from any profits earned. However, the latest collective forestland reform in the Fujian Province sought to catch up with the rest of the country with regards to allocation of private use rights to households.⁴⁹

For China's forestry, under the new system, the role of 'specialised households' was prominent.⁵⁰ These households specialised in forestry and were actively involved in timber production and forest management. These households flourished in some locations where the right conditions were present such as suitable soil and remote mountainous areas not suitable for crop planting.⁵¹ Some of these households were

of the system can be appreciated from the propaganda adopted to educate farmers of the new system: Guarantee the share of the state, Provide enough for the collective, and Keep the remaining (保证国家的, 留足集体的, 剩下都是自己的).

⁴⁶ Even as late as 1979, the Forestry Act prohibited all forms of forest management other than collective and state management. In 1984, a new Forest Law was enacted. Article 23 of the Forest Law acknowledged that households could own trees that they had planted around their houses and on land (barren hills and uncultivated land) that had been contracted out to them.

⁴⁷ According to estimates, around 97% of the total arable land are now included in the HRS, Han, Mingmo, 2001, p 119.

⁴⁸ Hyde, W., Xu, J.T., and Belcher, B. (eds), 2003, p 10

⁴⁹ The reform involves only commercial collective forestland, and provides for a systematic and comprehensive process whereby collective land is allocated to households and individuals in order to encourage private investment. The Opinion of the Fujian Province People's Government on Promoting the Collective Forest Property Rights Reform.

⁵⁰ Bruce, J.W., Rudrappa, S. and Li Zongmin, 1995

⁵¹ Richardson, S.D., 1990, pp 172-177

also provided with financial assistance to undertake afforestation and were also eligible for loans from the government. It was then believed that the outlook for collective and joint-venture forestry in China was bright mainly because it accommodated the diversity of contractual arrangements for forest establishment and management, and that it worked more according to the market in comparison to the state forestry.⁵² Furthermore, collective forestry enabled households to pool together resources to carry out forest management in a more cost-effective manner. Generally, it is widely agreed that the HRS has proved to be the impetus for the increase in forestland area in China during the 1980s and 1990s.⁵³

The HRS proved to be the solution to the problem and agricultural productivity increased by a few folds in the subsequent years. For example, grain output increased from 320.56 million tonnes in 1980 to 407.31 million tonnes in 1994, with an annual growth rate of 6.17. At the same time, farmers' per capita income increased by 16.74 percent annually, from 191.33 yuan in 1980 to 355.33 yuan in 1984.⁵⁴ Similarly, devolution of forestland management right has also encouraged afforestation activities by farmers although in some areas, deforestation actually took place before afforestation began.⁵⁵ A study by Zhang et al using data from four provinces over 1978 and 1995 concluded that forestland tenure reform generally had a positive impact on forestland expansion in China.⁵⁶ Similarly, a World Bank's publication highlighted that timber plantations and non-timber product forests have increased fastest on plots allocated under the HRS. Afforestation was particularly prominent in plots over which individuals have more control and income rights.⁵⁷ Evidence shows that both forest cover and standing volume on collective-owned forestland have also increased.⁵⁸ In the last five years, nearly 90 percent of the total investment in forest industry came from private capital; non-state forests make up of more than 80 percent of the new plantation areas.⁵⁹ Productivity has also increased as a result of the reform. Farm incomes have also increased steadily since the reforms began in 1978, with an

⁵² Ibid.

⁵³ Liu Dachang and Edmunds, David, 2003, pp 27-44; and Yin. Runsheng, 2003, pp 59-84

⁵⁴ Findlay, David and Chen Chunlai, 1999, calculated from State Statistical Bureau, Zhongguo Tongji Nianjian (China Statistical Yearbook), Zhongguo Tongji Chubanshe, Beijing.

⁵⁵ Zhang Daowei, 2003; and Qiao Fangbin, Huang Jikun and Rozelle, Scott, 1998

⁵⁶ Zhang Yaoqi, Uusivuori, J., and Kuuluvainen, J., 2000

⁵⁷ Rozelle, Scott et al., 2000, p 44

⁵⁸ Zhang Daowei, 2003

⁵⁹ Hou Bingye, 2004

annual growth rate of 15 percent between 1978 and 1999 but only 2 percent between 1997 and 1999.⁶⁰

2.4.1 Ways of ‘Contracting Out’ Land and Types of Land

The current arrangements of rural land use exist in various forms and the extent of use rights varies accordingly. The existence of these various arrangements is mainly the result of a half-hearted ‘privatisation’ reform that sought to ensure that devolution of private use right did not compromise the socialist ideology practised by the Chinese government. The following gives a general overview of the three main ways and forms of de-collectivisation of rural land in China.

2.4.1.1 Contracting out through administrative allocation

This is the earliest form of de-collectivisation of rural land where plots of land were allocated to households on the basis of either the number of household members or the labour force.⁶¹ Following the success of the HRS, collective wasteland and sparsely stocked forestland were distributed to farmer households to encourage them to plant trees to satisfy their subsistence needs for forest products. The underlying principle of administrative land allocation is egalitarianism where households’ needs are put on an equal footing in deciding how to allocate resources. These plots of land are usually in the vicinity of the family houses in order to make access easier. These lands are recognised as family plots and are to be used to provide for the subsistence needs of the family. Households are given relatively wide discretion when managing family plots. For example, they have the right to decide which species of trees to be planted, the right to dispose of forest products and the right to enjoy the full benefits from that disposal.⁶² Trees on the family plots belong to the households and tenure of family plots is usually more secure and longer.⁶³ However, the collective can take control of the family plots if households do not plant trees on the land.⁶⁴ In addition the family plot, each household is also allocated a private plot of land (*自留地*) on

⁶⁰ Zhang Daowei, 2003

⁶¹ According to a survey, in places with higher level of poverty, less off-farm job opportunity and less land available, allocation tend to be based on the number of household members so that equity can be achieved; on the other hand, in places with more off-farm job opportunity, more land and more wealth, allocation tends to be based on the number of labour force in households in order to achieve the greatest efficiency, Kung, James K.S., 1995, pp 82-111.

⁶² Liu Dachang, 2001, p 248.

⁶³ Kung, James K.S., 1995

⁶⁴ Ibid.

which the household can build a residential house⁶⁵ with the option of the remaining to be used as a private garden. These private plots of land are generally not involved in agricultural production apart from for own use and are inheritable.

Even though egalitarian allocation of land use has provided millions of Chinese farmers land to live on, it has also hindered more efficient use of rural land. To maintain egalitarian allocation of land, local authority has to constantly readjust land holding to account for any demographic changes.⁶⁶ This has created the problem of tenure insecurity. In addition, administrative allocation of land resources among rural households had also given rise to the problem of perception, which is closely related to the issue of legitimacy or entitlement. Local officials see that as land use right is 'given' by the government, it can also be subject to arbitrary readjustment by the government, including cancellation of the land use entitlement. Despite the inherent problems, administrative allocation of rural land is still the most common way through which farmers obtain land, and encompasses the majority of the rural land. Currently, the law provides that administrative allocation of rural land should be carried out via the use of contracts.⁶⁷

2.4.1.2 Individual contracting out (mainly for investment purposes)

After the adoption of the HRS, the conflict on arable land between the aims of providing an egalitarian and fair society on the one hand and productivity efficiency on the other had become more pressing. To address this issue, many local governments had adopted different land use arrangements that divided arable land into different categories, each of which carried with it certain responsibilities and duties. For example, in the mid-1980s, the two-field system⁶⁸ (双田制) for arable land was adopted in many parts of China. The two-field system consisted of family or subsistence plot and commercial or responsibility plots. The village authority first divided the arable land into these two categories before land allocation. All

⁶⁵ To prevent abuse of land, each household is only permitted to have one residential house in rural China.

⁶⁶ Constant readjustment, however, applies to only certain type of land, such as the responsibility plots; tenure for family plots are more.

⁶⁷ Land Management Law 1998, Rural Land Contracting Law 2002

⁶⁸ Other types of system include 'economic land', 'four wasteland' and 'flexible land', *Rural China in the 21st Century: The Land Resources*, 2000; and Prosterman, R., Schwarzwald, B. and Ye J.P., 2000.

households were allocated⁶⁹ certain amount of plots as subsistence plot (this was usually the minimum amount of arable land a farmer was entitled to) and this land was mainly used for subsistence purposes. Harvests from the subsistence plot were usually not subjected to a production quota. The remaining arable land was then contracted out (via bidding or auction) to farmers who were interested in carrying out commercial plantation. Crops from this type of land were subject to agricultural tax and the production quota set by the state; on top of that, the farmers usually also had to pay fees to the collective.⁷⁰ Variations of the two-field system were adopted all over China.⁷¹ These systems were put in place to strike a balance between egalitarian distribution and efficiency. By guaranteeing access to subsistence plots to all households, the socialist ideology was achieved; on the other hand, by allowing households who were able and willing to invest in larger scale production activities, more efficient production and higher yields could be achieved. Moreover, in many places, 'spare' land was separated from the two types of land, which was then used for re-allocation or readjustment purposes.

The different types of land have different implications on the importance of tenure security. Generally, households are more concerned with the threat of losing their subsistence plots. Households that have contracted substantial amount of responsibility plots from the collective do not perceive such threat, perhaps due to the unattractive potential returns for the production of grain.⁷² According to a rural household survey, peasant households associate ownership rights with subsistence but not responsibility plots or plots that are contracted for the purpose of fulfilling state quota.⁷³ Furthermore, research has shown that reallocation of land usually involves responsibility land and not subsistence plots. In 1997, the two-field system was discontinued by the central government.⁷⁴ This was to prevent misuse of power by

⁶⁹Allocation of subsistence plots was carried out either on the basis of needs or labour or both. Allocation on the basis of needs is arguably more egalitarian than allocation on the basis of labour, but the latter arguably results in more efficient production.

⁷⁰*Rural China in the 21st Century: The Land Resources*, 2000

⁷¹Ibid.

⁷²Kung, James K.S., 1995

⁷³Ibid., p 99. The rural household survey involves four counties in the Provinces of Sichuan and Hunan. This conclusion is derived from the fact that households would like to have the rights to transfer, to inherit land and to use land as collateral in relation to subsistence plots but not the responsibility plots.

⁷⁴Central Committee Rural Work Document No. 16 prohibited the introduction of the two-field system in villages that had not previously adopted it, and required villages that had adopted it without the

local officials or village committees who had the discretionary power to allocate large plots of land as responsibility land.⁷⁵ In many places, in order to increase agricultural production and to increase income, village authorities set aside a large area of land as responsibility land to be contracted out to households, which left only small areas of arable land to be allocated to all households on an egalitarian basis.⁷⁶ This had put poor households who could not afford to contract out responsibility plots in a disadvantaged position. The other problem of the two-field (and equivalent) system that the legislation aimed to address was the problem of small and scattered arable land. By segmenting the land into groups, it was inevitable that the average amount of land allocated to household would be smaller and more scattered. This not only increased the cost of cultivation, it also inhibited the development of agricultural production.⁷⁷ The current reforms of arable land aim to give farmers more secure and long term rights.⁷⁸

A very similar approach was taken in relation to forestland. Apart from distributing family plots to households for subsistence use, collectives have also ‘contracted out’ vast area of forestland to households for investment purposes. These are known as the ‘responsibility hills’. Unlike the family plots, these are not wasteland or barren hills; instead they are forested land owned by the collective.⁷⁹ The objective of the ‘responsibility hill’ system is ‘to improve the management of existing forests by modifying management methods within the collective system’.⁸⁰ In return for the resources and time farmers spend on tending and guarding the ‘responsibility hills’, they are allowed to share the benefits of forest management. The terms of benefit sharing vary among collectives, depending on the terms of the contract between the collective and the households.⁸¹ However, trees that already existed when land was allocated to households still belonged to the collective, so access to timber resources

voluntary agreement of village farmers to end the practice, Prosterman, R., Schwarwalder, B. and Ye J.P., 2000.

⁷⁵ Yan Mingkun and Xie Ying, 2004.

⁷⁶ *Rural China in the 21st Century: The Land Resources*, 2000

⁷⁷ Wang Pingjie, 2004

⁷⁸ Ibid. However, the two-field system is still widely practiced in certain places, regardless of the regulations in place, Prosterman, P., Schwarwalder, B. and Ye J.P., 2000. Also see Chen Xiaojun, et al., 2003

⁷⁹ However, practices differ from place to place. In some places, bare land and wasteland are allocated to households as responsibility hills, and trees subsequently planted on these plots belong to the households, not the collectives, Liu Dachang, 2001.

⁸⁰ Liu Dachang and Edmonds, David, 2003, p23.

⁸¹ Liu Dachang, 2001, p 248

is more limited compared to family plots, where the trees that are subsequently planted belonged to the households themselves. ‘Responsibility hills’ have evolved in three different directions since the 1980s⁸²: first, some of them were incorporated within family plots⁸³; secondly, some were returned to collective management following widespread deforestation on these lands; and thirdly, most of them have remained ‘responsibility hills’ under household management.

In contrast to plots that are allocated on an egalitarian basis, the volume of land contracted out may differ from household to household. This is because it is carried out on the basis of the capability of the individuals (instead of labour or the need of the households) to increase investment and productivity. Tenure on responsibility hills is usually shorter; not unlike the arable land, responsibility plots are usually subject to reallocation.⁸⁴ Practice varies from place to place in relation to fees: some collectives charge rent or fees for the land whilst others do not. Legally, both parties (collective as the assignor and individual as the assignee) must enter into a contract that sets out their respective rights and obligations. However, the use of a contract for land use arrangements in rural China is far from complete and many individuals do not have written contracts with the collectives.⁸⁵ This includes land contracted out for investment purposes, even though one would expect the widespread use of contracts in cases where huge sums of investments are involved.⁸⁶ Lack of contract plus arbitratative administrative decisions by local officials may cause hardship to the individuals.

2.4.1.3 Public bidding, auction and negotiation (‘four wasteland’)

⁸² Ibid., pp 248-249.

⁸³ This is consistent with the results from a household survey carried out in Guizhou Province in 2005, where many farmers do not distinguish responsibility hills from family plots. The ‘incorporation’ of responsibility hills was not actually sanctioned by the government, and the process was stopped by central government policy in 1987. However, responsibility hills that have been ‘incorporated’ into family plots were not required to be ‘re-done’, Liu Dachang and Edmons, David, 2003, p 24.

⁸⁴ According to a village survey in which the author was involved, many villagers could not differentiate between family and responsibility plots, and subsequently treated them in the same way. This shows that perhaps in those places the distinction between these two types of land is not significant. Zhang Shiqiu et al., 2005.

⁸⁵ A survey that involved 17 provinces in China shows that about 61.7% of the villages had not issued 30-year land use right contract as of 1999, Prosterman, R., Schwarzwald, B. and Ye J.P., 2000

⁸⁶ Zhang Shiqiu et al., 2005

Other ways by which rural households obtain use rights of rural land are through public bidding, auction or negotiation.⁸⁷ These are available specifically to the contracting out of the ‘four wasteland’, namely barren hills, barren ditches, barren mounds and barren shoals (荒山, 荒沟, 荒丘, 荒滩).⁸⁸ Regeneration of wasteland is one of the government’s main priorities in improving rural land use. Effective regeneration of large quantities of wasteland requires participation of and investment by rural citizens; hence, the government has created as many incentives as possible to attract community participation. These three different methods of land allocation are more transparent and fairer than the other two previously mentioned. Furthermore, by contracting out land to the highest bidder, it makes sure that the result is achieved with the least cost.

Contracting out of the ‘four wasteland’ is crucial in the process of increasing forestland area in China. This is because the law requires this type of land to be used for ecology protection purposes, especially for the prevention of soil erosion.⁸⁹ It is also important because investment in forestland usually requires a huge initial capital and a long period of time before profits can be realised and the reality is that not every household would have the will or resources to invest in tree planting. Hence, most land has been contracted out to specialised households who have the resources and willingness to invest in silviculture. By doing so, maximum productivity and efficiency can be achieved. Management of the collective forestland by specialised households was already the predominant community forestry in China by early 1990s, where there were more than 150,000 such farms in 1991.⁹⁰

In addition, contracting out of the wasteland is not only confined to village members; it is open to non-villagers as well. Unlike the other agricultural land, wasteland can be mortgaged.⁹¹ The contracting out of wasteland represents one of the most ‘market-friendly’ regimes available to rural land, with unlimited public participation and the use of competitive methods for allocation. This is because wasteland is not deemed to be ‘essential’, like cropland. Egalitarian allocation and tight control of cropland are

⁸⁷ Art 45 Rural Land Contracting Law (RLCL) 2002

⁸⁸ Art 44 RLCL 2002

⁸⁹ Art 46 RLCL 2002

⁹⁰ Bruce, J.W., Rudrappa, S. and L. Zongmin., 1995

⁹¹ Art 49 RLCL 2002

important because cropland is not only an important source of income but also a vital source of social security. On the other hand, wasteland has no or very little economic value and as a result, does not play such an important role.

2.4.2 Types of Regime under Collective Management of Forestland

As mentioned above, while the management right of collective arable land have been devolved to the household level, not all collective forestland have been allocated to households for management purposes. Collective management has remained an important feature of forestland in China. Part of the reason is the deforestation that took place during the 1980s when forestland management rights were first allocated to households. In many places, local government restored collective management on these lands in order to stop illegal cutting.⁹² This type of forest can be found in South and Southeast of China, such as Fujian, Zhejiang, Guangxi, and Yunnan Province.⁹³ Since then, different arrangements of collective management of forestland flourished in China, many of which were initiated locally that took into account the unique features of their locality. This was possible due to the lack of a clear legal basis that set out the constitution of collective forest management; in addition, the Chinese government was more than happy to dispense with regulations and to allow local authorities to experiment with different management arrangements.⁹⁴ Among the different types of collective management regimes, the most common are the following: centralised collective management; public association or shareholding; private association or shareholding; and ethnic minority management systems.

The first regime refers to the system where the village leader and village committee, on behalf of the collective members, make decisions about how collective forest is to be managed. These include what to plant, when and how to harvest, and how much to harvest,⁹⁵ although timber harvesting is still subject to various government restrictions such the harvest quota and transport permit system. How much discretion the village leader and village committee have, and to what extent villagers participate in decision-making depend on the local institutions. In reality, in many places, villagers know very little of the management plans for collective forests, and are under-

⁹² Liu Dachang, 2001, p 248

⁹³ Ho Peter, 2005, p 106

⁹⁴ Bruce, J.W., Rudrappa, S. and L. Zongmin. 1995.

⁹⁵ Liu Dachang and Edmunds, David, 2003, pp 24-25.

represented in decision-making processes.⁹⁶ Since the 1980s, election has been introduced in rural China, which has arguably greatly increased the efficiency and transparency of collective governance. The nature of village institutions will be discussed in more detail in the next chapter.

In relation to the public association/shareholding system, this refers to the situation where collective forests are distributed to farmer households in the form of shares rather than physical plots of land. One of the most-cited examples of the public association system is the shareholding system that was started in Sanming Town in Fujian Province.⁹⁷ Under the shareholding system, local households were not allocated the physical plots of the forestland; instead their rights over the use of forestland were in the form of shares. The shares were divided into two types: basic or 'old' shares and 'new' shares. Each community member was guaranteed one basic share (on the basis of their status as a member) whilst new shares were issued in return for the investment of labour or other inputs. Forestland was managed by a board of directors and profits were given to the members of the community in the form of dividends. The share-holding management regime of forestland in Sanming Town has since evolved to adapt to changes that had taken place.⁹⁸ The shareholding system has received approval from government officials and academics, who have advocated this system as a way to overcome the various disadvantages under household-based management such as plot fragmentation and the problem of inefficiency. Despite this, the public shareholding system has not been widely practiced;⁹⁹ in many places, farmer households prefer to initiate their own associations that place their forestland outside the control of the collective totally.

Private association, or self-initiated shareholding system, is where individuals pool resources together to manage the forest collectively. There are various forms of this kind of collaboration; there can be farmer-farmer collaborations, company-village

⁹⁶ Ibid., pp 30-31.

⁹⁷ Song Yajie et al., 1997.

⁹⁸ For example, individual dividend payments had ceased and tenure contracts were going to large and specialised forest management service providers. The depletion of high-value species and the requirement of a more ecosystem approach to forest management meant that cash flow from the collective enterprise had reduced considerably. All these different factors contributed to the changes within the shareholding system, Song Yajie et al., 2004.

⁹⁹ Liu Dachang and Edmunds, David, 2003, p 25; Bruce, J.W. 2000

partnerships, and collaboration between villagers and non-villagers.¹⁰⁰ In many places in Qiangdongnan Prefecture in Guizhou Province, the first type of collaboration (farmer-farmer) was found to be very common.¹⁰¹ Households (the number of which may vary), on their own initiative, pooled together their land, labour and capital, and managed them as one unit. This not only solved the problem of plot fragmentation, it also meant that labour investment in tending and guarding the forest was shared among the few households. There is yet a legal basis for this kind of association, hence the terms of obligations and benefits sharing were totally up to the agreement of the households involved.

The existence of all these different and 'locality sensitive' management systems are possible due to the relatively flexible implementation of the devolution of land use right policy and the necessity to accommodate conditions and requirements that are unique to the localities. However, collective management of forestland is experiencing a decline in recent years, especially since the latest forestland reform introduced in 2003, which again aimed at encouraging the involvement of households in forest management.¹⁰² This reform is generally taking place in the southern Provinces of China where collective management of forestland is still prominent. This new round of reform is seen as progress towards further liberation of forestry and forest management. Perhaps it shows that despite the various innovative collective management regimes that have sprung up in different localities, they are not adequate to meet the challenges faced by forest and forestry. The forest industry is now more susceptible to the world market since China joined the World Trade Organisation, and science-based ecosystem approach to forest management is increasingly becoming the norm. Collectives may find it difficult to satisfy the needs and requirements not only of the government, but also of the market. Whether or not the latest reform is warranted and whether or not collective management of forestland is coming to an end will be discussed in more detail in Chapter Four.

As we have seen above, collective management sets forestland apart from arable land, the use right of which has almost completely been privatised. Compared to arable

¹⁰⁰ Ibid. p 23

¹⁰¹ Zhang Shiqiu et al., 2005

¹⁰² This new reform will be discussed in detail in Chapter Four.

land, forestland is not as ‘privatised’ or ‘decentralised’ due to: 1. use of forestland is subject to stricter state control and the scope of choice in relation to use of land is much smaller in the case of forestland; 2. household rights over land are not as clearly demarcated and protected in the case of forestland where certain uses of land, such as the collection of non-timber forest product, are open to everyone in the village irrespective of the owner’s rights.¹⁰³ Despite the differences between forest and arable land, there are two characteristics that are shared by both types of land: all land are subject to the two-tier (which is a totally different concept from the two-field system of arable land mentioned above) system, where ownership right and use right are separated and held by different entities;¹⁰⁴ and management and use rights of both the arable and forest land have been subject to changes over the past few decades, which created tenure insecurity and mistrust by farmers of any new policy adopted by the central government.¹⁰⁵ While still retaining the two-tier system, rural land reforms in China have since then focused on improving tenure security and flexibility (mainly referring to transferability of rights). In 1984, the central government fixed the contractual period of arable land to 15 years, and subsequently extended the period to 30 years (by freezing land reallocations) in 1993.¹⁰⁶ For forestland, the contract-out period was extended to 70 years. This will be discussed in the next section.

2.5 1998 - present

De-collectivisation of land in China was further strengthened and regulated with the adoption of the Land Management Law in 1998, the Rural Land Contracting Law in

¹⁰³ Result from the village survey carried out in Guizhou in which the author was involved, Zhang Shiqiu et al., 2005

¹⁰⁴ This has been described as the principal-agent relationship. Prior to 1978, the principals (state and collective who are the land owners) had tight control over the forests. However, after 1978, the principals’ monopoly on decision making was weakened, following the devolution of management rights to households and autonomy given to state forest companies (both households and state forest companies are agents), Wang S., van Kooten, G.C. and Wilson, B., 2004, pp 77-78.

¹⁰⁵ The mistrust by farmers of policy adopted by the central government has been used to explain why rampant deforestation took place in many places, especially in the southern collective forestland, when de-collectivisation of forestland first took place at the beginning of 1980s. See Qiao Fangbin, Huang Jikun and Rozelle, Scott, 1998.

¹⁰⁶ In 1984, the Communist Party Central Committee issued Rural Work Document No. 1 urging local officials to prolong the time period of contracted land and in general the period should be more than 15 years. A Chinese Communist Party Central Committee decision published in 1993 stated that the term for contracting land may be extended beyond the 15-year period. And in 1994, the Peoples’ Daily reported a Central Committee decision that land use right should be extended for another 30 years after the original 15-year period expires. Prosterman, R., Schwarzwälder, B. and Ye J.P., 2000. However, it was not until the Land Management Law adopted in 1998 that the 30-year period was stated in the regulations.

2002 and the Forest Law (amended in 1998). The first two regulations mainly apply to all types of rural land (land in the city is governed by a separate group of legislations), while Forest Law only applies to forestland. These legislations represent the recognition of the need to protect the interests of farmers in the process of de-collectivisation. Many of the provisions merely confirm the existing practices whilst some provide new security and flexibility to the rights of households. The major change required by the new laws is that all devolution of land use rights must be executed by written contracts. The three other main issues addressed by the legislations are the contracting period, rights transferability and land reallocation. Each of these will be discussed below. One issue that these new laws fail to address is land requisition by the state. Consequently, rural land use and ownership rights are still subject to the extensive power of the state to requisition land.

Firstly, as already mentioned, tenure of land allocated or contracted out is extended. For arable land, tenure has been extended from the original 15 years to 30 years under the new Land Management Law¹⁰⁷ and Rural Land Contracting Law,¹⁰⁸ while tenure for forestland has been extended to 70 years.¹⁰⁹ This is aimed at encouraging households/farmers to invest in the land and to increase productivity.¹¹⁰ For forestland, the lengthened tenure is needed to encourage afforestation efforts and sustainable use of forest and its resources. The direct implication of longer and more secure tenure is the restriction on land reallocation.¹¹¹ Land reallocation is an essential tool for maintaining the egalitarian nature of land distribution in socialist China where an open land market is absent. Distribution of land in a village has to be 'readjusted' every so often following the changes in village population. For example, when a new member is introduced, or someone has died in a household, this changes the composition of the household, which forms the basis of land distribution (allocation

¹⁰⁷ Art 14 of Land Management Law (LML)1998.

¹⁰⁸ Art 20 of RLCL 2002.

¹⁰⁹ Art 20 RLCL 2002

¹¹⁰ It has been suggested that the size of the plot is the main determinant of investment decision by the farmers, not the duration of the land use contract as widely recognised , Wen Tiejun, 2004. However, according to a survey, when asked about whether the interviewee would like to be able to work on the contracted land permanently, 61 percent of the interviewees answered yes, 13 percent answered no while 26 percent answered no preference, Chen Xiaojun et al., 2004, p 15

¹¹¹ Art 27 provides that there should not be any land reallocation during the contracting period, apart from in exceptional circumstances such as the occurrence of natural disasters and is carried out according to the procedure. For contracts that expressly rule out land reallocation, the contractual terms must be followed.

of land is usually carried out on the basis of household needs or labour or both, see above). As a result, in reality the legal contractual period is not adhered to. In many places the contractual period can be as short as three years, depending on how often land reallocation is performed.¹¹² The issue of land reallocation will be discussed in more detail below.

Despite the many advantages presumably brought about by the new law, the extension of the contractual period has been met with criticisms. In particular, critics who are concerned about land fragmentation and unproductive land use have argued that the newly extended contractual period coupled with land use restrictions has exacerbated the problem of inefficient use of rural land as it has created a 'lock-in' situation where land is restricted to a particular use for a long period of time.¹¹³ This is a concern because exchange or transfer of rural land is still very much restricted in rural China. Critics who advocate for efficient use of land and competitive advantage have argued that in order to achieve economic development, more rural land should be freed up from the sole agricultural uses and should be devoted for urban expansion or industrial uses.¹¹⁴ This is particularly important in places where industrialisation has taken off and more and more land is needed to build houses and shops, such as in the Eastern provinces of China. In order to overcome the problem of inefficient land use, it has been suggested that China should relax the self-sufficiency policy and free up more rural land for commercial, development and industrial use.¹¹⁵ Alternatively, the Chinese government can also adopt a dual-track agricultural and land policy where economically developed coastal regions and areas near large and medium sized cities are treated differently from other agriculturally important rural areas. Land use rules should be relaxed for the former while strict restrictions on agricultural land use can still apply to the latter.¹¹⁶

Secondly, the new legislations allow the management and use rights to be transferred or rented out to a third party.¹¹⁷ Even though transfer of use rights was first allowed

¹¹² Chen Xiaojun et al., 2003, p 18

¹¹³ Pieke, Frank, 2005

¹¹⁴ Ibid., p 91

¹¹⁵ Ibid., pp 91-94

¹¹⁶ Ibid., pp 91-94

¹¹⁷ Art 2 of LML 1998 provides that "Land use rights may be transferred". Transfer of land use rights is also permitted by the RLCL 2002, Art 32.

by the Constitutions (amended in 1988)¹¹⁸, and was made politically acceptable after the Fourteenth Chinese Communist Party Central Representative Meeting in 1992, the new legislations give the vital legal legitimacy to the practice.¹¹⁹ Transfer of land use rights took place in some areas even before it was endorsed by the central government as farmers who joined the 'exodus' to the cities to look for jobs in the late 1980s 'secretly' transferred their land use rights.¹²⁰ Transferability of rights is one of the most important elements of property rights. The ability to exchange adds value to ownership right. Thus, if the market does not exist and exchanges cannot take place, property rights will have little value.

The relaxation of right to transfer land is very important for those who take up off-farm work in the cities, as they can now legally dispose of the use rights without having to jeopardise their entitlement to the land. Transferability of land use rights, however, is limited. For forestland, only the use right over timber, fuel-wood and economic forests can be transferred; use right over special purpose forest and ecological forest cannot be transferred.¹²¹ Furthermore, control of land transfer is arguably important to make sure that the physical boundary of a collective corresponds with some certainty to the collective member users. This is partly the reason why land transfer is still largely confined to transactions between family members or villagers. In addition, transfer of land for non-agricultural purposes is still prohibited.

Articles 32 to 43 of RLCL 2002 govern the transfer of contractual rights and obligations. They provide, *inter alia*, that transfer of contractual right must be executed via contracts,¹²² that the transfer should be registered with the county or a higher level of local government,¹²³ and that the original assignee is entitled to

¹¹⁸ Art 10 of the Constitution provides that use rights can be transferred.

¹¹⁹ The latest regulation concerning transfer of use and management of rural land rights can be found in the Transfer of Rural Land Contractual Management Rights Regulations 2005 which was issued by the Ministry of Agriculture.

¹²⁰ *Rural China in the 21st Century: The Land Resources*, 2000. One example is obtained from the survey carried out in three counties in Guizhou Province in 2005 (which was to assess the impact of the Natural Forest Protection Programme on local communities) in which the author is involved. The survey data (publication pending) shows that many households transferred forestland use rights since the early 1980s.

¹²¹ Art 15 of Forest Law 1998

¹²² Art 37 RLCL 2002

¹²³ Art 38 RLCL 2002

compensation for any improvement carried out on the land.¹²⁴ Transfer of land use rights can take the form of renting out, exchange, and permanent transfer and so forth.¹²⁵ If the original assignee of the land wishes to transfer completely the land usufruct right to another party, he or she must first obtain the approval of the assignor (the collective or the relevant governmental department) before the transfer can take place.¹²⁶ In this situation, the law also requires the original assignee to show that there are other reliable income sources available to him/her before the usufruct right can be transferred to a third party, who must also be engaged in agricultural activities.¹²⁷ The law does not, however, prescribe under what circumstances application can be refused, or whether the original assignee can appeal against an unfavourable decision. In relation to all kinds of land transfer, the law also requires that priority should be given to members of the same village.¹²⁸ Many local authorities have also gone a step further by prohibiting the transfer of usufruct rights to non-villagers or ‘outsiders’.¹²⁹ The issue of transfer right will be further discussed in the subsequent section.

The third important issue that the Land Management Law 1998 and Rural Land Contracting Law 2002 address is the issue of reallocation of land. Land reallocation or re-adjustment which used to be a common phenomenon in rural China is now strictly controlled and is only allowed in a very few stipulated circumstances. Article 14 of the Land Management Law 1998 allows only the “appropriate isolated readjustment of land” during the 30-year land use term, while Article 27 of the Rural Land Contracting Law 2002 also allows readjustment triggered by isolated events such as natural disasters. Both regulations provide that readjustment needs the approval of at least two-thirds of the villager assembly or two-thirds of the villager representatives, and approval by the administrative agency responsible for agriculture at the township and county levels. As already pointed out, land re-adjustment has always been an essential part of China’s egalitarian distribution of rural land. Due to the fact that distribution of land is carried out on the basis of households’ composition, any changes in composition of households have to be accounted for by readjusting the

¹²⁴ Art 43 RLCL 2002

¹²⁵ Art 32 RLCL 2002

¹²⁶ Art 41 RLCL 2002. Other types of transfer, however, such as renting out and exchange can take place without the approval of the original assignor.

¹²⁷ Art 41

¹²⁸ Art 33 RLCL 2002

¹²⁹ Prosterman, R., Schwarzwalder, B., and Ye, J.P., 2000

land contracted out to achieve the egalitarian goal. According to a nationally representative survey, 80% of communities experienced at least one reallocation of land between 1983 and 1990, and the number of reallocation experienced by an average village was 1.7 in 1996.¹³⁰ Having said that, there is no evidence to show that reallocation of forestland occurs as frequently as the arable land. This is probably because arable land is more important for the subsistence needs of the rural residents and it is imperative to ensure that households have access to adequate arable land. This could also be related to the fact that the importance of tenure security for long-term investment on forestland is recognised by village leaders and the farmers. In some places, instead of physical reallocation of forestland, households whose number has decreased are asked to pay monetary compensation to those whose members have increased.¹³¹

Despite what is provided by the law, in reality, many land use contracts contain the provision that 'the collective can (or in some places 'is required to') reallocate the land if it deems necessary'.¹³² Total abstention from reallocation is proved to be impossible. Apart from the need to address demographic changes, many local officials or leaders also use land reallocation as a tool to attain power or to carry out administrative tasks.¹³³ By controlling the allocation of land, village leaders can thus influence household's behaviour and subsequently fulfil administrative targets handed down by the central governments, such as the family planning targets, grain quotas, labour obligations and different kinds of taxes. Research has shown that the more personal interests that need protecting, the more likely that the leaders will control land rights.¹³⁴ It also shows that when on-farm labour and rental markets are incomplete, village leaders are more inclined to use land reallocation to improve equity and the efficiency of farmers in villages where access to off-farm jobs may have created an imbalance among villages in their landholdings.¹³⁵

¹³⁰ Ibid. p 4.

¹³¹ Hanstad, T. and Li, P., 1997

¹³² Prosterman, R., Schwarzwalder, B., and Ye, J.P., 2000

¹³³ A paper by Scott Rozelle and Li Guo looks at the relationship between village leaders and land rights formation in China. It points out that readjustment of land, which is the most powerful tool possessed by the village leaders in relation to the use of land, is usually carried out with three aims: to protect the interest of village leaders, to minimise administrative cost and to improve equity and production efficiency. Rozelle, Scott and Li Guo, 1998

¹³⁴ Ibid.

¹³⁵ Ibid. p 437

Despite the assumption that tenure security is beneficial to land users, some studies have thrown up results that are not so favourable of the new law. It seems that the important role of land re-adjustment in ensuring every household has access to land is not only recognised by the local governments but also the households themselves. A survey carried out in Meitan County in Guizhou Province in 1999¹³⁶ shows a surprising result whereby the majority of the farmers¹³⁷ have indicated a preference for periodic land reallocations over the proposed, seemingly more stable, land tenure institution. An earlier survey by the same author also shows the support for land reallocation by farmers¹³⁸, where on the whole, most of the peasants interviewed by the author rejected the concept of 'no readjustment' for 30 years as impractical and unfair. The suggested rationale given for this phenomenon is that in rural areas where off-farm income is low or insecure, land is not only a means of production but also a means of social security: the majority of farmers would arguably assign more weight to the security-cum-insurance role provided by equal land access than to economic efficiency.¹³⁹ According to a survey carried out in four Provinces in China (Zhejiang, Henan, Jilin and Jiangxi), land re-adjustment is more essential and more widely accepted in places where there is land scarcity and where off-farm employment opportunities are scarce.¹⁴⁰ In places with abundant land and off-farm employment opportunities, the issue of adequate land for each household to earn a living is less of a problem.

Furthermore, direct evidence of the impact of the policy on investment behaviour is also less than clear. A welfare analysis research¹⁴¹ on the link between investment and land tenure insecurity in villages in China shows that guaranteeing land tenure (which means reducing the risk of reallocation) in the survey area (31 villages in Hebei and Liaoning Provinces) would yield only minimal efficiency gains. The threat of land reallocation does not appear to entail a substantial social cost in this part of China. In

¹³⁶ Kung, James K.S., 2002

¹³⁷ Up to 62 percent of the 800 farm households surveyed, *ibid.*

¹³⁸ Kung, James K.S., 1995

¹³⁹ Kung, James K.S., 2002, p 810.

¹⁴⁰ Liu Shouying, Carter, M.R. and Yao, Yang, 1998

¹⁴¹ Jacoby, H., Guo Li and Rozelle, S., 2002.

addition, another survey found that without being able to transfer land, higher levels of tenure security would only have a modest impact on increased investment.¹⁴²

Before the new ‘no adjustment’ policy was implemented nationwide, trials were carried out in designated places, one of which was Guizhou Province. In 1994, the Guizhou Communist Party Committee declared that ‘the term of the contract be extended for another 30 years for arable land, and 60 years for non-arable land’.¹⁴³ The implementation guideline under this policy was a ‘no increase of land for increased population, no decrease of land for reduced population’ strategy. At the end of 1997, the party community issued another document that extended the contract term of arable land to 50 years (compared to 30 years nationally), and to 60 years for non-arable land, both starting from 1994.¹⁴⁴ A few studies have been carried out to assess the impact of this policy on arable land use, households’ behaviour and investment. Results show that even though land reallocation was still practised, the element of ‘learning’ stood out. Compared to other Provinces that had not implemented the policy, households in Guizhou Province indicated more support for the new extension of contracting period and the corresponding restriction on land reallocation. According to the survey, the adoption of the policy at the village level in Guizhou Province increased a household’s propensity to have this policy choice as its first preference by almost 12 per cent.¹⁴⁵

The discussion above illustrates the complications in addressing the issue of land reallocation. On the one side, frequent land reallocation disrupts the security of tenure and may discourage long-term investment by households; on the other, given the current development (or under-development) of the rural economy where land is still the main and only source of social security, land reallocation is vital to ensure that all households have equal access to land. As a result, different surveys produce varied results that are both for and against land reallocation. Despite such ambiguities, two points can be made that can potentially shed some light on the policy choice of land reallocation. The first is that results from some surveys show that households that had

¹⁴² Ibid.

¹⁴³ Deininger, Klaus and Jin Songqing, 2002

¹⁴⁴ Ibid.

¹⁴⁵ Ibid. This can be contrasted with the survey result put forward by James Kung which found 62 percent of the households surveyed to be in favour of period redistribution, Kung, James K.S. and Liu Shouying, 1997.

experienced 'no readjustment' (during the trials) tend to support the policy than those that had not.¹⁴⁶ This highlights that perhaps resistance by households that had not participated in the trials did not reflect the true picture. Furthermore, the results show that most of the resistance to the policy comes from households who have recently experienced a population change, who hence expect administrative intervention to help them to reach a new equilibrium. Secondly, 'prior to a more thorough transformation of the rural economic structure, peasants' preference of institutional arrangements governing land use are unlikely to change much'.¹⁴⁷ As shown by the survey results, egalitarian distribution of land is less of a concern in places with abundant arable land and off-farm employment opportunities. Subsequently, land reallocation may be less necessary if other sources of income or better public social services are available to farmers. Also, it could be argued that administrative decisions can and should be replaced by market forces, provided that land market exists and local economy offers various off-farm employment opportunities.

In addition to these three main aspects, the Rural Land Contracting Law 2002 also provides a range of regulations that clarify the rights and responsibilities of the contracting parties. These include the use of written contracts,¹⁴⁸ rights and duties of the contracting parties,¹⁴⁹ other ways of contracting-out land to individuals,¹⁵⁰ sex equality,¹⁵¹ registration,¹⁵² and transfer¹⁵³. The LRCL 2002 also allows contractual right to be inherited.¹⁵⁴ The use of written contracts has proved to be a great challenge in rural areas in China as most farmers are illiterate. A survey that involved 17 provinces in China showed that about 61.7 percent of the villages had not issued 30-year land use right contract as of 1999.¹⁵⁵ The absence of written contracts may also be due to deliberate acts by the local governments, who may find it impractical to issue contracts (and the corresponding land use certificates) when land is readjusted

¹⁴⁶ Deininger, Klaus and Jin, Songqing, 2002

¹⁴⁷ Kung, James K.S., 1995, p 106.

¹⁴⁸ Art 21

¹⁴⁹ Arts 12 -17

¹⁵⁰ Arts 44 - 50

¹⁵¹ Art 6

¹⁵² Art 23

¹⁵³ Arts 32 - 43

¹⁵⁴ Art 31

¹⁵⁵ Prosterman, R., Schwarzwälder, B. and Ye J.P., 2000

every 3-5 years.¹⁵⁶ Despite greater clarification of the major themes of use rights since 1998, there are still no provisions for the mortgage of land use rights.¹⁵⁷

3. Contract-based Entitlements of Rural Households Over Land

The post-reform private rural land use rights in China have three basic characteristics: 1. more secure (and longer) use right; 2. autonomy in land management; 3. right to transfer. Each of these will be discussed individually, together with the legal safeguards accorded to each of these rights. Analysis of the legal provisions will be central to this discussion, although attention will be paid to what actually happen in practice, which usually defies the purpose of the legislations. Before we proceed, it has to be pointed out that insecurity of tenure and mistrust of government policy were widespread among rural households, which explains the large-scale deforestation that took place immediately after management of forestland was devolved to the households. This was due to the fact that government policies had changed many times in the past. A classic example to demonstrate this is the changes in ownership of fruit trees in Chuxiong County, Yunnan Province, since 1950s. Ownership of the fruit trees was changed a total of 7 times within a space of 30 years: from households to advanced cooperative in 1956 and further to commune in 1958; commune back to households in 1961; households to production team in 1969; production team to households in 1971; households to production team in 1977; and production team to households in the late 1970s.¹⁵⁸ For many places, the last transfer of forestland took place in the early 1980s (de-collectivisation) and tree ownership has stayed the same since then.

3.1 Right to Use

The most prominent component of the land use right ‘package’ given to households under the HRS is the right to use the land and its resources (apart from minerals). The right to use the land was effectively separated from land ownership and has become a self-standing right on its own. Right to use includes the right to cultivate the land and the right to utilise resources grown on the land. In addition, it also includes ownership

¹⁵⁶ Chen Xiaojun et al., 2003

¹⁵⁷ Ibid. Art 49 of RLCL 2002 provides that only wasteland that has been auctioned out can be mortgaged.

¹⁵⁸ Liu Dachang, 2001, p 245.

right of the produce grown on the land, including timber. Inherent in the right to use is the right to derive income from such use. However, right to income is sometimes compromised by government policy. In relation to arable land, profitability used to be low due to excessive taxes and charges; while for forestland, it is due to both excessive taxes and the harvesting quota that restricts the right to log timber.

Issues relevant to the right to use are the length of use and security of tenure. As pointed out above, length of use has been extended recently by new legislations; it is usually long enough to cover one generation of land use. For forestland, the lengthened tenure is needed to encourage afforestation efforts. Furthermore, use right of some of the land is inheritable.¹⁵⁹ The RLCL 2002 provides that the collective should not amend the contract and interfere in the usual enjoyment of rights during the contractual period¹⁶⁰, and households affected by legal land reallocation or requisition¹⁶¹ are entitled to compensation.¹⁶² In addition, illegal occupation of land is a criminal act and the person wronged is entitled to compensation.¹⁶³ However, the issue of security of tenure is not as clear-cut. The current right to use enjoyed by private households is subject to uncertainties and possibilities of repudiation mainly due to the extensive power held by the state over land use control. The uncertainties come from two main threats, namely land reallocation by the collective owner, and land expropriation or requisition by the state. The issue of land reallocation has been discussed above; the subsequent paragraphs will focus on the issue of land requisition.

Rural land requisition is mainly associated with the development of land for non-agricultural or commercial purposes. Article 43 of LML 1998 provides that any unit or individual that wishes to carry out construction or (non-agricultural) development

¹⁵⁹ Art 31 of the RLCL 2002 provides that for all contracted land, incomes or benefits that are accrued under the contract are inheritable; furthermore, use rights of forestland are inheritable within the contractual period. This seems to mean that for arable land, only the benefits are inheritable and not the use rights per se. This could be because there is a real concern that allocation of arable land should reflect the demographic change and should not be held up by family who arguably does not need it. There is no such concern for forestland because it is not generally used for subsistence purposes. Yin Fei, 2005, pp 336-337

¹⁶⁰ Art 14

¹⁶¹ Art 65 of the LML 1998 lists out the circumstances where collective can take the land back, including illegal use of land and where the land is needed for public services construction.

¹⁶² Art 16. Compensation is also available for any improvement made on land by the farmer when the land is either transferred or given back to the collective, Arts 26 and 43.

¹⁶³ Art 59

on rural land must apply for the permission to use state land.¹⁶⁴ It further outlines that the state land includes both state-owned land and collective land that have been requisitioned by the state. The state (which includes all levels of government such as county government and municipalities) has extensive power to requisition rural land for development purposes, and the law prohibits collective and households to transfer land use rights for development purposes.¹⁶⁵ This power is further reinforced by the fact that all city land belongs to the state¹⁶⁶: relatively well-developed rural area can be turned into a city, and as a result land is automatically turned into state ownership.

In China, there is a two-stage market involving rural land. The first stage of the land market involves the state buying land from the collective¹⁶⁷ at a price set by the law and then selling it on to the commercial developer at the market price. The buying price is substantially lower than the selling price because the ‘former is applied to state units or non-profit land users, while the latter involves commercial land users’.¹⁶⁸ The second stage of the land market is where commercial land users circulate their land use rights to other commercial users. Land use rights can be rented out or used as collateral in the secondary market. Due to the profitability of the undertaking, state requisition of agricultural land has been rife and become out of control. The wish of the central government to protect dwindling agricultural land is sometimes defeated by the greed of local governments that see the land market as a great source of income.¹⁶⁹

¹⁶⁴ Use of rural land for public welfare undertaking, township and village enterprises and housing sites for the members of the collective is exempted from this provision.

¹⁶⁵ Art 63 of LML 1998. The provision also provides an exception to this rule, namely that any land legally converted for development purposes before can be transferred if the business using the land has experienced bankruptcy or merger. Another exception to the non-transferability for non-agricultural development rule is provided by Art 60 of LML 1998, where it is provided that the collective economic entity can employ land use rights as shares to either set up or participate in shareholding companies or associated business with a third party.

¹⁶⁶ Art 8 of LML 1998.

¹⁶⁷ Art 44 of LML 1998 provides that agricultural land to be used for development purposes must first apply for land conversion permission. Art 45 then provides that the state can requisition the converted land for commercial use.

¹⁶⁸ Lin, George C.S. and Ho, Samuel P.S., 2005

¹⁶⁹ For example, the profit in the first-stage land market (earned by the state) in 2001 amounted to 132 billion yuan while the profit in the second-stage land market (earned by the developers) amounted to 718 billion yuan, Niu Ruofeng et al., 2004, p 58, taken from a report by Huang Xiaohu.

To capture the huge profits from land conversion, many land transactions have been carried out without going through the proper state expropriation process.¹⁷⁰ Research shows that large areas of arable land have been converted, legally and illegally, for development projects undertaken by the state agencies at various local levels.¹⁷¹ According to a cross-country investigation: only 53 percent of all development projects involving forestland had been approved by the Forestry Bureau; and only in 53 percent of the cases felling permits had been obtained.¹⁷² As a result, the government issued two state documents to stop all forest requisition for land development in 1998 and 1999.¹⁷³ It has been pointed out that as long as the huge gap between the compensation paid to farmers and the profits from subsequently selling the land in the land market remains, there will always be incentives for local governments to expropriate rural land.¹⁷⁴

Although the government has tried to address the problems of illegal requisition of agricultural land, the results have so far been disappointing.¹⁷⁵ Every year there are thousands of public disturbances as a result of unfair land requisition by the government,¹⁷⁶ despite of the introduction of new laws that seek to regulate land requisition.¹⁷⁷ Vast area of former forestland has also been requisitioned to make way for development.¹⁷⁸ Clashes are common and widespread between farmers who are willing to risk everything to protect their main source of income (60 percent of

¹⁷⁰ Lin, George and Ho, Samuel, 2005, p 420

¹⁷¹ Ibid.

¹⁷² Ho, Peter, 2005, p 115

¹⁷³ State Council's Notice on 'The Protection of Forest Resources and Halting the Destruction, Reclamation and Indiscriminate Occupation of Forests' (5-8-1998), and Notice on 'The Continuation of Freezing All Forest Requisition for Construction Projects (30-7-1999). Ho, Peter, 2005, p 115.

¹⁷⁴ Zhou Qiren, 2004, p 101. The highly lucrative business and relatively low transaction costs (land is requisitioned by administrative order rather than through the market channel) could also result in abuse and wasteful use of land, ibid. The current legislative framework has perpetuated the lucrative business of selling off farm land for developmental purposes, Clarke, Donald, 2000.

¹⁷⁵ According to estimates, there are currently 5,500 'development zones', taking up 35,000 square miles of land. A 'clean-up' operation in 1993 found that 78% of the land requisitioned for industrial use were misused. In 2003, the State Council issued the Emergency Notification of the Suspension of Various Development Zones (《关于暂停各类开发区的紧急通知》) and carried out another 'clean-up' operation, which subsequently freed 50,000 mu of land back to agricultural use. Niu Ruofeng et al., 2004, p 57 and *Rural China in the 21st Century: The Land Resources*, 2000

¹⁷⁶ *Public Unrest Increasing in China*, 19 January 2006; *China Village Fury at 'Land Grab'*, 10 November 2006

¹⁷⁷ In particular, see Chapter Five of Land Management Law 1998

¹⁷⁸ In 2002, 647 hm² of forestland were requisitioned in Linan City, Zhejiang Province. More than half of the requisitioned land were use for commercial purposes, Xu Xiuying and Zheng Xiaoping, 2005, p 19

farmers' income come from agriculture)¹⁷⁹ and developers who, more often than not, have the support of local government officials to obtain land that have been taken away from the farmers.¹⁸⁰ It is undeniable that land requisition poses a great threat to farmers' right to land.¹⁸¹

The government not only regulates when agricultural land can be turned into non-agricultural land, it also dictates how much compensation should be paid to those households whose land has been requisitioned. Article 16 of RLCL 2002 provides that the contracting households are entitled to compensation if their land has been requisitioned. Article 47 of LML 1998 provides the formula for the calculation of compensation for the land that has been requisitioned. The compensation is divided into three groups: compensation for the loss of land, resettlement compensation and compensation for seedlings. Compensation for the loss of land is calculated on the basis of the annual average productivity of the land for the past 3 years prior to any requisition.¹⁸² Similarly, compensation for resettlement is also calculated on the basis of the past annual average productivity of the land¹⁸³ and is subject to a maximum threshold.¹⁸⁴ Land Management Law Implementation Regulations 1998 further outlines that compensation for the loss of land should be kept by the collective, while resettlement compensation is given to the bodies who are responsible for the resettlement of households. Lastly, compensation of the seedlings and any fixture on the land should be given to the contracting households.¹⁸⁵

In reality, however, things are not as straightforward. The problems of underpayment, delayed and even no payment are rife.¹⁸⁶ More often than not, the compensation money is 'intercepted' by a higher level of government such as township,

¹⁷⁹ Niu Ruofeng et al., 2004, p 22

¹⁸⁰ A few of these cases have been reported by the Chinese media. One case has attracted particular attention, both in the media and academic circles: Land Requisitioning in Zigong, Sichuan. For comments on this case and land requisitioning in China generally, please see Chen G.D. and Chun T., 2004; Sun Yafei, 15 July 2004; and Zhang Yaojie, 13 June 2004.

¹⁸¹ Donald Clarke pointed out that there is slower growth in agricultural production by individual farmer compared to the productivity of town and village enterprises because the threat of expropriation is higher than among township and village enterprises, Clarke, Donald, 2003, p 101.

¹⁸² Compensation should be around 6 to 10 times of the annual average productivity, Art 47.

¹⁸³ 4 – 6 times of the annual average productivity of land for the past 3 years.

¹⁸⁴ Compensation for every hectare of land should not be more than 15 times of the annual average productivity for the past 3 years.

¹⁸⁵ Art 26

¹⁸⁶ Chen Xiaojun et al., 2003, pp 40-42.

administrative village or other lower level administrative departments. This is exacerbated by the lack of a clear authority at the collective level, which will be discussed in the next chapter. For example, of the average 200,000-300,000 yuan per mu compensation for the land requisition paid out at present, rural households only get 2,000-20,000 yuan.¹⁸⁷ Some money is paid into the collective pot for public services purposes but the rest is illegally kept by government officials and village leaders.

As we have seen, rural land use right is not comprehensive. Although it encompasses the right to derive income and even the ownership right of the produce grown on the land, the protection of the right to use is far from satisfactory. The state still wields excessive power over rural land use, which is reflected in the right to requisition rural land for non-agricultural or commercial use. Recently it is also manifested in the power to withhold land use right temporarily under the logging ban. Current legislations so far have failed to address and control the state's power to requisition rural land.

3.2 Right to Autonomy

The second characteristic of rural contracting land is the autonomy of right holders to manage land. Under the current system, households are given the right to make decisions concerning the use of land, subject to certain limitations. Article 16 of RLCL 2002 provides that the contracting household possesses the rights to use, to receive income from and to transfer the land; more importantly, households also has the right to make decisions about land use and disposal of things produced. Correspondingly, the collective should refrain from interfering with these rights¹⁸⁸, the occurrence of which amounts to a breach of contract.

Until recently, rural production has always been subjected to restrictions and control. For example, households were subject to the provisions concerning production target and type of crops to be planted.¹⁸⁹ This was mainly due to the result of the state procurement system, which was only gradually phased out in the past two decades.

¹⁸⁷ *Rural China in the 21st Century: The Land Resources*, 2000

¹⁸⁸ Art 14 of RLCL 2002

¹⁸⁹ *Rural China in the 21st Century: The Land Resources*, 2000

This system required farmers to sell a certain amount of their crops at a set price to the government every year to make sure that the government have enough food to feed the country.¹⁹⁰ Village leaders or officials were given the task to make sure that targets were met and delivered. Failing to fulfil the target would result in administrative punishment to the officials, which might mean demotion or even dismissal. Thus, in many places, local government dictated what the farmers should plant on land and how much should be produced. The state procurement system aside, local government also had to collect agricultural tax that was fixed according to the area of productive land or number of residents. Hence, there was always pressure for the farmers to produce a minimum amount of crops so that the tax obligation could be met. ‘Dictated’ or ‘controlled’ production is now not a common occurrence and most farmers are free to decide what and how much they want to plant.¹⁹¹ The recent tax reform has further improved the situation.

Having said that, ‘dictated’ or ‘controlled’ production still occasionally takes place in certain areas. For example, agricultural production has been tightly controlled by local authorities in some villages in Hubei Province.¹⁹² In 1986, the local government ‘forced’ the farmers to plant grapes. In 1990, in order to impress the higher level of government officials who were visiting the area, the local government ordered farmers to plant wheat on both sides of the road. This continued to happen several times again, where the local government compelled farmers to plant certain products that were deemed ‘favourable’: apple trees in 1993 and mulberry trees in 1994. In 1996, the government ordered the farmers to plant garlic on land along the road that had already been planted with wheat. Usually, local government or the village leaders feel the need to dictate production for two reasons: firstly, by organising unified production projects and establishing specialist households, local leaders hope that it would improve their ‘political achievement’ and hence increase their chances of

¹⁹⁰ For China’s past procurement policy, see Niu Ruofeng et al., 2004, pp 79-86. China’s procurement system has undergone several changes since 1979. When it was first implemented, the price of procurement was set by the government which was much lower than the market price. Subsequently, in 1993, the government abolished grain vouchers in the urban areas to reduce state’s subsidies to urban grain consumption. However, the voucher system has to be resumed very soon after that as the market prices of grain soared dramatically. The government’s original plan of allowing the procurement price to be determined by the market forces had to be put on hold. State control over grain purchases was reinstated.

¹⁹¹ Chen Xiaojun et al., 2003, p 16

¹⁹² Liu Fengqin, 2005, p 182.

getting promoted; secondly, local leaders may want to maximise profits or income by forcing farmers to produce agricultural products that are deemed profitable.¹⁹³

In relation to forestry, the state still exercises an overwhelming control over the sale and production of timber. Under the harvesting quota system, a cutting licence needs to be obtained before individuals can cut down trees (although no permit is required to cut down trees on the private ‘homestead’ plot). Thus, individuals’ right to harvest timber is restricted by the unified national production plan set by the government. Furthermore, in the ‘forest counties’¹⁹⁴, the Forestry Department ‘functions as a virtual monopoly buyer of timber’.¹⁹⁵ More often than not the Forestry Department operates the only timber market and sells timber through licensed outlets.¹⁹⁶ Alongside with the monopoly over the purchase and sale of timber, the Forestry Department also controls timber prices. In these places, households usually enter into production contracts with the Forestry Department, partly because of its monopoly over the timber market and partly because of the access to financing provided by the Forestry Department.¹⁹⁷ In addition, Article 33 of the Forest Law provides that for timber not purchased by the state, a transport certificate must be obtained before the timber can be transported. This again reinforces state’s monopoly over timber purchase.

Apart from production control, households’ right to autonomy is also curtailed in other ways. One major deficiency is the restrictive practice of turning agricultural land (both arable and forest land) into non-agricultural land or for non-agricultural use.¹⁹⁸ In some places, there are even restrictions on converting cropland to other alternative agricultural uses, such as orchards, and fishponds.¹⁹⁹ The use of such intrusive measures to control use of land is controversial and costly, not least because it often presents opportunities for abuse by those in power and undermines the

¹⁹³ Ibid.

¹⁹⁴ These refer to important non-state timber-production regions such as the Fujian Province, which are mainly situated in the southern part of China. Control is more relaxed in the aqua-culture oriented coastal counties where timber production is insignificant, Bruce, J.W., 2000, p 6.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Art 4 of LML 1998, Art 15 of Forest Law 1998 and Art 8 of RLCL 2002.

¹⁹⁹ Rozelle, Scott et al., 2005

integrity of use rights.²⁰⁰ Hence, restrictions on private land users' autonomy often go hand in hand with the exercise of discretionary power by either the government officials or village governing body.

3.3 Right to Transfer

The third characteristic of the contract-out system is the right to transfer.²⁰¹ As already mentioned, transfer of use right is now endorsed by the new regulations. Results from a village survey show that without the ability to transfer right, a higher level of tenure security will not result in a greater increase in land investment by the farmers.²⁰² This is intuitive because higher tenure security is not a great incentive as such if the security is contingent on self-cultivation by the households.²⁰³ Thus, transferability of right not only can increases agricultural production (or more afforestation activity and survival of trees in the case of forestland) by allowing land to be cultivated or managed by those who can do it in the most efficiency way, it will also help to improve rural economy by allowing more rural citizens to work in the cities while renting their land out. In reality, practice differs from place to place. Transfer of land use right is still a rarity in many parts of rural China. A Ministry of Agriculture finding recorded that in 1990, a mere 0.44 percent of the contracted land were involved in land exchanges, although the figure had gone up to 3-4 percent in 1998.²⁰⁴ According to a survey carried out in some provinces in China, in 1995, even though 75 percent local leaders had reported rental activities in their villages, farmers still rented less than three percent of their land, and most of which were between relatives.²⁰⁵

According to one theory, the rural land rental market is very much influenced by two factors in rural China: the availability of off farm jobs and the market institutions.²⁰⁶ The first factor relates not only to off-farm employment opportunities, it also relates to the profitability of farming (as land held by farmers is only for agricultural use).

²⁰⁰ See above for problems associated with the state's power of land requisition.

²⁰¹ Again, as pointed out above, right to transfer for forestland is only confined to users of timber, fuel wood and economic forests.

²⁰² Jacoby, H., Guo Li and Rozelle, S., 2002

²⁰³ Deininger, Klaus and Jin, Songqing, 2002, p 17.

²⁰⁴ Qian F.X., Ma Q. and Xu X. 2005, pp 1053-1054.

²⁰⁵ Rozelle, Scott et al., 2005

²⁰⁶ Qian F.X., Ma Q. and Xu X. 2005

Before the agricultural tax reform, the heavy tax burden often made farming extremely unprofitable. Even after the tax reform, farming is still not profitable due to inflation and high input prices.²⁰⁷ As a result, not many people are keen to take on more land. On the other hand, the availability of off-farm jobs also ‘releases’ rural residents from farming, which in turn enables more land to enter into the market. The increase of land supply then stimulates demand. It is argued that the rural land rental market in China is ‘supply driven’ and that when supply is available, demand will arise.²⁰⁸ This is somehow proven by the fact that most of the ‘lessor’ families were involved in off-farm jobs²⁰⁹ while the contrary is true for the ‘lessee’ families.²¹⁰ This is also supported by the fact that land transfer is more active in the East Coast of China and places where off-farm employment opportunities are more plentiful. Here, it is either the case that farming is carried out in larger scale and is thus more profitable, or households earn enough money from off-farm employment to pay for the ‘losses’ from renting out land.²¹¹

However, the availability of off-farm employment only is only part of the story. Although a lot of rural residents now take part in off-farm employment, most households²¹² do not wish to have their land taken back by the collective as the land act as a ‘fall back’ guarantee if they have lost their jobs at the cities.²¹³ In many instances, households who rented out the land not only did not receive payment or rent, they even had to pay someone to ‘rent’ the land from them.²¹⁴ In relation to fulfilling agricultural taxes and quota, in most cases, the original contracting household still bears the responsibility to pay for taxes and fulfil quota.²¹⁵ Even if the

²⁰⁷ Wang Hongwang, 27 December 2007; Huang Xiangrong, 27 December 2007

²⁰⁸ Ibid. pp 1064-1065. This is in contrast with the ‘enclosure movement’ that took place in England in the 16th century where the launch of capitalistic agricultural production increased demand for land, which subsequently created the need to deprive farmers of their rights and push them toward city and off-farm employment, *ibid.* p 1072.

²⁰⁹ Other characteristics shared by the ‘lessor’ families are small family size, more young family members, and family members are more educated, *ibid.*, p 1059.

²¹⁰ The ‘lessee’ families generally share the opposite characteristics of the ‘lessor’ families, such as large family size, more old and less educated family members, *ibid.*

²¹¹ Chen Xiaojun et al., 2003

²¹² This is especially true with regards to households that only take part in local industry rather than outright migration to the cities, *ibid.*, p 1058.

²¹³ Similarly, most collectives in poor areas do not usually want to take back those land that have been contracted out as they want to get continuous contribution from households to fulfil the quota or tax obligation.

²¹⁴ Chen Xiaojun et al., 2003.

²¹⁵ Although agricultural tax has theoretically been repealed by the government, informal charges and fees have again sprung up again in many places. See Chapter One above.

responsibility is transferred, in the event of default, local leaders typically hold the original household liable for the quota. This has discouraged more active rental transactions among the villagers.²¹⁶ Lastly, rental transactions may be interpreted by local leaders as land misallocation, and subsequently may result in land reallocation and dispossession.²¹⁷

The second factor concerns the substantial transaction costs involved in land exchanges due to the absence of institutions supporting or facilitating contracts of land. Even now, land registration²¹⁸ does not exist in many villages, and as a result transaction costs can arguably be very high. That may explain why most land use transfers take place among family members or villagers where the need for certainty and market information is minimal. However, in some places, innovative market institutions have been created to facilitate land use transfer: a 'land trust' is used to act as a 'broker' between the assignor and assignee²¹⁹; the 'reverse renting and sub-contracting' mechanism²²⁰ is adopted to enable the collective body to consolidate land exchanges; and the 'shareholding land co-operative' is established to facilitate unified exchanges of land.²²¹ The availability of these and other mechanisms is vital for the existence of a working land rental market in rural China. In fact, that the shift of labour to off-farm has begun earlier than the rental-market development shows that the establishment of a rental market is greatly dependent on the availability of the relevant institutions.²²² Institution-building in turn depends very much on the active participation of local public authorities, without whom efficient 'collective' land market would not exist.²²³

²¹⁶ Rozelle, Scott et al., 2005, p 135. This is supported by the survey data which shows that farmers rented an average of 7.9 percent of land in places without quota, and only 2.2 percent in places with quota.

²¹⁷ Ibid., p 136

²¹⁸ This includes the registration of collective ownership rights and registration of private use rights.

²¹⁹ Land trust is used in Shaoxing County in Zhejiang Province, Qian F.X., Ma Q. and Xu X. 2005, p 1066.

²²⁰ This mechanism allows village authority to rent land from individual households that have been allocated land, and then contract the land out to agribusiness of specialised households.

²²¹ Qian F.X., Ma Q. and Xu X. 2005, pp 1066-1067.

²²² Ibid., p 1070.

²²³ The existence of 'collective' land market like the shareholding co-operative and the 'reverse renting and sub-contracting' mechanism is particularly important given the fact that private land rental market is still far from complete.

Another restriction to the right to transfer is the inability of right holders to mortgage the land.²²⁴ Land as collateral is a very useful and vital tool for the right holders to obtain credits. More fundamentally, it denotes the power of the right holder to dispose of the right as he or she chooses. The scarce and unmovable nature of land makes it ideal and reliable collateral to be used to obtain loans or credits. In rural area where personal properties are limited, land plays an important role in helping farmers to obtain the much-needed credit for investment purposes or in the event of emergency. Availability of credits is especially important for farmers managing forestland, as activities such as tree planting, insect treatment and fire prevention usually require a commitment of relatively large capital. Apart from the initial financial inputs, continuous care and investment are required in forestland management, depending on how long the trees take to mature. Long-term management of forestland can only be possible if the farmers have access to credit facilities so that they do not have to rely exclusively on government subsidies and handouts. The prohibition to mortgage land exacerbates the problem of lack of access to credit facilities in rural China. The prohibition is perhaps due to the overriding concerns of land use control and the social welfare of rural households.²²⁵ Furthermore, anything short of ownership right (or long-term leasehold) may not provide the necessary assurance to banks and other lenders.

As we can see, the issues involved in the current land contracting-out system are not straightforward and involve various theoretical and practical complications, which reflect the difficulty of striking a balance between tenure security (which promotes efficiency) and equity. In addition, enforcement of the laws has been less than perfect and practices vary from place to place. Even though the law now strives to provide greater security to households' right by demanding allocation of land to be carried out via written contracts, implementation has been far from satisfactory. Effective implementation of the law is impeded mainly by the presence of a large amount of administrative interference and arbitrage within the system. However, as more and more local economy blossoms under the market system, it is hoped that income equality can be achieved not by strict egalitarian allocation of land but via the

²²⁴ However, this does not apply to wasteland that has been allocated through public auction, bidding and negotiation, Art 49 RLCL 2002.

²²⁵ As pointed out above, many rural households see land as their most important source social security.

opportunities to participate in other off-farm employments. Furthermore, as democracy and transparency become stronger at the village level, local leaders will be more accountable and abuse of power can be minimised.

4. The New Property Law

The last section looks at the newly adopted Property Law (also known as the Real Rights Law) in China. This law seeks to reconfirm and reinforce the protection of private property rights in China. Since it has just come into force in October 2007, its actual impact can only be speculated. The main sections of the Property Law in relation to rural land ownership and use rights are discussed below. In November 2002, the Sixteenth Meeting of National Representatives declared that there was a need to further complete legal protection for private property. In the subsequent month, the Ninth Meeting of the National People's Congress carried out the first deliberation on the subject and a draft on the Property Law was being revised. In March 2004, the Tenth Meeting of the National People's Congress adopted amendments to the Constitution, adding a provision to recognise the legal protection of citizen's lawful holding of private property. This was a significant move as it was the first time private ownership interest was recognised by the Constitution of the once communist country.²²⁶

Prior to the new Property Law, legal protection of property rights could be found in the General Principles of Civil Law 1986, which recognised private property rights generally provided that they do not conflict with state policies and social interests.²²⁷ The provisions limit to certain extent the intrusion of the state into social and economic relationship while retaining the power of the state to assert control. However, throughout the 1980s and 1990s, law and regulation on property were mainly concerned with state-owned property and the extent of managerial autonomy granted to managers of state enterprises.²²⁸ When the Draft Property Law was originally arranged to be tabled before the NPC in 2006, it was suspected that the

²²⁶ Provision 13 of the PRC's Constitution. The 1999 constitutional amendments merely provided that individual private and other non-public economics that exist within the limits prescribed by law are major components of the socialist market economy, Article 11 of the PRC's Constitution.

²²⁷ Potter, Pitman, 2001, pp 62-63.

²²⁸ Ibid.

controversy around the issue of private ownership rights had prompted the date for deliberation to be postponed. The major controversy was ignited by a letter posted on the Internet by a law professor in the University of Peking in 2005²²⁹, where he criticised the Draft Law as against the Constitution, the socialist culture of the country and of strengthening the wealth gap.²³⁰ On 16 March 2007, the Tenth National People's Congress adopted the Property Law, which came into force on 1 October 2007.²³¹

The codification or formalisation of the property law was deemed essential for various reasons.²³² Firstly, it will spur economic growth and provide incentives for efficient exploitation of resources. Secondly, the pressure to provide protection to foreign investment and enterprise has increased since China became a member of the WTO.²³³ Thirdly, China's economy has diversified and is becoming ever more sophisticated.²³⁴ Many of these new economic sectors require a clearer and stronger property rights regime. Fourthly, the lack of a property law in modern China is argued to be untenable, and that Chinese legal scholars have become more active and equipped in drafting property law.²³⁵

In relation to the rural land use rights, on the surface, this new piece of legislation has not added anything new to the substance of the rights as provided by the LML and RLCL; however, the new law does strengthen the foundation of private ownership and use rights in the Chinese legal system. Before the incorporation of rural land use rights into this new piece of law, there have been heated debates about the nature of rural land usufruct rights: whether or not they are contractual rights or real rights or

²²⁹ Law Professor Gong, Xiantian posted a letter on the internet on 12 August 2005 to openly criticise the Draft Property Law to be unconstitutional and 'against the basic principles of socialism', Zhao Lei, 23 February 2006

²³⁰ For an example of the debates between the proponents and opponents of the new Property Law, see Han Fudong, 10 March 2006

²³¹ People's Republic of China Property Law 2007

²³² Chen Lei, 2007, pp 5-6.

²³³ Potter, Pitman, 2001, pp 59-61.

²³⁴ China's economy has gone from 'agriculture to industry, to real estate development, to mortgaged-backed securities, and to intellectual-property-intensive service industries', Chen Lei, 2007, p 6.

²³⁵ Ibid.

neither of these rights.²³⁶ The lack of a clear status made protection and enforcement more difficult, and facilitated the occasional interferences of rights.

4.1 Property Law and Land Ownership Rights in China

The Property Law in China largely follows the Civil Law system²³⁷ and divides property rights into three main categories, namely ownership right, usufruct and collateral right. Ownership right is the most comprehensive, which includes the rights to possess, to use, to derive income from use and to exclude others.²³⁸ As a result, it also encompasses the other two main rights, which are the usufruct right and collateral right.²³⁹ Properties are divided into two categories, namely movables and immovable properties. In China, there are very limited instances of private ownership of immovable properties, such as land. The Property Law mainly reiterates the existing arrangements of ownership of land and natural resources, where the only two owner entities are the state²⁴⁰ and the collective.²⁴¹ Proof of ownership of immovable properties is only effective when the title is registered, although this requirement does not apply to state ownership of natural resources as prescribed by the law.²⁴²

State ownership rights of natural resources (including land) and other properties are vested in and enforced by the State Council, which is the highest executive body in China, the relevant departments and state enterprises. Collective ownership of land and natural resources are valid when prescribed by law, and registration of ownership is necessary. The new law provides that properties belonging to the rural collective are owned by the members of the collective as a whole.²⁴³ Collective ownership of land, forest, grassland and so on is to be vested in and enforced by either the village committees or village economic units (for village level collective ownership)²⁴⁴, or the

²³⁶ Xu Hanming, 2004, pp 150-156; Cheng Yunxing, 2004, pp 59-66; Chen Xiaojun et al., 2003, pp 230-235; Yin Fei, 2005, pp 297-304

²³⁷ Chen, Lei, 2007, p 2.

²³⁸ Art 39

²³⁹ Art 40

²⁴⁰ Arts 46-49

²⁴¹ Art 58

²⁴² Art 9

²⁴³ Arts 59-60. Again, the new Property Law does not provide a clear definition of 'collective', it merely uses the existing definition found in the Land Management Law 1998 and the Rural Land Contracting Law 2002. This issue will be discussed in detail in Chapter Three.

²⁴⁴ Art 60 (1) and (2)

township economic units (for township level collective ownership).²⁴⁵ The Law also identifies situations where collective decisions²⁴⁶ are needed: contracting out of land²⁴⁷, reallocation or readjustment of the contracting land²⁴⁸, use and allocation of compensation for loss of land²⁴⁹, matters related to collective enterprises²⁵⁰, and other matters that are prescribed by the law.²⁵¹ Furthermore, it offers protection to collective members by providing them the right to petition to the court for the annulment of any decision adopted by the village representatives (village committee or economic unit) that has harmed the interests of the members.²⁵² This provision has strengthened the concept and meaning of collective ownership by giving real powers to the collective members not only to decide on how to use the properties, but also to challenge any decision made on behalf of the collective.²⁵³

In relation to private ownership, the Property Law provides that private property rights are to be protected.²⁵⁴ In particular, it recognises and protects private ownership of capital such as investment equipment, buildings, and savings and so forth.²⁵⁵ The Law provides that the state has the responsibility to protect private property rights, and lays down the penalties for infringement of private property rights.²⁵⁶ There is, however, one important reservation in the protection of collective and private property rights, namely the state's power for requisition. The Property Law provides that the government can, in the public interest, requisition private or collective property, provided that compensation is paid according to the law or reasonable compensation in the absence of any legal provision.²⁵⁷ In addition, an individual whose land has been requisitioned should also be, on top of the compensation, reallocated.²⁵⁸

²⁴⁵ Art 60 (3)

²⁴⁶ Here, 'collective decisions' refer to decisions made by the members, rather than the representatives, of the collective, Art 59.

²⁴⁷ Art 59 (1)

²⁴⁸ Art 59 (2)

²⁴⁹ Art 59 (3)

²⁵⁰ Art 59 (4)

²⁵¹ Art 59 (5)

²⁵² Art 63

²⁵³ However, a provision that requires the representatives of the collective who have caused financial hardship to collective properties through misconduct to be held liable was taken out of the main body of the law, Art 72 of the last version of the Draft Property Law.

²⁵⁴ Arts 4 and 66

²⁵⁵ Art 64

²⁵⁶ Arts 65 and 66

²⁵⁷ Art 42

²⁵⁸ Ibid.

Although the reservation of state's power to requisition private property is not unique to China, given the already widespread practice of land requisition by the state, it was hoped that the Law would offer greater protection to private and collective interests. However, it merely confirms the ground on which a requisition can take place (namely in the public interest); it neither gives detailed definition to 'public interest' nor provides a list of circumstances in which requisition can take place.²⁵⁹ As a result the state still possesses wide discretionary power to decide when and where land requisition can be carried out. This is an area to be improved if private property rights are to be better protected.

4.2 Usufruct Rights of Rural Land

Chapter Ten of the Law outlines the meaning and composition of general usufruct rights. Article 117 provides that usufruct rights (of immovable property) consist of the right to possess, right to use and right to derive income from use.²⁶⁰ Article 118 further provides that individuals or units can obtain usufruct rights of natural resources owned by the state and the collective. The Law also provides that property owners must respect the usufruct rights held by individuals or units, and should not interfere with the enjoyment of such rights.²⁶¹ In particular, compensation is required when the usufruct rights are terminated prematurely (like in the case of requisition).²⁶² In return, usufruct rights holders are required to protect and carry out reasonable use of the natural resources.²⁶³

Chapter Eleven provides details of the composition and types of rural land usufruct rights. The fact that a whole chapter of the Law is devoted to rural land usufruct rights shows that not only is the government keen to further strengthen the protection for rural households over land use, but that land use contracting out is also a policy that the government wants to encourage and actively promote. This is understandable because in a country where outright private ownership of land is still not acceptable, creation and circulation of usufruct rights at the lowest level of users are crucial in at least achieving some flexibility of land use that will promote efficiency and increase

²⁵⁹ Chen Lei., 2007, p 12.

²⁶⁰ Note that it does not include the right to exclude others.

²⁶¹ Art 120

²⁶² Art 121

²⁶³ Art 120. The Draft included the provision that usufruct right holders should not to cause harm to the interest of the owners, but it has been taken out in the official version of the Law.

households' incomes. One important caveat that governs all rural land contracting out is the prohibition to convert agricultural land into non-agricultural land use.²⁶⁴ This is the safeguard built into the system to make sure that agricultural land is not lost to competing uses such as housing development or industrial use.

However, the chapter on rural land usufruct land is a short one.²⁶⁵ The new law reiterates some important provisions relating to rural land usufruct rights, including the contractual period²⁶⁶, restrictions on land reallocation²⁶⁷ and transfer.²⁶⁸ In relation to the contractual period, a new stipulation has been added that is not found in the RLCL 2002, namely that upon the end of the contractual period, the collective authority 'renews the contract in accordance to the law'. It is debatable whether or not this amounts to automatic renewal of usufruct rights; contrary to this ambiguity, the new law also provides that usufruct rights of *housing* are subject to 'automatic renewal' at the end of the contractual period.²⁶⁹ In relation to land reallocation, the same restrictions (namely only on rare occasion and with the necessary procedure provided in the RLCL 2002) apply. This again shows the government's commitment to secure land use tenure. However, as already discussed above, tenure security is not favoured by everyone; and until the social and economic issues are addressed, it can be argued that reallocation will still take place regardless of the new provision.

Lastly, in relation to land use transfer, the new law merely refers to the existing provisions in RLCL 2002 regarding land use transfer. This means that for permanent transfer of use right, the transferor still needs to obtain the permission of the assignor (the collective), and the transferor must also prove that he or she has other sources of income, and that the second assignee is actively involved in agricultural activities. The Property Law also requires that members from the same collective are given the first consideration in relation to transfer of land. Furthermore, the law still prohibits the mortgage of land.²⁷⁰ During the consultation stage, members of the Legal

²⁶⁴ Art 128

²⁶⁵ There are only eleven articles in total.

²⁶⁶ Art 126 provides that the collective should or will renew the contract once the contractual period has ended. Whether or not this amounts to automatic renewal of usufruct rights is yet to be explained.

²⁶⁷ Art 130

²⁶⁸ Art 128

²⁶⁹ Art 149

²⁷⁰ Like the RLCL 2002, this prohibition does not apply to wasteland that has been contracted out via public bidding, auction or negotiation.

Committee of the National People's Representatives argued that conditions were still not right to allow mortgage of rural land to take place.²⁷¹ This was mainly because of the concern that agricultural land per capita is small, and that there is a danger that China's agricultural land and the social welfare of rural residents will be jeopardised if mortgages were to be allowed. It was also argued that the problem of rural credits could be solved by facilitating the establishment of village-based financial services.

In general, the law has not added anything new to the existing law that governs rural land usufruct right. Again, the Chinese government has decided that the time was not yet ripe to introduce radical elements into the current land use system. The Law does not, for example, call for the establishment of a rural land market where private users can freely trade their use rights; nor does it allow the use of rural land as collateral.²⁷² Instead, the Law reinforces private usufruct rights by recognising it as 'property' or 'real' rights. The significance of this development will be discussed below.

4.3 Registration and Enforcement of Rural Land Usufruct Rights

A system of land registration is a pre-requisite to a properly functioning land market. Not surprisingly, the new Property Law reiterates the significance of registration of both ownership and usufruct rights. As already mentioned above, usufruct right can be created by contract but its existence must be proven by the registration of title with the relevant governmental department (usually at county or higher level of government). Without registration, the usufruct right will not be enforceable against an innocent third party²⁷³; and any changes in usufruct right, such as a transfer or exchange, must also be registered in order for this to take effect.²⁷⁴ At present, registration of land (and land use rights) is scattered among six authorities from different departments, namely the state land administration, the housing authority, the mining authority, the water administration, the fishery authority and the forest administration.²⁷⁵ Although the new law attempts to streamline the registration

²⁷¹ The Fifth Deliberation of the Property Law: The Time is Not Ripe to Allow Land Usufruct Rights to be Used as Collateral, 22 August 2006

²⁷² Except wasteland that has been allocated through public auction, bidding and negotiation. See above.

²⁷³ Art 9

²⁷⁴ Art 14

²⁷⁵ Chen Lei, 2007, p 8.

authority by requiring the formation of a uniform registrar office at the national level, so far this has not happened due to unresolved issues.²⁷⁶

Once the usufruct right is registered, the authority must issue a certificate of right to the right holder as proof of registration. The new law also introduces a new provision that seeks to remedy the existing law that fails to differentiate 'real' rights from 'contractual' rights.²⁷⁷ Article 15 provides that if any creation, changes, transfer or termination of rights over immovable objects are provided in a contract, the contract will come into force even if the rights have not been registered accordingly. It has been suggested that unregistered rights are only enforceable as 'contractual' rights, not 'real' rights.²⁷⁸ Lastly, the composition of the usufruct right is to be reflected in the registration, and any conflicting claims must be settled by reference to what is contained in the registration.²⁷⁹ In order to protect the interest of the right holder from abuse of power by the authority, when carrying out the registration, the authority must not require the assessment of the value of the property or repetitive registration, or go beyond the boundary of its power.²⁸⁰

A registration fee will be charged but the amount should not be dependent on the size or value of the land; the exact fee to be charged will be set by the State Council.²⁸¹ Relieves are also offered for losses or harm suffered by the right holder as a result of the mistake committed by the registrar: the right holder can apply for compensation from the registration authority itself, and also from the individual or individuals who has caused the mistake to occur.²⁸² In addition, any person who applies for the registration of interest by providing false information and subsequently causes harm to another person is required to pay compensation to the other person, and could even be made criminally liable.²⁸³

²⁷⁶ The questions that have not been resolved are which property rights should be registered, what procedures should be used, and which offices should be vested with the authority to register, *Ibid.*

²⁷⁷ For example, Art 4 of the Guarantee Law 1995 provides that a contract for mortgage will only take effect on the day the collateral right is registered. In other words, contractual obligations are made dependent on the creation of the right over the collateral.

²⁷⁸ Wang Liming, 6 March 2007

²⁷⁹ Art 17

²⁸⁰ Art 13

²⁸¹ Art 22

²⁸² Art 21

²⁸³ Art 21

When a conflict arises regarding the usufruct right, the Property Law provides that the right holder can settle the matter via mediation or negotiation or bring the case to the court.²⁸⁴ When the property is unlawfully retained, the right holder can ask for restitution.²⁸⁵ Similarly, if the property is damaged, the right holder can ask for the damage to be undone.²⁸⁶ When there is interference with or impediment to the exercise of the usufruct or ownership right, the right holder can request for the interference to be removed.²⁸⁷ Infringement of usufruct right can entail civil action to be brought, and imposition of administrative and even criminal sanctions.²⁸⁸ And lastly, as already mentioned above, in the event that the state terminates usufruct right prematurely, the right holder is entitled to compensation unless provided otherwise by the law.²⁸⁹

In a nutshell, the Property Law has provided additional safeguards to protect right holders from any intentional or innocent mistakes committed by a third party in the process of registration. As pointed out in the previous chapter, land use right registration is still not carried out in all cases, despite the repetitive demands by the lawmakers. It remains to be seen whether the Property Law will provide new incentives to all right holders to register their rights. More importantly, the new law sets out the redresses available to right holders whose interests have been violated. The availability of some of these redresses, such as restitution, signifies the protection of land use rights as 'real' rights. Other important implications of this will be discussed below.

4.4 Implications of the New Property Law on Rural Land Usufruct Rights

As we have seen above, the Property Law sets out the basic structure of how ownership and usufruct rights can be created, protected and enforced. This is particularly significant because it is the first time China has attempted to consolidate the different types of property rights. The real implication of the Law, however, is not derived from the detailed provisions on rural land use rights but rather on a more significant level, namely the nature of these land use rights. This is significant

²⁸⁴ Art 32

²⁸⁵ Art 34

²⁸⁶ Art 35

²⁸⁷ Art 36

²⁸⁸ Arts 37 and 38

²⁸⁹ Art 119

because it seeks to settle the disputes surrounding the issue that have divided the legal jurists for a long while. The new Law finally provides clarification to the nature of rural land use right by declaring it as a 'real' right, as opposed to a mere contractual right. The categorisation of land use right as a real right has significant implications to the protection of private rights against intrusion, especially interference from the state and the collective. This subtle change in the relationship between the state and the individual may bring far-reaching consequences in terms of how the state regulates land use, as will be shown below. Nevertheless, as the law has only recently come into force, its actual implications on rural land use rights can only be speculated.

Rights over a thing or property in China can be divided into two general types, namely 'property' rights (物权) and 'creditor' rights (债权). This dichotomy is similar to the Western concept of 'real' (or right in rem) and 'contractual' rights (or right in personam).²⁹⁰ Both of these rights denote interests over a thing or property, but differ in relation to the extent of the right. It has been pointed out that right in rem refers to the relationship between the right holder and the thing or property, while right in personam refers to the relationship between the right holder and another party.²⁹¹ Basically, if an interest is considered a 'real' right, then the right/interest holder will have a claim over the property against 'the whole world', or in other words against everyone else in the world. On the contrary, if an interest is considered as a mere 'contractual' right, then the right holder's interest is against the other contractual party, but not a third party who is not part of the contract that established the interest in the first place.²⁹²

The difference between 'real' and 'contractual' rights may seem subtle at times; it nevertheless has huge implications on the enforceability of right and the remedies available for infringement of that right. The following are a few distinctions between 'real' and 'contractual' rights identified by a Chinese scholar.²⁹³ Firstly, a 'real' right holder has the exclusive discretion and power to govern the uses of the property: the right to use does not need consent or authorisation by a third party or a contract. In other words, the right holder has extensive autonomy over the use of the property.

²⁹⁰ Yin Tian, 2003

²⁹¹ Ibid.

²⁹² Cheng Yunxing, 2004, pp 59-66

²⁹³ Yin Fei, 2005, pp 54-55

Secondly, ‘real’ right is created or conferred by law, and only the law can change the constitution of the right. Subsequently, the content of the right will not be affected by any individuals’ decisions or contractual agreement. Thirdly, a ‘real’ right is valid against ‘the whole world’ while ‘contractual’ right is only effective against the contracting parties. Lastly, a ‘real’ right holder has priority over a property claim while a ‘contractual’ right holder will only get the residual claim.²⁹⁴

In addition to the above, infringement of a ‘real’ right usually entitles the right holder to claim for the restitution of the property, while infringement of a ‘contractual’ right usually entails only damages or monetary compensation.²⁹⁵ Restitution of the property may be of significant importance when it concerns a unique good such as land, which is scarce and not easily substituted. It is due to these significant implications of the nature of rights held by rural households in relation to land use that fierce debates among the legal jurists in China have been ignited. The adoption of the Property Law has put an end to the debate as it effectively identifies rural land use rights (currently held by individuals and households) as ‘property’, or ‘real’ rights.²⁹⁶

The next question to be asked is whether or not the new status given to rural land use rights can help to address some of the right ‘deficiencies’ that are discussed above. The answer, unfortunately, would be no. Although land use right is now a ‘real’ right, it is nevertheless an incomplete one. The reason why is due to the following. Firstly, there is no indication that government control over land and land use is going to be greatly relaxed. As we have seen above, strict government control is one of the main reasons why private land use rights are grossly curtailed. One of the major threats to private land use right is land requisition by the government. So far no specific law has yet been prescribed to regulate land requisition and control abuse of power by government officials.²⁹⁷ Labelling private use rights as ‘real’ rights will be fruitless if

²⁹⁴ Cheng Yunxing, 2004, pp 59-60

²⁹⁵ Chen Xiaojun et al., 2003, p 233

²⁹⁶ This is not the first time where rural land usufruct right is included under the heading of ‘real’ right: the Land Management Law 1998 that also regulates rural land usufruct right is grouped under the heading of ‘real’ right in the Civil Law of the PRC. The new Property or Real Rights Law, however, unequivocally indicates the nature of the usufruct right.

²⁹⁷ There are three main issues concerning land requisition in China that still need to be addressed.

First, the term ‘public purpose’ (the ground on which land expropriation can take place) is not clearly defined and is subject to various interpretations. Secondly, ‘fair and reasonable’ compensation is also not defined. In particular, the current yardstick for compensation does not include the market value of

the law is not able to protect the rights from government intervention. Secondly, private land use rights are still strongly influenced by administrative decisions, including the very creation of the rights itself. The existing law merely provides the framework for the creation of private use right²⁹⁸; the contents of the contract are, nevertheless, still left to the discretion of the local authorities. The vague and discretionary nature of the rights is the opposite of certainty and autonomy that are the features of a ‘real’ right. Furthermore, the composition of private use rights is subject to administrative oversight and may change on the order of the local authority or village leader.²⁹⁹ Lastly, declaration of law without effective enforcement means that rights may only have force on paper. Stronger private use rights need to be enforceable, and the courts play an important role as the vanguard of private rights. However, as will be discussed in Chapter Five, the judicial system in China suffers from many fundamental problems, including the lack of judicial independence, corruption and lack of professionalism.³⁰⁰ More importantly, local courts are usually biased towards the local government; without proper support from the courts, individuals will not be able to enjoy the rights guaranteed to them by law.

Although it may still be too early to come to a definite conclusion, it seems that the impact of the new Property Law on rural land use rights is minimal. Nevertheless, the new law can potentially strengthen the protection of private land use rights and give right holders a new venue to contest any interference of rights that is either not sanctioned or prohibited by the law. And even though the new law does not negate the power of the state to requisition private property, the fact that households now hold ‘real’ rights over rural land will give them some ammunition to fight against unwanted or unlawful requisition of land. In particular, they can now arguably bring action directly to the court against the entities that are involved in the illegal activities instead of having to depend on the collective (as land owner and assignor) to bring action on their behalf. In fact, this direct action is arguably available in any situation where unlawful infringement of use rights has occurred. Provided that the judicial

land. Thirdly, the existing law also fail to specify the expropriating authority, which leaves room for abuse of power by government officials. Chen Lei, 2007, pp 12-13.

²⁹⁸ For example, Art 21 of the RLCL 2002 lists out a number of things that should be present in the contract such as the names of the parties, the expiration date, the use of land, the respective rights and duties, and the remedies for breach of contract.

²⁹⁹ This refers particularly to land re-allocation.

³⁰⁰ Chen Albert, 2004, pp 151-159.

system is improved and becomes more independent, the new law may in fact have wide-ranging implications on private land use rights.

5. Conclusion

China's rural land policy has undergone many changes during the past few decades. At the beginning, the policy of self-sufficiency and equality was reflected in the collective land ownership and use arrangements. After the Cultural Revolution and the 'open door' policy in the late 1970s, the rural land policy was gradually moving toward a more open and efficiency-based system. However, due to political and security reasons, the Chinese government is still reluctant to let rural land to enter the market system. The current policy still keeps the division of land ownership and use right, where only the latter is enjoyed by farmer households. The existing law requires the collectives to enter into land use contracts with households and provides some safeguards for the various rights that are granted. Among the safeguards provided are the length of the contractual period, prohibition of land reallocation during the contractual period and compensation in the event of land requisition. The latest piece of legislation, namely the Property Law, has failed to introduce new substantive provisions in relation to land use right, although the classification of the rights as 'real' rights can potentially have huge implications on how use rights are protected.

Despite the well-intended legislations, enforcement in reality is far from satisfactory and infringement of law is widespread. Land reallocation is still common notwithstanding the legal prohibition, and illegal expropriation of land is widespread in the countryside. The logging ban imposed by the central government is potentially a breach of the contractual right and whether or not compensation is required is still open to debate. In order to eliminate households' mistrust against the government, more public consultation and open discussion should be held before a policy is put into place. By giving assurances to the security of tenure and use rights held by households, it will enable households to have greater confidence in embarking on long-term planning and putting in more investment. However, the problems associated with land use and land use control are complicated because they involve not only economic considerations, but also social and political ones. These various factors intertwine with the issue of rural land use and allocation, which means that the latter cannot be looked at in isolation from the rest. The next chapter looks at the

meaning of 'collective ownership' of rural land in China. Apart from the less-than-perfect individual rights, the collective as a whole also suffers from 'right deficiencies'. It will be seen that even though the collective are legally the owners of half the rural land in China, their power and discretion are subordinate to the interest of the state. In short, it is arguable that collectives are merely *de jure* owners of rural land while the real power lies in the hand of the state.

Chapter 3

China and Collective Property

1. Introduction

So far we have seen the transformation of China's rural land use arrangements from a centrally planned and controlled regime to a system whereby private ownership (of assets other than land) and use rights are more acceptable. This is one of the most significant changes that have taken place in rural China, not least because it has successfully mobilised the force of hundreds of thousands of rural households to increase productivity and efficiency. Compared to the collective era from the 1950s to 1970s, privatisation of the rural land use rights and production has not only freed up the labour force, it has also increased the incentive to work. When the government gradually loosened its grip on the overall production of agricultural products, rural households responded to the market and became even more independent. The previous chapter looked at the hard facts of the historical evolution and the nature of property rights in agricultural land. It also outlined the current laws that deal with land use issues, notably the Rural Land Contracting Law and the new Property Law.

This chapter will take a step back and look at the issues of institution¹ behind past and current laws and policies in relation to rural agricultural land in China. The outcomes of an institution depend mainly on the interaction between the rules and the actors.² One of the factors that govern the relationship between the actors within an institution is property rights. Property rights not only regulate resource sharing or allocation among the different actors in an institution, they also determine the respective rights

¹ The theory of institution provides the basis of discussions in this chapter. It was extensively analysed by the economist Douglas North, and has since been expanded by various economic theorists such as Armen Alchian, Harold Demsetz and Yoram Barzel. The theory of institution will be discussed briefly below.

² An 'institution' is set against a background of fixed natural endowments or resources, and rules are promulgated to regulate use and sharing of these resources. Unlike technology, the quantity of most natural resources are already fixed, hence their influence in the changes in institution is less fluid and more constant. However, changes in natural endowments, such as the discovery of new stock or serious depletion, will have huge impacts on the institution as new rules and different mindsets are needed to rearrange the current approach to resources use and sharing. This chapter will focus on the more fluid factors that influence the shaping of an institution, namely rules and actors. Another factor, namely technology, is less rigid than natural endowments but is also less fluid than rules and actors. Technological changes will not, however, be discussed in this chapter.

and obligations of each actor.³ Actors in the institutional context include not only rule-makers, but also ‘rule-followers’.⁴ Depending on the political system adopted by each institution (a country can be an institution), the balance of power between rule-makers and rule-followers may differ. For example, in an authoritarian institution, rule-makers have exclusive access to the rule-making process; whilst in a democratic institution, rule-followers are given both direct and indirect channels to influence the rule-making process. However, even in an authoritarian institution like China, ‘rule-followers’ still have indirect influence on the making of rules. This indirect influence comes from the fact that even though an authoritarian institution may have control over all factors of production (like in China in the Maoist era until de-collectivisation in the 1970s), ‘rule-followers’ still have possession of something that cannot be totally subject to the control of a third party, namely their labour. As the experience in China shows, it is through the manifestation of their decision on how and how much to contribute of their labour that they will have an influence on the types of rules adopted by the institution.

The structure of this chapter is as follows. The following section looks at the collective ideology that is gradually disappearing in the cities but is still haunting China’s rural social, economic and political landscape. It highlights the justifications (rightly or wrongly) given to support the preservation of collective ownership and control of land. The third section then looks at the institutional change in the 1970s with the introduction of the Household Responsibility System. It looks at how and why the change took place, and points out that the HRS triggered political and economic changes across China from the grassroots level (the lowest level of ‘rule-followers’). It is essential to go back to this period, which culminated in the HRS, because many existing features of rural land management (and ownership) trace their origin to that period. The fourth section then looks at the current collective system with regards to rural land and administration, in particular the role of the collective as representatives of rural households; and the interactions between the different actors in the collective system, which range from households, collective, local government and central government. In the last section, the shortcomings and incompleteness of

³ See Section Two of Chapter One above.

⁴ ‘Rule-followers’ used in this context refers to people who are expected to abide by the rules but who are not directly involved in the making of these rules.

the collective entity and their implications on the village level of governance will also be discussed. In particular, it questions the suitability of the collective to act both as the administrative agent of the state and as the owner of rural land.

2. Collective Ownership: The Ideology and Justifications

After the establishment of the new People's Republic of China and before the nationwide land reform in 1956, the priority was to make sure that social justice was achieved, and everybody was given equal access to ownership of land. As already pointed out in the previous chapter, private ownership of land was allowed in the early years of the Communist rule. However, the priority shifted in the 1950s and changes in land holding ensued: land and other factors of production were consolidated and private ownership was abolished. The main aims of capital consolidation were to push up productivity, mainly based on the Soviet model, and also to increase government's revenues. It has been pointed out that the reason behind the shift of policy was the wish of the government to speed up the growth of its industry.⁵ In order to achieve that, the government needed vast financial resources, and one important source of income then was agriculture. As a result, the government imposed a centrally controlled production process and consolidated revenue.⁶

A description of the state's revenue from agriculture pre- and post-collectivisation illustrates the importance of the change. Before consolidation, residual profit from agriculture was around 30 percent, whereby 10 percent of this was paid to the government as tax whilst households kept the remaining 20 percent.⁷ The effort by the government to increase its share of the residual profit (to capture a share that was bigger than 10 percent) by imposing higher agricultural and land taxes was met with stiff resistance from the farmers.⁸ Hence, to increase its revenue from agriculture, the government decided to carry out radical reform so that it could have access to most, if not all, of the residual profit. The most effective and quickest way to do this was to

⁵ Ibid., pp 7-8

⁶ Ibid

⁷ Ibid., pp 8-9

⁸ It has been pointed out that the highest threshold of tax acceptable to farmer households was 15 percent of the residual profit, *ibid.*

change the property rights arrangements of factors of production.⁹ After collectivisation, the government became the sole claimant of the residual profit and this greatly increased government's revenues from agricultural production. However, as will be shown below, the increase in revenue was only short-lived and not sustainable.¹⁰ State's revenue dropped constantly from 1959 (two years after the introduction of People's Communes) and reached its lowest point in 1962.¹¹

2.1 The Ideology of Collective Ownership

If the rationale behind large-scale collectivisation in the 1950s was correct, it shows that collectivisation was born out not only of some abstract ideology that the ruling party aspired to, but also partly out of practicality to increase agricultural productivity and government's revenues. Heated debates had been stirred up during the consultation stage of the new Property Law, whereby many academics and politicians still argued that China should retain its 'socialist' identity and that the embracement of the private property rights clashed with its ideology.¹² Politically China is still a communist country although since the 'open door' policy in 1978, its economic system and society have gradually become more socialist in nature. However, so far land ownership is still reserved exclusively for the state and the state-controlled collective; privatisation of land is still considered to be too radical a reform to be accepted by the communist government. The current arrangements (whereby land is owned collectively and usufruct rights are privatised) are considered the most suitable because collective ownership is more easily reconcilable to the existing ideology on the one hand, and privatised use rights help to increase efficiency on the other. It is arguable that as long as the Chinese government regards privatisation of land as contrary to the socialist nature of its society, collective ownership will persist.

⁹ This is because property rights allow the owner to keep the residual claim of the property.

¹⁰ As we shall see in the subsequent section, production under the collective system had faced setbacks mainly due to the lack of incentives for households to participate earnestly in production. This is ironic in the sense that by taking away households' autonomy and rights over production, the state had also taken away the motivation to work, which in the end decreased government's revenue.

¹¹ Zhou Qiren, 2004, p 15. In 1961, the government temporarily relaxed collective control of agricultural production, including allowing some sort of private use of land like the HRS. However, when productivity started to climb up again in 1964-1965, the relaxation was reversed and private use rights were put to an end, *ibid.*, p 17.

¹² See Chapter Two above.

Furthermore, egalitarian allocation of rural land use is still considered the flagship of China's communist past, which was one of the founding principles of the revolution that led to the establishment of 'new' China. Egalitarianism is only possible when property is either state- or collectively controlled and owned. This is because in order to guarantee equal access to an equal amount of land, constant re-allocation of land in order to reflect changes in demography is required. As a result, permanent entitlement to land by households (or private ownership) is undesirable or unfeasible. Under a collective ownership regime, private use rights are allocated to members of the collective whilst ownership rights (including the right to terminate or readjust use rights) still reside in the collective body.¹³ The dilemma of constant readjustment of land and enhancement of tenure security has been discussed in Chapter Two above. The conflict is likely to escalate as the demand for tenure security increases alongside with the spread of the market system, whilst at the same time egalitarian access to rural land is becoming more important as the issue of social welfare of poor rural households is getting more pressing.¹⁴

2.2 Land Use Concerns and Justifications

Despite calls from various quarters for further rural land ownership reform¹⁵, most commentators and especially the Chinese government have opted for the status quo. Even though privatisation of usufruct rights has done wonders to rural economy and productivity for the past three decades, many still refuse to consider privatisation of ownership rights. Aside from the ideological reasons discussed above, there are other social and economic reasons that have prompted these commentators and the Chinese government to insist on keeping the collective ownership regime. As we shall see below, these concerns are not unique to China, they are equally identifiable with problems faced by many developing countries. Examples of these concerns are high pressure on land, lack of economic development, subsistence nature of rural economy, unfamiliarity with the market, lack of market facilities, lack of general amenities,

¹³ Collective land in China is not broken down into separate units owned by individual collective members (in other words, it is not the aggregation of individual private plots); rather, it is owned by the collective as one whole unit and individual claims of ownership by the collective members is not possible.

¹⁴ In most rural places land is still regarded the only social security for poor households, hence is has a high social welfare value. This issue will be discussed in more detail in the subsequent subsection.

¹⁵ Hanstad, T. and Li P., 1997; Pan Jiawei and Zhou Xianri, 2004, pp 220-221. Most have suggested either granting permanent leasehold or even privatisation of land.

illiteracy, limited resources, and so forth. Some of these concerns are more prominent in China due to some distinctive features of rural China, such as the huge population pressure. All these difficulties or complications have affected the choice of land ownership types, either directly or indirectly. The following discusses these issues in the context of rural China; it will show how and why many would still argue that collective ownership of rural land is to be preferred over private ownership (the debate of ideology aside).

The first issue is the high population-land ratio. China is the most populous country in the world, with almost 20 percent of the world's six billion population. Even though the physical size of China is big¹⁶, its productive land is small and limited compared to its population.¹⁷ To make matters worse, more than half of its population still resides in rural areas, where labour surplus stands between 150 million to 170 million people.¹⁸ Land pressure has been made worse by the recent loosely regulated expansion of factories, offices and urban housing on to rural land.¹⁹ Apart from the essential development needs, conversion from agricultural to non-agricultural land is also motivated by the fact that non-agricultural land is 'completely commoditised' whilst agricultural land is 'non-commoditised' under the current land use arrangement.²⁰ Agricultural land is incompletely commoditised mainly because it is very difficult to transfer rights of such land, and in some places, the land is 'subject to an obligation to make grain deliveries to the state at below-market prices'.²¹ In contrast, non-agricultural land is subject to fewer restrictions (especially in relation to transfer, sale and mortgage of land). As a result, the conversion of agricultural land to non-agricultural has been carried out wantonly and the situation has gone out of

¹⁶ With 9.6 million square km, China is the fourth largest country in the world after Russia, Canada and the United States.

¹⁷ As pointed out in Chapter Two, the land area per capita is less than 1.4mu (around 0.093 hectare); although in one third of the provinces, the land area per capita is less than 1 mu, and in one third of the counties, land area per capita is 0.8 mu, Wen Tiejun, 9 May 2004.

¹⁸ Niu Ruofeng et al., 2004, p 103

¹⁹ In 2003 alone, China has lost 2.5 million hectare of arable land. From 1997 to 2003, the total amount of arable land lost was 6.9 million hectare. Since the last decade, however, the main cause of cropland losses has gradually moved from commercial and industrial development to ecological projects that required cropland to be converted into either forest- or grassland, Niu Ruofeng et al., 2004, pp 76-77. This, for the first time, pits one type of agricultural land use against another. The conflict was predictable as various large-scale ecological projects such as the Sloping Land Conversion Programme have been pushed up the government's priority list, especially since 1997.

²⁰ Clarke, Donald, 2000, p 2

²¹ Ibid.

control, which has prompted the Chinese government to issue emergency orders to halt further conversion of agricultural land on several occasions.²²

High population pressure on land is one of the causes of widespread poverty in rural China (especially in the Western region²³), as there are not enough resources to provide for everyone. Although China's rural population is decreasing²⁴ (mainly due to migration to the city and the One Child Policy²⁵), population pressure on land is still immense. Furthermore, agricultural production in China is still reliant on the small-scale, conventional family farming where mechanisation level is low. In these circumstances extended families operate traditional farming operations that combine family endowments of labour with little advanced technology.²⁶ Farmers are mostly concerned about crop yield rather than quality or efficiency and high production is achieved via the relatively high use of labour, fertiliser and pesticides.²⁷ Hence, access to agricultural land is absolutely vital for the survival of most of its rural population and also for social stability in rural China. As a result, the Chinese government feels the need to impose control on land use to make sure that everyone has access to enough agricultural land.

The second land use related issue concerns the lack of a social welfare system in rural China. Unlike the cities where the social security or welfare system is relatively

²² The State Council issued 'emergency orders' (紧急通知) in 1986, 1997 and 2003 to halt further and uncontrolled conversion of agricultural land. The persistence of this problem is explained to be the result of the two-stage land market system explained in Chapter Two above, where the state first requisitions land from farmers by paying them non-market based compensation and then sells it on at the market price. As long as local officials or collective representatives can reap huge profits from sale of agricultural land, the recurrence of this problem is to be expected, Zhou Qiren, 2004, p 101.

²³ 61.8 percent of population living in poverty concentrate in China's Western region, which is made up of 12 provinces. The government recognises the problem of 'unequal development' and has, in September 1999, launched the Western Development Strategy, which aims to improve the standard of living and reduce poverty among people in the Western region. The Western Development Strategy has three over-aching aims: infrastructure development; ecology protection and improvement; and rapid industrialisation with the use of science and technology. Yeung Y.M. and Shen J.F., 2004

²⁴ Rural population in China has decreased from 866.37 million (70 percent of the total population) in 1997 to 737.42 million (56 percent) in 2006. Figures obtained from China's Statistical Yearbook 1998 http://www.iiasa.ac.at/Research/LUC/ChinaFood/data/urban/urban_5.htm and Statistical Communiqué 2006 http://english.people.com.cn/200703/02/eng20070302_353783.html

²⁵ The effectiveness and morality of the coercive nature of population control under the One Child Policy has been questioned by Amartya Sen. It has been suggested that the various social and economic programmes adopted by the Chinese government over the decades would have reduced China's birth rate regardless of the compulsive policy, Sen, Amartya, 1999, pp 220-221

²⁶ Niu Ruofeng et al., 2004, pp 154-170

²⁷ Zeng David, 2003

established, there is yet to be such a system in the rural areas.²⁸ For example, only 20 percent of the national spending on health is allocated to the rural area and 87 percent of the rural population pay for healthcare out of their own pocket.²⁹ Furthermore, although 63 percent of the participants in the national compulsory education system were rural residents, state allocation of funding to the rural area was only 54.2 percent (out of the total funding for national compulsory education system) in 2000. As a result, unpaid teacher's salaries in rural area amounted to 1.35 billion yuan in 2004, which was equivalent to the annual salary of nearly 30 percent of rural teachers.³⁰ The social welfare system not only is confined to urban residents, it is also unavailable for migrant workers who work in the cities but nonetheless retain their 'rural residency'.³¹ The lack of access to a properly functioning and comprehensive social security system has inevitably caused rural residents to regard land as their main and only security. As a result, not only are rural citizens unwilling to part with their land, migrant workers in the cities are also reluctant to give up their entitlements to land in the villages. According to a survey, the majority of the villagers interviewed indicated that access to off-farm employment by no means constitutes a sufficient condition for farmers or villages to give up their rights to land.³²

Right of access to land is even more prominent in areas where off-farm employment opportunities are lacking or minimal. Despite the boom of village and township enterprises in the 1980s which provided hundreds of thousands of job opportunities to rural residents, many have since been closed down due to a slowing growth rate, declining profitability, growing losses and the impaired ability to absorb surplus labour.³³ Land, being scarce and immovable, is an ideal source of social security for those who do not enjoy any of the modern forms of security that are enjoyed by urban

²⁸ Niu Ruofeng et al., 2004, pp 26-28. Having said that, things are starting to improve as the Chinese government have introduced some reforms recently that aim at transferring some burden away from rural residents. The reforms are, nevertheless, piecemeal and not all of them are effective. See below for more discussion.

²⁹ Ibid.

³⁰ Ibid.

³¹ This is the 'hu kou' system where everybody is given one of the two types of residency, namely rural and city. This was adopted by the Chinese government to avoid great influx of rural citizens to towns and cities, and to prevent over-burdening the social security system in the urban areas.

³² Kung, James K.S., 2000

³³ Whiting, S., 2001, p 288. Employment from township and village enterprises (TVEs) remained steady since 1993, and the total number of TVEs had declined from about 25 million 1994 to around 21 million in 1999, Clarke, Donald, 2003, p 101.

residents, namely free education³⁴, subsidized healthcare³⁵, pension³⁶, unemployment benefits and so forth. Collective ownership arguably makes sure that land does not fall into the hands of a few people and subsequently deprive others of their vital means of security. It is said that given the current situation in rural China, where the value of social security has outweighed economic consideration of land value, it is inappropriate or unsuitable to apply the principles of the free market.³⁷ However, this heavy reliance on land to provide long-term security to households has come at a great cost, namely an extremely rigid land market as all land is tied up with hundreds of thousands of household units who are unwilling to give up the land.

The third land use related concern is the uncontrolled influx of the rural population into towns and cities. This is a serious concern of the government as it is worried that mass-migration from rural areas to the city could potentially collapse the urban social and economic structure, including its social welfare services. The Household Registration Regulation was adopted in 1958 to control rural-urban migration. Despite the impressive economic and social changes that have taken place in China in the past three decades, the ‘*hu kou*’ system is still a defining feature of China’s rural community and economy. The ‘*hu kou*’ system not only enables the government to control internal-migration, it also ‘allows’ the cities to reduce the costs of providing social services for city dwellers by excluding non-urban households. Land use control complements the ‘*hu kou*’ system in restricting internal-migration. Under collective ownership, entitlement to land is based on the residency of the individuals, hence

³⁴ Since 2006, the Chinese government has introduced a new ‘nine-year free education’ reform in rural area, where school fees are exempted for primary and secondary students. The first phase of reform was carried out in the Western region, and was gradually spread to the Central and Eastern region, *Wen Jiabao: The Nationwide Abolition of the Nine-Year School Fees of Rural’s Voluntary Educational System*. 5 March 2006.

³⁵ Like education, the Chinese government has also introduced some positive reform in rural healthcare system. For example, it introduced the New Rural Co-operative Medical Scheme where the government reimburses part of the health care bills. This Scheme is reported to be well received by the people, Bristow, Michael. 27 June 2007. Furthermore, in January 2008, the government has announced that it will introduce a universal national health service and promote equal access to public services by year 2020. This is akin to the National Health Service in the UK, Chen Shirong, 7 January 2008.

³⁶ Unlike the healthcare scheme, a special pension scheme that was introduced to target rural households whose land had been requisitioned by the government has not worked as expected. Under this scheme, those who are 60 or above pay 30 yuan per month, those who are between the age of 16 and 60 pay 40 yuan per month, and a 40 yuan top-up is paid by the government. Those who contribute can receive 80 yuan per month when they reach above 60. However, in places where this scheme is being experimented, it has not received widespread support from the residents mainly because they are of the opinion that contribution is not matched by the pension payment; or in other words, the payment is too little, Wang Xueliang and Su Xiaoxuan, 17 September 2007.

³⁷ Wen Tiejun, 9 May 2004

limiting the mobility of rural residents. Furthermore, land use transfer is also restricted in the sense that the law and local policies still give preference to people from the same village.³⁸ This means that more often than not individuals do not have access to social and economic security outside the collective realm, which is a deterrent to migration out of the rural collective. This again reinforces the tie between residency and land use rights.

China has proposed to consider ending the residency permit in 11 provinces, mainly along the developed eastern coast.³⁹ This proposal not only addresses the issue of the widening wealth gap between the city dwellers and rural households, it also seeks to bring justice to millions of migrant workers who live in the cities without legal documentation who are denied access to welfare services in the cities.⁴⁰ In reality, given the huge social and financial implications of abolishing the '*hu kou*' system, it is very likely that any such a move will be opposed by the governments in the cities. Nevertheless, the '*hu kou*' system has recently been relaxed in some places. In 2001-2002, locally set 'entry conditions' started to replace the migration quota in small cities and towns.⁴¹ These 'entry conditions' included the educational background, skills and age. Conversion from rural to urban residency was available to people who have fulfilled the 'entry conditions'.⁴² Relaxation in the '*hu kou*' system is particularly important for eastern provinces where the demand of migrant labour is high.

The fourth issue that is used to justify collective ownership is the unfamiliarity with the market and lack of market infrastructure in rural China. Like many developing countries, there is a real concern that the rural population, especially farmers, may not be able to engage in meaningful market transactions (here it refers to the private land market) due to lack of knowledge or skills. This is compounded by the lack of market information and other facilities such as road, transport and telecommunication. Many

³⁸ According to a study, village boundary does exert great influence on land exchanges. In particular, it was found that village authority exerts more control on outflow of land (renting out) than inflow (renting in), Qian F.X., Ma Q. and Xu X. 2005, pp 1068-1069.

³⁹ Rural Chinese May Get City Rights, 2 November 2005

⁴⁰ According to Xinhua news agency, there are about 87 million people living in areas where they did not have permanent residency rights, *ibid.*

⁴¹ Wang Feiling, 2004, p 129

⁴² *Ibid.*

of the rural population still live in remote mountainous areas where access to the market is restricted. In addition, rural land market in China still faces a number of important obstacles, such as tenure insecurity, non-market valuation of land, lack of a properly functioning institution, lack of market information, lack of effective supervision and so forth.⁴³ Privatisation of land is unworkable and undesirable in the absence of a properly functioning market system (and institution). This is because it will arguably expose rural households to exploitation and abuse.⁴⁴ The difficulties faced by the masses following privatisation of land after the dissolution of the Soviet Union in the 1990s provide a good lesson.⁴⁵ It has generally been agreed that the complications induced by the reforms to privatise capitals in the former Soviet Union were partly caused by institutional failure. When the planned economy system was brought to an abrupt end before a working institution for the market system was established, a vacuum was created which caused productivity to fall and subsequently the recession.⁴⁶ As a result, until the rural population is ready, collective ownership of land can put off unwanted risks and exploitation caused by the privatisation of land.

In addition to the social, economic and political reasons given above, it has also been argued that collective ownership is the best regime for land with certain characteristics due to the physical nature of the land and its uses. This is typically argued in the case of forestland and grassland, whereby due to their unique characteristics, they may not be suitable even for privatised usufruct rights, let alone ownership.⁴⁷ It is argued that forestland is best managed as a whole ecosystem rather than fragmented plots. This is particularly true with regards to protection forests whereby its importance is in the form of ecological services, such as the prevention of soil erosion and preservation of biological diversity. By fragmenting forestland into hundreds of small plots managed by different households, it will impede effective management of the ecosystem, and may even be destructive to the forest structure.

⁴³ Cheng Yunxing, 2004, pp 109-114.

⁴⁴ For example, without proper institution like impartial and effective courts, private rights will not be protected; and without the correct market information, individuals will not be able to make rational decisions.

⁴⁵ Clarke, D., Murrell, P. and Whiting, S., 2006

⁴⁶ Kolodko, Grzegorz W., 1999

⁴⁷ Schwarzwälder, B. et al., 2001

Furthermore, forest management can be costly compared to arable land, and requires specialist skills and knowledge. Tree planting and maintenance may require large initial investments and subsequent professional care that ordinary farmers may lack. These are legitimate concerns as not every farmer household will have the necessary resources and skills to ensure that forestland is managed in sustainable and acceptable ways.⁴⁸ In addition, the investment period is longer in the case of forestland compared to arable land. While crops are harvested once, if not twice, every year, by comparison, trees may take a few decades to grow and the gap between each harvest may take years. The long investment period may not be appreciated by farmers as the risks they have to face are high. The lack of profit is also a reason why individual households may not have the incentive or motivation to manage forestland properly. Chapter One has shown that due to the high taxes and charges, timber production is not profitable. It has also pointed out that the compensation scheme for ecological services is still at an early stage and is clearly inadequate. Without sufficient financial rewards, it is valid to assume that investment from individual households will be half-hearted, if not lacking. As a result, this may lead to the neglect and mismanagement of forestland. Collective ownership and management of forestland is hence deemed more appropriate as it can coordinate efforts to make sure that at least the minimum level of investment is provided.

Lastly, many examples have been produced to show that collective management of forestland is as, if not more, successful than the household contracting out system. These ‘success stories’ range from the traditional management arrangements of indigenous people⁴⁹ to more modern innovative measures adopted by market-aware communities.⁵⁰ Due to the lack of detailed legal provisions on how collective forestland should be governed or managed, local communities have had a free hand to experiment with different types of arrangements that were deemed to be the most suitable to the local conditions.⁵¹ This flexibility has produced creativity and

⁴⁸ These concerns have actually been voiced by the farmers themselves, and were reasons why the initial contracting out of forestland management had not worked properly in many places, *ibid.*, pp 29-34.

⁴⁹ Lai Q., 2003; Kenji Kitamura and Guanxia Cao, 2003

⁵⁰ One of the most well-known is the SHIFT (Shareholding Integrated Forest Tenure) in Fujian Province, Song Yajie et al., 1997. Other share-related arrangements can be seen in Schwarzwälder, B. et al., 2001. For more examples, see Li Weichang, 2003

⁵¹ Bruce, J., 1999

innovation that has made collective management in some places successful; however, the flexibility has also induced inconsistencies and opportunities for abuse.⁵² Most have agreed that it is time to inject more certainty into the system by introducing relevant laws.⁵³ In support of the collective management regime for forestland (and grassland), many have urged the lawmakers to differentiate arable land from non-arable land (namely forest- and grassland), and provide nationwide implementation of the HRS only for the former.⁵⁴ It is argued that collective management is still preferred to the HRS in the case of forest and grassland.⁵⁵ It is, however, accepted that the collective ownership and management regime does not work in all types of circumstances. There are preconditions that must exist in order to ensure robust and long-term collective management institutions. These preconditions are: clearly defined boundaries; congruence; collective-choice arrangements; effective monitoring; graduated sanctions; effective conflict-resolution mechanisms; and minimal recognition of rights to organise.⁵⁶ It is reasonable to assume that not all these preconditions would be met in most places, and that imperfect forms of collective ownership are being practised throughout China. The issue of collective management of forestland will be discussed in more detail in Chapter Four.

2.3 Rebuttal of Justifications

The preceding paragraphs outline the justifications and ideology of collective land ownership in China. They demonstrate obvious and serious concerns related to land use and land holding in rural China. These concerns are voiced by academics and politicians alike to argue for the need to maintain the status quo. However, there are questions as to whether or not this view is correct. Some of the justifications may themselves be wrong; or even if the justifications are valid, collective ownership of land may be the inefficient or undesirable way to meet these concerns. The following discussion presents some of these arguments, and leaves open the question as to

⁵² Ibid.

⁵³ However, there is disagreement over what type of regime should be encouraged by the law. While some have advocated further strengthening of private rights, some have argued for the opposite. See Cheng Yunxing, 2004, Hyde, William et al., 2003, and Schwarzwälder, B. et al., 2001

⁵⁴ Schwarzwälder, B. et al., 2001, pp 54-56

⁵⁵ Ibid. This is in contrast with the recent large-scale forestland reform in many parts of China, which aims at devolving more forest use rights to individual households. The reform will be discussed in more details below.

⁵⁶ Ostrom, E. , 1999.

whether or not it is now wise to move from (*de jure*) collective ownership to a more secure private rights regime.

China has been undergoing rapid changes for the last two decades. Since then, many things have changed as the government not only opened up its door to the world, but had also been transforming its political and economic rules at home. China became a member of the World Trade Organisation in 2001, and is a party to many international treaties. Membership of the WTO means that China has to create a favourable investment environment for foreign investors, which includes providing economic and political rules to facilitate the necessary changes.⁵⁷ As a result, it is inevitable that private rights are allowed to flourish. Nevertheless, as explained above, politically China is still a communist country and the government has always said that further modernisation should have the ‘Chinese characteristic’⁵⁸, meaning that it has to be adapted to suit Chinese society.⁵⁹ The approach of the Chinese government so far has been cautious. This is described in China as the ‘crossing the river by touching the stone’ approach.⁶⁰ As will be seen in the last section below, the cautious approach of the Chinese government has created a vacuum in the enforcement of land ownership rights against government officials and also village cadres whose predatory behaviour has caused hardship and injustice to the collective members (who although are the *de jure* owners of their land nevertheless lack effective representation to protect their rights).

In relation to the egalitarian approach to the allocation of land, it is arguable that it is gradually losing its significance mainly due to the fact that a large part of rural

⁵⁷ In the 1990s, the Chinese government has passed many commerce-related laws that aim at facilitating the growth of domestic businesses, such as the Company Law (1993), Securities Law (1998), Law of Partnership Enterprise (1997), Insurance Law (1995), Law on Commercial Banks (1995) and Law of Negotiable Instruments (1995), Chen, Albert, 2004.

⁵⁸ Deng Xiaoping gave speeches on ‘socialism with Chinese characteristics’ during his southern tours in the early 1992. This concept provided the opportunity or platform for China to embrace capitalist market system after 1978. The fifteenth National Party Congress of the Community Party of China (CPC) promoted Deng Xaioping’s theory on socialism to become one of the dominant components of the official ideology of the CPC in 1997, *ibid.*, pp 82-83.

⁵⁹ The guiding ideology of Chinese Constitution can shed some light on what it means by ‘Chinese characteristics’. The Four Basic Principles that form the foundation of the Constitution constitute: the insistence on the socialist road, insistence on the people’s democratic dictatorship, insistence on the leadership of the CPC, and insistence on Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory (or the ‘theory of the three representations’), *ibid.*, pp 49-50.

⁶⁰ 摸石过河, Zhang Daowei, 2003, p 93.

households' income in many places comes from off-farm employment. Since there is no control over how much income one can obtain from off-farm employment, there is increasingly a disparity between households that have off-farm jobs and those who do not.⁶¹ Hence, it has to be questioned whether or not it is wise to still cling to the egalitarian approach in relation to land allocation, whilst in reality there is no longer social equality in rural China. Because egalitarian allocation of land results in fragmentation of plots and inefficient use of land resources (mainly due to tenure insecurity and infrequent land transfer), it would be unfortunate if the practice is kept even if the potential to achieve its aim has been greatly diminished. In addition, it also involves the more fundamental question of whether social equality and justice can be best achieved by giving egalitarian access to factors of production such as land. The issue of social justice has been explored intensively in the West.⁶² Contemporary political philosophers and politicians generally agree that some form of social justice needs to be upheld.⁶³ However, most of these 'socialist' states⁶⁴ endorse the use of income redistribution⁶⁵ (via tax and social welfare systems) rather than rigid control of access to scarce and non-moveable factors of production such as land. In a market economy, income redistribution seems to be a more effective and less draconian method to provide social justice as it allows factors of production to be freely exchanged and put in the most efficient use. If China has in fact chosen to embrace the capitalist economy, it is inevitable that it will find its restrictive control over rural land comes into conflict with the ethos of the free market.

It has been pointed out above that a high rural population (with limited land resource) requires a centrally controlled and managed ownership regime. However, it is questionable whether such a system helps to reduce the pressure on land; in fact, it is

⁶¹ According to statistics, the average annual income of a migrant labour was 5808 yuan in 1998. In a survey involving 20 villages in the Jiangxi Province, it was found that the average annual income of a farmer in relatively high productivity area was 2260 yuan while the average annual income of a farmer from low productivity area was only 584 yuan, Zeng Shaoyang and Tang Xiaoteng, 2004, p 123.

⁶² One of the most famous theories of justice in the Western academia is by John Rawls. His book *A Theory of Justice* (1971) revived the discussions on how to allocate and share the world's resources among people of the same and different generations. See Chapter One above.

⁶³ See Chapter One above.

⁶⁴ The 'socialist' states here refer to democratic countries in the Western world, and are different from the 'socialist' authoritarian country of China. Most developed 'socialist' states can be found in Western Europe where income redistribution is carried out in a liberal and democratic setting.

⁶⁵ Contrast this to the libertarian political theory that does not advocate income or property redistribution; instead, libertarians advocate for a minimal 'night-watchman' role of the state, Kymlicka, Will, 2002, pp 102-165. See Chapter One above.

strongly argued that by tying its rural populace to rural land via the allocation of land based on residency, the Chinese government has in fact exacerbated the problem of land use pressure. Also, by strictly controlling land use the government is addressing the ‘symptoms’ (high people to land ratio) rather than the causes (tight rural-to-city migration control and inefficient land use) of the problem. Although the ‘one child’ policy has helped to prevent the situation from getting worse, there are other alternatives that can help to reduce the population pressure in rural China. The government should both relax migration control (in particular the ‘*hu kou*’ system discussed above) and create more off-farm employment opportunities (by encouraging investment in towns and villages) so that the population pressure on agricultural land can be reduced in a way that does not compromise the efficiency of land use.

Closely related to the problem of the population-land ratio is the concern of protection of agricultural land from further encroachment from industrialisation and urbanisation. However, it can be argued that what is needed is better enforcement of existing laws rather than creating incentives for government officials and village cadres to expropriate land.⁶⁶ In reality corrupt officials seize productive land wantonly for non-agricultural use only to abandon it later.⁶⁷ In addition, productive land is also abandoned in large scale by farmers or households who do not want to get involved in agricultural production due to low profitability.⁶⁸ On the other hand, the policy of self-sufficiency is also disputable. The current strong economic growth experienced

⁶⁶ As already explained above, the conversion of agricultural land into non-agricultural land involves the state taking the land from the collective at non-market price and then selling it on at market price. The difference between the two prices makes it a very lucrative venture.

⁶⁷ Niu Ruofeng et al., 2004, p 57. One such cases took place in Guangdong Province, Maichen Town in Xuwen County. In 1997, the township government wrote to the county government to seek approval to build a fruits and vegetables market on the agricultural land owned by the collective. According to the plan, the new market would create 7000 new jobs and the annual tax payable to central government would be 2 million yuan. The county government granted the permission to requisition 42.3 mu of land. Subsequently, the township government issued a notice that 90 mu of land was to be requisitioned at a certain date. The project was faced with strong resistance from the residents and violent clashes took place between the crowd and township government representatives. Many residents were also put in jail. Until now, the land that had been requisitioned had so far been left unattended and no market had been built. It has been pointed out that the township government has pocketed around 1 million yuan from this whole affair. The township government entered into an agreement with the developer with whom they were doing business that the government would get 30 percent of the profits from the resale of the land by the developer. It was decided that compensation to the residents was 40,000 yuan per mu, while the resale price was 880,000 yuan per mu. The extremely huge profits from land requisition and resale prompted the township government to act in a predatory and wasteful manner, Zhou Qiren, 2004, pp 99-101.

⁶⁸ Zeng Shaoyang and Tang Xiaoteng, 2004, p 55; Chen Xiaojun et al., 2003, pp 73-74.

by China inevitably raises the value of rural land in many parts of the country, which in turn increases the opportunity cost of retaining land solely for agricultural purposes. In addition, China has to carry out more intensive cultivation to support its increasing population, which may put undue burden on its environment. The credibility of the self-sufficiency policy was further undermined by the accession of China to the WTO, as trade with other countries is freed up even more quickly.⁶⁹ As one author pointed out, China should now 'focus on raising rural incomes rather than maintaining grain self-sufficiency'.⁷⁰ A relaxation in its self-sufficiency policy would also loosen up state's overly tight control over agricultural land.

It has also been pointed out above that rural land is subject to strict control because land is more often than not the only social security that rural residents possess (due to the lack of a comprehensive welfare system). However, the unique features of land make it extremely costly to tie it up not only for one particular use, but also to hundreds of thousand of small households when alternatives exist to provide the necessary social security to its rural citizens. The high value of land stems from the fact that it is scarce, immovable, available for many uses, and long lasting. The market value of land in China has increased since three decades ago when the market economy was first adopted; this is particularly true about land in the Eastern coastal provinces, which are where many of the most developed cities in China are situated.⁷¹ Land scarcity has also greatly increased the value of land: there are now 50 million farmers in rural China more now than fifty years ago.⁷² Hence, the opportunity cost of using land as the main form of social security has also increased.

Furthermore, the use of land as social security for the rural population can be counter-productive. It could be relied on as an excuse for delaying setting up a proper social security system in the countryside and could potentially amount a vicious circle. So long as land is perceived as the only social security by millions of households across China, land (and land use) transfer and exchange will be severely limited. This will prevent the land market from maturing and make land use inefficient. In addition, it

⁶⁹ Niu Ruofeng et al., 2004, p 89.

⁷⁰ Rozelle, Scott and Huang Jikun, 2005, p 13

⁷¹ For example, government income from the sale of land has increased from 26,000 yuan per mu in 2000 to 84,000 yuan per mu in 2001, Niu Ruofeng et al., 2004, p 59.

⁷² Rozelle, Scott and Huang Jikun, 2005, p 13.

has been pointed out that many rural citizens now do not regard land as their main social security, mainly due to the availability off-farm employment opportunities and the low profitability (and high risk) of agricultural activities.⁷³

Another important justification given above is that collective ownership complements (accidentally or otherwise) the '*hu kou*' system. Collective ownership of land ties rural residents to the land and makes rural-urban migration less desirable for those who do not want to lose their entitlements to land. The '*hu kou*' system has attracted criticisms from various fronts in recent years. Some see this as the 'peasants apartheid',⁷⁴ because citizens with rural household registration do not receive equal treatment as their urban counterparts in relation to access to jobs in the cities and the welfare system. There have been many instances whereby either the workers did not get their salaries⁷⁵, or the children of these workers were neglected due to the discriminatory system in the city.⁷⁶ The division between the cities and rural parts of China has become larger since the economic reform in the late 1970s⁷⁷, and is partly due to the rigid '*hu kou*' system. In addition, the '*hu kou*' system also ties a large part of China's population to its rural land, thus inflating the problem of land pressure.

Apart from adding to the problem of land pressure, tying its population to rural land also has other negative implications. As land is allocated according to residency, those who would want to find work or get education in the cities find themselves in a

⁷³ Xu Zhiyong, 2005.

⁷⁴ Luard, Tim, 10 November 2005. This article reported that the Chinese government was considering abolishing the residency permit system in 11 provinces. However, in another news article, *China 'Facing Migrant's Underclass'*, 1 March 2007, reported that many migrant workers are still denied 'rights to adequate health and education services and are vulnerable to exploitative working conditions'.

⁷⁵ In fact, the non- or delayed payment of salaries has become a common problem among industries that hire migrant labour. Some provincial governments have passed laws that aim at tackling this issue. In some cities, local governments have adopted policies to set up funds to help workers that have not been paid. Guangdong Province Considers Adopting Salary Payment Regulation, 17 December 2003.

⁷⁶ The two main concerns related to children of migrant workers living in the cities are education and health care. In most places they are still segregated from the children with city registration; as a result, schools for mainly migrant workers' children have sprung up in less desirable areas of the cities. *China 'Facing Migrant's Underclass'*, 1 March 2007.

⁷⁷ The Gini coefficient (which is an internationally recognised measure of income disparity in which "0" reflects perfect equality and "1" represents inequality) in China has risen from .18 in 1978 to .36 in 1990 and to .52 in 2002. In comparison, the coefficient for Scandinavian countries is .25 and .4 in the United States. It is said that even though some South American and sub-Saharan African countries have higher Gini coefficient, the effect is felt more keenly in the PRC due to the fact that egalitarianism and commitment to the welfare of the workers and peasants were the founding principles of the new PRC. Teufel Dreye, June, 2006, *China's Political System: Modernisation and Tradition*, 5th Edition (USA: Pearson Longman) p 161.

dilemma: on the one hand, there are more opportunities in the cities; but on the other hand, they may not want to give up totally the land and their rights to land before they have established themselves in the cities. There are serious and long-term consequences resulting from this inflexibility or immobility. One of these occurs at a personal level: it has deprived rural residents of the right to seek work anywhere without the fear of losing something substantial. Furthermore, there have been cases whereby in order to keep the entitlement to land in the village, old parents volunteer to work in the fields so that their children can look for opportunities in the cities. In many families, there are men and women who are in their sixties or seventies who still toil the land not for commercial production but to retain the entitlement to the land for the family.⁷⁸ They have to show that they are still 'using' the land so that the land is not taken back by the collective. On the national level, tying up its rural population in the rural area and in agricultural production has huge repercussion on China's economy and its future growth. Apart from causing millions of labour surplus in the rural area and adding pressure to the land, it also ties millions of its population to the primary sector and makes transition to secondary and tertiary sectors more difficult and slower, especially in its least-developed regions.

In relation to the argument that low market exposure in rural China requires some form of collective ownership, it may not be entirely true. It is arguable that current Chinese rural households have had more exposure to the market system than their counterparts in the ex-communist states of the Soviet Union in the 1990s. The exposure has come from two fronts: the establishment of township and village enterprises, and migrant labour. Even though many township and village enterprises did not survive after the initial years, they had in one way or another introduced elements of the market system (known as local corporatism) into the rural area.⁷⁹ In addition, recent mass rural-urban migration has also helped to accelerate the introduction of the market system into rural China. Many of the young migrant labourers have obtained entrepreneurial skills from the cities and brought them back to their villages.⁸⁰ One example of farmers' involvement in the land market is the establishment of houses with 'small' home ownership or estate right. This refers to the

⁷⁸ Zeng Shaoyang and Tang Xiaoteng, 2004, p 63

⁷⁹ Whiting, S., 2001; Li Ping, 2005

⁸⁰ Zeng Shaoyang and Tang Xiaoteng, 2004, p 93

situation whereby commercial houses are built on collective agricultural land and are then rented out for profit.⁸¹ This is against the law⁸², which prohibits agricultural land being converted into non-agricultural use without going through the state mechanism (which basically means being requisitioned and subsequently sold on by the government).⁸³ This phenomenon can be found in rural or sub-urban areas near big cities both in the eastern and western parts of China such as Beijing, Chongqing and Chengdu.

Thus, it seems that China's rural population is not totally unfamiliar with the market system. What are perhaps lacking are the market institutions that would enable and facilitate market transactions to be carried out properly. These include not only the establishment of institutions that oversee and facilitate market transactions, but also a set of regulations that set out the 'rules of the game'. More importantly, property rights must be made unequivocal and protected against arbitrary confiscation by the government.⁸⁴ It is vital that the necessary market institutions are established before a land market is pushed forward. In fact, it has been proposed that instead of prohibiting the 'small' home ownership rights, the government should create a 'land exchange market' that allows collective rural land to be sold for commercial housing purposes.⁸⁵ In short, there is evidence that shows that China's rural population has already started to embrace the market system; it is now mostly down to the government to start building the network and institutions.

It has also been argued that due to the unique characteristics of forestland, collective ownership and management may be more suitable and desirable. However, it is arguable that the choice of ownership for forestland would depend on several factors

⁸¹ Ye Tan, 23 June 2007

⁸² Despite the illegality of these houses, they prove to be very popular among low-income urban residents and partly solve the housing problems in the cities. However, there have been cases where these houses are subsequently pulled down by the government. There have been calls for the government to legalise the titles of these houses because of their social and economic significance, Qiu Feng, 23 June 2007 and Wang Xiaoqiao, 11 October 2007.

⁸³ See Chapter Two above.

⁸⁴ Donald Clarke has argued that protection of rights from government interference is one of the main reasons why there is economic progress in China generally. He made a distinction between contract rights and property rights. The former is where people have the rights to enter into contracts and to have their rights protected. The latter refers to the fact that property is safe from arbitrary confiscation from the government. According to him, 'a reasonable assurance to would-be investors that the fruits of their investments will not be confiscated unpredictably is far more important to economic development than a formal legal system that enforces contract rights', Clarke, Donald, 2003.

⁸⁵ Wang Xiaoqiao, 11 October 2007

other than just the characteristics of the land themselves.⁸⁶ There is no single model of management system for any particular type of forestland; the success of a management regime greatly depends on the form of governance and its incentive mechanisms. An effective reward and sanction system is particularly important as it would ensure that the rewards match the costs involved. Costs that are particularly relevant are the costs of gathering information, defending boundaries, implementation and monitoring. Different management regimes may entail different calculations of cost. For example, the cost of defending boundaries may be lower in a collective management regime but the cost of regulating the use may be higher than in a private management system.⁸⁷ However, even this kind of assumption is not absolute as the overall cost of management depends on the 'receptiveness' of the important players to the arrangements within the regime. For example, social capital built around traditional beliefs and norms may be absent in a modern rural community where residents do not share (or are oblivious to) a single tradition or custom. Costs of collective management in the former may, in most cases, be lower than the latter. Another example would be the presence of an open and 'user-friendly' legal framework within which coordination between individuals can be achieved with relatively little cost.⁸⁸ As we shall see, collective management of forestland had not been successful during the collective era; there are also serious failings inherent in the current collective governance structure in rural China that give rise to inefficient land use and opportunity for abuse of power.

Lastly, despite the few examples of a successful collective forest management regime, the latest forestland reform shows that things are not all rosy. Due to the significance of this reform, it will be discussed in more detail in the next chapter. It suffices to say that the forestland reform involves not only changes in land use rights but also involves adjustments in other aspects of forestry such as taxation and land transfer. The catalyst for this last reform was mainly the low productivity and lack of investment by households in forestry.⁸⁹ Many collective entities lack the necessary resources to carry out forestry activities. Furthermore, it is also due to dissatisfaction

⁸⁶ Ostrom, E., 1990

⁸⁷ Ostrom, E., 2000, p 343

⁸⁸ An example of the impacts of the different legal environment on the types of resource management can be found in the case of groundwater management in different locations in the State of California, see Ostrom, E., 1990, pp 103-139.

⁸⁹ See Chapter Four below.

among rural households in that some village leaders were abusing their position to make profit out of collective forestland.⁹⁰ Many of these problems are caused by the inherent difficulties within the collective system itself, such as the lack of a clear definition of 'collective' and the usurpation of power by local government.⁹¹ In addition, one of the most-cited examples of successful collective management based on the share-holding system has also failed to hold up in many places.⁹²

So far, the above has shown that there are indeed concerns that are social, economic and political in nature that can be used to justify a collective ownership regime for China's rural land (specifically forestland). At the same time, however, these concerns are not conclusive: there are either other ways to meet the concerns or the concerns are themselves not justified. Having said that, some of these concerns are serious issues that need to be addressed before any legal reform is carried out in relation to land tenure. Social reforms are needed if issues like social welfare and population pressure are to be addressed. Without first dealing with these issues, which are usually the causes of the complications faced by rural China today, mere legal reform of property rights will not be sufficient or desirable.

3. Productivity and Property: The Household Responsibility System

Having looked at the justifications (and their rebuttals) of collective land ownership, this section will trace the reasons behind the major institutional change that took place in rural China in the 1970s: the establishment of the Household Responsibility System. Apart from stimulating agricultural production, the introduction of the HRS acted partly as the catalyst for the new wave of rural industrial sector when the overall political and economic atmosphere became more open. The HRS shows that in the case of China, privatisation of land use rights did have a positive impact on land use efficiency. Furthermore, rural welfare and income have also increased following the economic growth that was induced by the HRS.⁹³ During the early stages of the HRS, agricultural production efficiency had been greatly boosted;⁹⁴ tree planting activities

⁹⁰ Liu Chang and Dong Wei, 24 August 2006

⁹¹ These will be discussed below.

⁹² This refers to the share-holding system discussed in Section 2.4.2 of Chapter Two above.

⁹³ See Chapter Two above.

⁹⁴ See Chapter Two above. However, since then crop production has not been consistent mainly due to the price control and the procurement system put in place by the government. When prices were

by households have also increased since the inception of HRS, and currently China has the largest area of plantation forests, most of which are in its southern region where the collectives own most of the forests.⁹⁵ However, fragmentation of land and lack of capital and technology have been cited as grave concerns for household management of forestland in China.⁹⁶

The HRS was adopted in the late 1970s when crop production was very low⁹⁷ and the people experienced extreme poverty. However, the conditions of production such as technology and capital had not changed⁹⁸, nor had there been an unprecedented surge in demand.⁹⁹ What actually took place at that time was that for the first time, the farmers were given the opportunity to react freely to the situation. The early collectivisation process was imposed on the farmers by the government, and had then been kept in place by the government with an iron fist. When the control was relaxed, farmers seized the chance and demanded a change. Hence, the catalyst of change in the late 1970s from collective management to private use rights was the change in the political and social environment in Chinese society.¹⁰⁰ As we shall see below, the political change was in turn the result of the government's reaction towards low productivity and high enforcement costs. The change in land use arrangement took the shape of a more private-oriented right, whereby households were given not only the usufruct right, but also ownership right of things planted on the land. Furthermore,

artificially suppressed, farmers did not have the incentives to produce more crops, Niu Ruofeng et al., 2004, pp 72-75, and Lu Xueyi, 2002, pp 74-82. For timber production however, the question of efficiency is overshadowed by the main restrictions imposed by the government, namely the logging quota and logging ban.

⁹⁵ In 1995, China has the world's largest plantation forest area, namely 21.4 million ha, Brown, Chris 2001. Since 1997, the Chinese government has launched more large scale tree-planting projects (the NFPP and SLCP) that would have increased its forestland area by millions of hectare. Between 2000 and 2005, China posted an overall increase in forest area of more than 4 million ha per year, *Asia-Pacific Leading the World in Forest Plantation Development*, 13 April 2006.

⁹⁶ Ferguson, I. and Chandrasekharan, C., 2005, p 73. However, the gravity of these concerns has not been reflected in the case studies, which show households' ingenuity in setting up informal groups to help reduce the cost, and which also show that the main concerns faced by farmers are in fact the logging restrictions imposed by the government.

⁹⁷ Agricultural production fell consistently between the period between 1974 and 1977. Production in 1977 was even lower than production in 1961 when China was still suffering from the great famine, Zhou Qiren, 2004, pp 26-27.

⁹⁸ The factors that influence the context of property rights are discussed in Demsetz, Harold, 1967, pp 347-359, and Libecap, Gary, 1989, pp 16-19.

⁹⁹ A boost in fur trade (or surge in demand) was cited by Harold Demsetz as the main factor that triggered the change in property rights arrangement among the North American tribe, Demsetz, Harold, ibid.

¹⁰⁰ In 1978, Deng Xiaoping, who served as a de facto leader of China at that time, launched the socialist market economy reform in China that essentially opened up parts of China and its economy to the world.

over the years, the law has not only recognised the private-based rights, it has also actively promoted the creation of such rights and built in safeguards that further expand the remit of the rights (see Chapter Two above). This was largely a result of what the government perceived as the wish of the people. The HRS was not a top-down decision; rather it started off as a ground movement and was gradually accepted by the government.¹⁰¹ So, the next question to be probed is why was it that the rural residents in China preferred a more private-based approach to a collective- or state-based system.

3.1 Mismatch of Reality and Ideology

Since the adoption of the HRS, many analysts and academics have written on this subject.¹⁰² Many have welcomed the change and justified the HRS as a step towards more rational management of rural land, which has benefited not only productivity but also the people's standard of living.¹⁰³ Generally, during most of the collective era, people worked in the collective fields and owned none of the production capital. All the crops produced belonged to the collective and the collective in turn followed the order of the state. Furthermore, allocation and use of labour were also determined by the government. The state dictated what to produce, how much to produce and how food should be distributed; the collective were allocated tasks and these tasks must be fulfilled.¹⁰⁴ In effect, the collective was the 'administrative arm' of the central government, which also controlled the price and the market of agricultural products. In return for their contribution, individuals and households were allocated grains and provided with public amenities. In a nutshell, people lacked the 'exit right' and the right to 'make voice'.¹⁰⁵

¹⁰¹ As pointed out in Chapter Two above, when the HRS was first implemented in Anhui Province, government's policies were unfavourable to it. Even though the outcome of the Third Plenum of the Party's 11th Central Committee encouraged flexibility and local experimentation with different regimes, the HRS was never expressly approved by the government. The Central Committee (through Central Document No. 75) only officially endorsed it in 1980, and it took twenty years for the government to include it in the law, which was the Land Management Law revised in 1998, see Chapter Two above.

¹⁰² Du Runsheng, 2005; Hyde, William et al. (eds), 2003; Lu Xueyi, 2002; Liu Fengqin, 2005; Liu Jinhai, 2005; Niu Ruofeng et al., 2004; Whiting, Susan, 2001; Zhou Qiren, 2004; Ho, Peter (ed), 2005

¹⁰³ Ibid.

¹⁰⁴ For detailed description of an example of the 'chain of command' in agricultural production, see Liu Jinhai, 2005, 70-79.

¹⁰⁵ These terms are taken from A. Hirschman's theoretical concept. 'Exist right' refers to the right to withdraw oneself from a relationship or arrangement; right to 'make voice' refers to the right to communicate grievances and complaints. It was asserted that during the collective era, farmers did not have either the 'exit right' or the right to 'make voice'. Their participation in the collective production

Allocation of food and income during the collective period was supposed to be based on one's contribution towards the team's output; but the reality was that output was gravely insufficient and as a result the collective had no choice but to carry out allocation on the basis of need.¹⁰⁶ This created a situation where people who had worked for their share were treated equally as people who had not. The latter are known as the 'free-riders'.¹⁰⁷ The 'free-riders' problem is prominent in a collective regime where there are opportunities for people to free-ride on the efforts of others. At the heart of the problem is the fact that nobody within the collective can be excluded from the collective benefits, and each person is motivated not to contribute to the joint effort.¹⁰⁸ The presence of 'free-riding' means that the collective benefit will be either not optimum or even absent. During the collective era in China, the problem of free-riding was widespread and this sent out a negative signal to people that labour was not properly rewarded.¹⁰⁹ As a result, more and more people were reluctant to put in effort on the collective land, and due to this the overall productivity had gone down.¹¹⁰ In the end, a situation similar to the 'tragedy of the commons' occurred whereby group productivity suffered, only that in this scenario, the inefficient extraction or use of common resources was caused by 'under-utilisation' rather than 'over-utilisation'.¹¹¹

system did not come from their 'loyalty' to the collective, but rather they did not have the choice either to withdraw or to engage in other economic activities, Zhou Qiren, 2004, p 18.

¹⁰⁶ Liu Fengqin, 2005, pp 114-122.

¹⁰⁷ The problem of 'free-rider' and the theory of prisoner's dilemma explain the difficulty associated with human cooperation. Many social scientists have explored the conditions under which cooperation can be achieved and maintained. According to Russell Hardin (1982), the difficulties of collective action depend not just on the size of the group, but also on the ratio of costs to benefits. Howard Margolis argues that individuals have two types of utility functions, those that favour group-oriented preferences and those that favour selfish preferences. Individuals often make trade-offs between the two. All can be found in North, Douglas, 1990, pp 13-14.

¹⁰⁸ Ostrom, E., 1990, p 6.

¹⁰⁹ Liu Fengqin, 2005, pp 141-146; Zhou Qiren, 2004, p 18.

¹¹⁰ As mentioned above, farmers did not have the choice either to withdraw from the collective organisation or to engage in other types of economic activities. Hence, their only option (to protest against the mismatch of efforts and rewards) was to invest only the minimum effort and time in collective agricultural production, Zhou Qiren, 2004, p 18, and Liu Fengqin, 2005, pp 146-150.

¹¹¹ Chapter Four below discusses common resource management and the related problems, including the problem of the 'tragedy of the commons'.

On the other hand, farmers showed exceptional dedication to the ‘homestead’ plots on which they grew crops and vegetables mainly for their own consumption.¹¹² The differential treatments highlighted the problems of the collective system. Low overall productivity was not caused by the fact that farmers were lazy or incompetent; instead, it was due to the mismatch between effort and reward caused by the property rights arrangement at that time.¹¹³ Farmers not only could not reap the rewards of the effort they put in, they also lacked the autonomy to decide what to plant, when to plant, how much to plant, when to sell and how much to sell for. In modern economies, all these questions are answered by referring to the market, which sends out the relevant information to farmers. A free market exists when things can be sold and bought freely, or in other words, where property rights can change hands freely. During the collective era, individual farmers not only lacked the ability to retain the rewards, they also lacked the ability (or authority) to trade the excesses. This coupled with the ‘free riders’ problem explains why there was no incentive for farmers to invest time and effort on collective land, or to have a long term plan for the continuing use of the land.

3.2 The Costs to the Government

The above situation was putting a huge strain on the governance system and the government budget. Not only was low productivity a concern, the government also had to pour in a lot of resources to monitor and enforce government targets.¹¹⁴ The government relied on the collective to enforce government policies; even with the greatest zeal, in many cases the collective cadres were not able to force everyone to work for the common good due to the reasons explained above. As a result, the cost of implementation was prohibitively high.¹¹⁵ When this happened, the government responded to the situation in ways that would help to reduce the cost.¹¹⁶ One of the

¹¹² In fact, the productivity of the collective land amounted to only 14 to 20 percent of the productivity of the private plots, Zhou Qiren, 2004, p 52.

¹¹³ Ibid., p 12

¹¹⁴ Liu Fengqin, 2005, p 145; Zhou, Qiren, 2004, p 18.

¹¹⁵ Zhou Qiren, 2004, pp 14-16. Implementation costs are greatly influenced by the structure and organisation of the institution. In China, the collective management structure determined the enforcement and information costs of the implementation of government policies. The nature of collective management and entity will be discussed in more detail in the next section.

¹¹⁶ Known by some as a ‘superfirm’, it is argued that a government also behaves like a private firm, and costs and profits are important determinants in a government’s behaviour. This theory, known as the firm theory, was first proposed by Ronald Coase in *The Problem of Social Cost*, see Chapter One above. According to Coase, a firm is an alternative form of economic organisation which could curtail

means available to the Chinese government was to relax its grip on collective production. In fact, as pointed out by Zhou Qiren, the relaxation of collective control coincided with the times when costs incurred by the government were high.¹¹⁷ This happened twice between 1952 and 1982. The first was in 1961 after agricultural production had dropped drastically in 1959 and had prevailed, causing serious famine in China.¹¹⁸ It prompted the government to allow some form of private/household management at that time. Like the HRS, production responsibility was assigned to individuals and the team cadres' only responsibility was to ensure that quotas were met. However, unlike the HRS, the relaxed control was only temporary, and when production started to climb again in 1964 and 1965, the government terminated the responsibility system.¹¹⁹ The second time collective control was relaxed was in 1978 when the HRS was re-introduced.

The reactions of the government can be explained by understanding how an institution responds to social and economic changes. According to Douglas North, economic performance of an institution (a country can be regarded as one of such institutions) is greatly influenced by both its political and economic rules, including the rules on property rights. Political rules usually influence the economic rules (through allocation of rights between the different actors) although the role can be reversed. When political transaction costs are low (such as when there is widespread support for government policy and enforcement is relatively smooth) and the political actors are properly guided (such as when there is adequate access to important information relating to what people need and how to achieve efficient results), efficient property rights will exist, which in turn will result in economic growth. On the other hand, 'high transaction costs of political markets and subjective perceptions of the actors would result in property rights that do not induce economic growth'.¹²⁰ This can be caused by the presence of opposing interests and the problem of information asymmetry. The presence of strong opposing interests increases enforcement cost (as

transaction costs and subsequently increase the value of production by altering and combining rights through the market. A government will also try to look for ways to keep transaction costs to the minimum, and one way to do this is to alter property rights.

¹¹⁷ Zhou Qiren, 2004, pp 14-16

¹¹⁸ According to the statistics, around 30 million died from starvation during the great famine, Zhou Qiren, 2004, p 16.

¹¹⁹ Ibid., p 17.

¹²⁰ North, D., 1990, p 52

the ruler has to either ‘buy off’ the dissidents or push through the reform in the face of strong opposition); while information asymmetry causes the wrong or non-optimum decisions to be made.

Both of these problems plagued the government during the collective era where inefficient political rules limited economic growth. In relation to the former, the government faced ‘silent opposition’ from the people. Although the authoritarian institution set up by the government had control over all factors of production (and their uses), farmers nevertheless still had possession of something that could not be subject to total control by a third party, namely their labour. Hence, farmers were able to show their ‘discontentment’ via reducing either the quality or the amount of their labour contribution.¹²¹ As a result, an institution that had to be enforced at a high cost was created. Secondly, the failure of the centrally planned economy (which covered not only the whole production and distribution processes, but also the use of factors of production) was a clear manifestation of the problem of information asymmetry. It highlighted the impossibility for the government’s planning, no matter how meticulous it was, to gather and produce all information related to production, consumption and also the preferences of its people. Even in a free market society, the problem of information asymmetry still exists mainly due to incomplete information and the subjective perception of the environment by different actors.¹²² This problem was magnified in a system that did not allow feedback and free-flow of information. The ‘suppression’ of China’s economic (and social) growth by its political rules only started to ebb in 1978 when the HRS was introduced. In the decades that followed, economic performance and social development¹²³ in turn influenced the political rules and completely changed the political landscape.

¹²¹ Zhou Qiren, 2004, p 18.

¹²² According to North, there are two particular aspects of human behaviour that are of great importance in an institutional analysis: motivation and deciphering of the environment. He points out that in many cases, individuals are not only motivated by wealth-maximising behaviour but also altruism and self-imposed constraints. Similarly, individuals decipher the environment by processing information through the pre-existing mental conditions and make decisions accordingly. North concludes that the process of decision-making is both subjective and incomplete; since knowledge and the computational power of the decision-maker are severely limited, one must distinguish between the real world and the actor’s perception and reasoning of it. In short, North thinks that the regularised interactions known as institutions may be inadequate to deal with the economic problems at hand. North, D., 1990, pp 22-23.

¹²³ Since the past two decades, the society of China has transformed from a conservative agricultural society into a more vibrant and diverse industrialised and modern society. Alongside the economic growth, people, especially the young generation, have come appreciate more the importance of some

The HRS was the turning point in China's rural development history. It had encouraged farmers to be actively engaged in production as the income they received was more or less commensurate to the investment they put in. The abolition of the procurement system, price control¹²⁴ and agricultural taxes¹²⁵ had all helped to increase incentive for the farmers to produce. The same also happened to forestland, although at a much slower pace. The timber procurement system was officially abolished in 1985¹²⁶, although in 1987, the central government introduced a quota system for both commercial and non-commercial timber harvest. In addition to the relaxation of agricultural production, the new arrangement also solved the problem of 'free-riders' as households now had to rely on their own labour input to survive. As pointed out in the previous chapter, the HRS brought about great increases in productivity and also the expansion of plantation forests. The HRS has always been hailed as a success story not only because it managed to inject the necessary incentives into agricultural production, it has presumably also saved China from potential political and social turmoil as it did not cause sudden and abrupt change to the land ownership structure.¹²⁷

However, there is a danger that the success of the HRS is coming to an end as households now find off-employment more profitable than farming, and new incentives have not been put in place to attract young people to stay in farming. The

basic rights such as right to participate and right to private ownership. The numerous amendments made to its Constitution, Civil and Criminal Codes in the past two decades demonstrate the fast-changing society in China, Chen, Albert, 2004.

¹²⁴ Crops production has a long history of state control, as production of food is seen as a national security issue by the socialist state. Several attempts were taken to liberalise the crop market by the central government from the 1980s to 1990s but each attempt had been met by setbacks: each time when there was a shortage of grain, the government would intervene and control the market and price. However, in 2004, the government adopted a Decision to replace the central administration system with a more efficient entrepreneur-like organisation structure, and more importantly, the grain market is to be further opened up to allow it to become a functioning competitive market. Niu Ruofeng et al., 2004, pp 79-86

¹²⁵ Since 1 January 2006, agricultural tax was abolished and millions of farmers are benefiting from the tax slash. Forestry taxation reform is also being carried out in a few provinces such as Jiangxi, Fujian, Hebei and Guangdong. See Chapter One above.

¹²⁶ However, due to the concern of over-logging, the procurement system was re-established in major timber-producing counties in 1987. All price controls were finally lifted in 1993.

¹²⁷ According to Peter Ho, the HRS has proved that moderate reformers are right on two counts: 1. privatisation of use rights rather than land ownership rights has proven economically viable; and 2. the decision of Chinese government to maintain the Marxist-Leninist principle of state and collective ownership has also avoided large-scale land-related grievances over pre-revolutionary ownership that ruptured many transitional economies, Ho, Peter (ed), 2005, p 12.

current government control over land use is too rigid and as we shall see below, there are signs that the problems of ‘opposing interests’ and information asymmetry are once again present. The relaxation of control over agricultural production (in terms of how and when to use labour) took place in a more open atmosphere, which also prompted the growth of the local industrial sector. Industrial boom and urbanisation increased the demand for labour and attracted hundreds of thousands of migrant workers.¹²⁸ The movement of labour and shift in the labour pattern (from agricultural to non-agricultural) in turn had changed the rural land use pattern. For example, non-permanent land use transfer was essential for those who wanted to join the exodus but did not want to just leave the land unattended. Also, access to off-farm employment opportunities lessened households’ reliance on land, and hence reduced the conflict between the need for tenure security (by introducing a longer use period) and the need to readjust land holdings.¹²⁹

Furthermore, when more and more households abandon farmland to pursue off-farm employment in the cities, land holding per capita increases in these places and allows large-scale farming. In fact, this is already happening in some eastern coastal cities¹³⁰ although in many places, large-scale farming did not take off and land is just left unattended.¹³¹ When land supply exceeds demand, agricultural production would be negatively affected.¹³² The government would have to introduce some measures that should not only increase the profitability of agriculture, but also the value of land. These measures may be similar to those already adopted by most developed countries

¹²⁸ Labour migration was not significant until the 1990s when mass rural-urban migration took place. At the early stages of industrial growth, most labour found work in nearby towns and cities, and migration was less common. However, soon after labour movement became more diverse. Now many rural residents travel to different provinces to find work, and they stay away from home for a much longer time (some even end up staying in the cities permanently). Zeng Shaoyang and Tang Xiaoteng, 2004, pp 32-43

¹²⁹ See Chapter Two above.

¹³⁰ For example, in Suzhou City in Jiangsu Province where industrialisation is widespread, many farmers have given up agricultural activities. In one village, the collective is carrying out large-scale farming on land that have been returned by the farmers, Chen Xiaojun et al., 2003, p 92

¹³¹ It has been pointed out that large-scale farming would not necessarily be adopted even if more and more people left their land. Survey in Jiangxi showed that due to labour migration, a lot of land had been abandoned and large-scale farming did not take off. This was mainly due to the lack of profitability in the agricultural sector. Households that stayed behind did not wish to take on more land (so that large-scale farming could be carried out) as they did not see farming as a good source of income, Zeng Shaoyang and Tang Xiaoteng, 2004, pp 127-128.

¹³² Some evidence from Jiangxi Province shows that when labour devoted to agriculture decreased, grain production dropped. For example, ‘twin-season’ field, which was popular after the introduction of HRS, had gone back to ‘single-season’ field due to inadequate labour input, *ibid.*

such as agricultural tax cuts or exemption¹³³ and subsidies¹³⁴, or even land ownership reform. Whether or not this will actually happen in the future depends on several factors, such as economic growth, population growth and labour mobility. As highlighted above, apart from its impact on the land, the huge 'drainage' of rural labour has had a negative impact on rural society as more and more young people leave the countryside.

In conclusion, this section highlights an important fact: the reactions of the economic actors forced the Chinese government to change its political rules at the beginning of the reform era. There is a possibility that it will continue to do so, although this time it is the shift from agricultural to non-agricultural labour that will have an impact on land use policy. It seems that in China for the last three decades, political rules have had to always catch up with the economic rules. Perhaps it is compensating for the extensive political interference during the Maoist era.

4. Collective Land Ownership: A Thing of the Past?

Following the discussions of the relevance of collective ownership and the changes introduced by the HRS, this section will look at the role and nature of the collective entity itself.¹³⁵ More interesting is the change in the role of the collective since the reform era, especially after the concept of 'village self-governance' was introduced in the early 1980s. The reform of the village governance system was significant for various reasons, not least because it introduced 'election' at the village level and changed the dynamics of the relationship between the central government, local government, the collective and lastly the collective members.

¹³³ As seen in Chapter One above, the government already abolished some agricultural tax. However, this has not helped to improve the situation due to two main reasons: low profitability in agriculture and the government's fiscal arrangement that requires local government to be self-reliant.

¹³⁴ For the different types of subsidies the government can provide, see Niu Ruofeng et al., 2004, pp 90-93.

¹³⁵ The collective entity discussed in this section refers to the mainstream non-indigenous communities, which are the majority of the collective regime in China. It does not include traditional communities that mostly consist of minority tribes, which can be found in several provinces such as Yunnan, Sichuan and Guizhou. The special status of these indigenous communities is acknowledged and they are usually given more autonomy to govern the community affairs. For example, Article 9 of the Forest Law gives indigenous communities 'more autonomous rights for forestry development, timber distribution and use of forestry funds in ethnic autonomy regions'.

The current power and representation of the collective are manifested at the village level, both administrative and natural villages. After de-collectivisation, the government had to readjust its fiscal and the collective administrative systems to accommodate the changes that were taking place. For example, in 1980, the fiscal reform made each sub-national level of government responsible for its own revenue and expenditure.¹³⁶ And in 1983, administrative power was transferred from the commune and brigade administration to township and village administration respectively.¹³⁷ More importantly, accompanying the administrative reform was the severance of the party and the government from the economic activities, especially at the township level.¹³⁸ This was an important development as it was aimed to lessen political interference in the economy and increase economic efficiency. However, as we shall see below, there has never really been a real separation of these three (party, government and economic) functions at the township and collective levels.¹³⁹

4.1 Relationship between the Village Governance, Local and Central Government

This subsection looks at the relationship between the collective governance and the state. It will show that despite supposedly being an independent entity, the collective is heavily influenced by the government. This is due to the inherent inadequacies and inconsistencies that are found within the institution of the collective. Even though the collective is the owner of a large part of rural land in China, there are plenty of ambiguities in relation to what collective ownership really means. Firstly, the concept of 'collective' is not defined. There are three different entities at the lowest level of governance: township government, administrative village, and natural village or village groups (which corresponds to the commune, production brigade and production team respectively during the pre-de-collectivisation era).¹⁴⁰ More often

¹³⁶ Before 1980, China's fiscal system functioned under a 'unified income and expenditure' system where each level of government turned over virtually all taxes to the central government. The central government then allocated the money from the central budget to local governments, Whiting, S., 2001, pp 75-76.

¹³⁷ Township government replaced the people's communes, while administrative and natural villages replaced production brigades and production teams respectively.

¹³⁸ Whiting, S., 2001, p 76.

¹³⁹ Even at the beginning of the administrative reform, the separation of functions did not really take off, *ibid.*, pp 76-77.

¹⁴⁰ Out of these three administrative bodies, only the township government is officially part of the state governance system; the other two are independent self-governing bodies.

than not legislation fails to identify which level of collective is referred to.¹⁴¹ Also, the level at which land rights decisions are to be made is not clarified.¹⁴² To make matters worse, different legislations have given the ownership right to different levels of collectives. For example, both the Constitution and Land Management Law 1998 stipulate that all rural land, apart from state-owned land, belongs to the *farmers collective*; however, under the Organic Law of the Villagers Committee 1998, non-state owned land is said to belong to the *village collective*.¹⁴³ Furthermore, in many places, even though the village level is the official owner entity, actual decisions regarding the use and management of land are made by smaller village groups.¹⁴⁴ Thus, there is a mismatch between *de facto* and *de jure* owners, which may cause complications and confusion.

It has been suggested that the ‘undefined collective’ is an ‘intentional institutional ambiguity’.¹⁴⁵ In fact, according to a scholar, the lack of identity and power of collective is the manifestation of the overriding interest of the state.¹⁴⁶ It is the result of a deliberate act (or ‘conspiracy’) by the government ‘to avoid an escalation of land disputes between the various levels of the rural collective’.¹⁴⁷ Even though the ownership of land and other means of production were vested in the production team (or the rudimentary cooperative) after the last reshuffle within the collective system before 1980, land exchanges had taken place between the different levels of collective governance.¹⁴⁸ As a result, in many places the ownership entities are not clear-cut and the administrative village tends to usurp the ownership rights of the natural village.¹⁴⁹ Furthermore, many natural villages or village groups lack the legal status to be legitimate owners of land.¹⁵⁰ Hence, the collective body that owns land differs from place to place, and in some cases ownership is never clear and is subject to claims by

¹⁴¹ *Rural China in the 21st Century: The Land Resources*, 2000; and Yang, Cairan, 18 June 2003.

¹⁴² Niu Ruofeng et al., 2004, p 56; and Rozelle, Scott and Li Guo, 1998.

¹⁴³ Niu Ruofeng et al., *ibid.*

¹⁴⁴ Chen Xiaojun et al., 2003

¹⁴⁵ Ho, Peter, 2005, p 42

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, pp 44-68. It has been argued that the Chinese government has tried to unify rural land ownership by delegating to the administrative village the authority to manage the farmland; this is manifested in the fact that according to the law, administrative (not natural) village is entitled to sign land contracts with peasant households, Cai Yongshun, 2003, p 665.

¹⁵⁰ In some places village groups lost or have their official stamps taken away, which have prevented them from acting as independent authorities, Chen Xiaojun et al., 2005

different levels of village governance. Nationwide investigations of 271 villages in the late 1990s show the percentage of land owned by different rural collectives: 40 percent by administrative village; 45 percent by village small groups; and 15 percent by both village and village small groups.¹⁵¹ The problem of 'definition vagueness' has two major implications: it is highly probable that any future delimitation of boundary and registration of ownership rights will cause large-scale social unrest in the rural area; and by keeping the definition vague, the government can easily requisition land for 'public benefit' purposes.

The second issue relates to the governance structure of the collective. A major development in relation to collective administration since the de-collectivisation was the introduction of the status of 'self-governance' at the village level.¹⁵² Like the HRS, village 'self-governance'¹⁵³ was 'experimented' with by local governments in several provinces in 1980 at a time when there was no official approval by the government.¹⁵⁴ The legality of these locally elected village committees that managed rural affairs was only confirmed in 1982 when a provision was inserted into the Constitution¹⁵⁵, which was then followed by a nationwide experimentation. The first provisional legislation¹⁵⁶ on the regulation and establishment of villager committees was adopted in 1987 and in 1990, the government launched the model nationwide. It was not until 1998 that the first official legislation was adopted.¹⁵⁷ Under the new law, rural affairs are to be decided and carried out in the village meetings, which are to be presided over by the village committees, whose members are to be elected locally.¹⁵⁸

¹⁵¹ Cai Yongshun, 2003, p 665.

¹⁵² Here it refers to the administrative villages, which are assisted by natural villages or village groups.

¹⁵³ It has been pointed out that village elections were promulgated for several reasons: as a means of rectifying the deteriorating village-cadre relations; to prevent civil unrest in countryside by making cadres more accountable; and ideologically speaking elections appealed to the origin of Chinese socialism where the government governed according to the will of the people. Peerenboom, R., 2002, pp 203-204

¹⁵⁴ The first self-governing village committees were set up in Yishan County and Luocheng County in Guangxi Province. These village committees were initially set up to provide community services such as community safety and protection of irrigation facilities. Self-governing village committees subsequently appeared in other provinces such as Sichuan, Henan and Shandong, Pan Jiawei and Zhou Xianri, 2004, p 33.

¹⁵⁵ Ibid., pp 33-34.

¹⁵⁶ Organic Law of Villagers Committee (Experimentation)

¹⁵⁷ Organic Law of Villagers Committee, Pan Jiawei and Zhou Xianri, 2004, pp 33-35

¹⁵⁸ Even though theoretically villagers elect their leaders in democratic and open elections, things do not always take place according to law. Apart from the fact that candidates sometimes use power or support of the township government to win, there are also instances where the posts are dictated or even filled by local party leaders, ibid., pp 146-149.

The village committees can also be supported by the village groups that represent collective members at the natural village level. In addition, approximately 40 percent of villages in China now have village-level regulations (村规民约) that facilitate village governance.¹⁵⁹ These regulations are adopted and enforced by the village committees/leaders, and they regulate village affairs and are binding on members of the collective. These regulations are adopted locally and have no direct relation with state legislation.¹⁶⁰

The government administration structure officially ends at the township level, which is one level higher than the administrative village. The village administration hence works as a ‘bridge’ between the government and the people. Township government’s role is to ‘guide, support and help’ village committees and leaders, while the village committee’s role is to assist the township government.¹⁶¹ It is the township government’s role to, *inter alia*, guide villagers in carrying out democratic elections; to help the village committee train its members; to help set up a monitoring and reporting system; to guide the village committee in implementing government’s policies; to help and guide the village committee in providing social services; and to guide the village committee in formulating village regulations.¹⁶² In return, the village committee is expected to help the township government to (*inter alia*): implement government’s policies such as economic, social, legal and health policies; to meet various government’s targets; and to assist in keeping township government abreast of rural affairs.¹⁶³

The current arrangements of township and village governance as explained above have two fatal shortcomings. Firstly, the township government, being part of the government structure, is given the responsibility to implement and oversee government policies at the village level and rural affairs. However, this is difficult if not impossible if it only has an ‘advisory’ role in relation to the village committee. This essentially creates a vacuum between the government (with township

¹⁵⁹ Ibid., 2004, p 67

¹⁶⁰ Ibid.

¹⁶¹ Article 4 of Organic Law of Villagers Committee

¹⁶² Pan Jiawei and Zhou Xianri, 2004, pp 87-88

¹⁶³ Ibid.

government as its representative) and the collective members (the rural population).¹⁶⁴ In other words, it creates a gap that, in theory, is incapable of being closed; or if it is to be closed, depends entirely on the self-motivation of the collective, which makes it to fall outside of the realm of the ‘government’. Hence, in reality, this administrative vacuum is either filled up by the township government going beyond their advisory role, or is left as it is.¹⁶⁵ The consequences of the latter can be detrimental when the misuse of power by the village committee and village leader cannot be reined in.¹⁶⁶

Secondly, the notion of ‘self-governance’ itself is questionable. In rural China, it seems that ‘self-governance’ simply means using collective resources and governance structure to carry out tasks that are handed down by the government. Although village committees and leaders are officially not civil servants, they nonetheless shoulder the responsibility to implement and enforce government policies and administrative targets. Many of these village leaders run the day-to-day affairs of the villages, including collecting taxes and charges, imposing government targets in relation to agricultural products, and carrying out other administrative policies such as the one-child policy.¹⁶⁷ Furthermore, although all villages are expected to set up village committees that consist of representatives of the village members, most decisions are

¹⁶⁴ Ibid., pp 88-91.

¹⁶⁵ According to one analysis, there are two types of village governance models, which are further divided into four different classes. The first type is known as the ‘standard’ model where the governance system fulfils government’s criteria of an ‘exemplary’ village. This type is divided into those that have a healthy and complete governance structure, and those that have achieved considerable economic growth although the governing structure itself maybe less than desirable. The second type is known as the ‘substandard’ model where the governance system is less than desirable. This type is further divided into those called ‘administrativised’ villages where the village committee is subject to total control of the township government, and those called ‘out-of-control’ villages where the village committee has the free rein and there is no supervision from the government. According to a survey, around 60 percent of all villages in China are ‘administrativised’ villages, ibid., pp 102-103.

¹⁶⁶ The inability of township government to interfere actively in village governance can have negative impacts on the welfare of rural communities sometimes. For example, there was a case where a village committee annulled a village election just because the former village leader was not re-elected. The election results were then declared valid by the township government after the collective members sought help from it. However, the village committee brought the township government to court on the reason that it had ‘violated and over-stepped’ its responsibility, ibid., pp 104-105.

¹⁶⁷ The contents of some village-level regulations reflect the complexity of the village governance. For example, many regulations include matters such as the fulfilment of government policies in relation to population control and healthcare, development of local economy and also the regulation of social relations, ibid., pp 67-71. In some places, monetary fines are imposed on anyone who has breached the provisions. Some scholars have questioned the legitimacy of the ‘localised’ laws, especially those that impose positive duties and monetary fines. This is because village regulations are not subject to review by the courts or other administrative bodies. There is no obvious way for rural residents to dispute the legality of those regulations that are deemed unfair or excessive. Ibid., pp 110-111.

still made by the village leaders or party leaders.¹⁶⁸ The subordinate nature of the collective governing body throws up doubts about its ability to act independently for the best interest of the local community, especially in relation to economic and social development.

Another restriction faced by the collective is the financial constraint. Although the collective have to carry out 'governmental tasks'¹⁶⁹, they are nevertheless mostly financially self-reliant. Many of the public services and amenities that the collective entity needs to provide for its members are provided by the government in the city.¹⁷⁰ For example, the collective is expected to pay for school construction costs, the salaries of teachers, road construction and so forth. This puts a heavy burden on the finances of the collective, as a result rural taxes (agricultural and non-agricultural) can be prohibitively high. As pointed out in Chapter One, although the Chinese government abolished agricultural taxes in 2006, many illegal charges and fees have again sprung up. The need for self-finance explains why this has happened. Furthermore, the fact that a great proportion of village income is given to the central government is seen as a huge compromise of village authority and has led many farmers to believe that the state is the actual owner of the land.¹⁷¹ In fact, according to a case study, 60 percent of the interviewees named the state as the legal owner of the land, while only 27 percent said the collective was the legal owner.¹⁷² Some interviewees did not think there was any difference between state and collective ownership.¹⁷³ This is a significant finding as it points out how serious the mismatch between the *de jure* and *de facto* owner is.

Hence, it seems that 'self-governance' is limited only to choosing the right person to implement government policies; the collective members themselves provide no inputs into the policy-making process. The 'chain of command' is still top-down and there is

¹⁶⁸ In addition, many village committees meet irregularly like once a year, which makes it impractical for all decisions to be made on the basis of the majority wishes of the villagers, Zhang Xiaoshan, 13 October 2005

¹⁶⁹ This refers to the fact that most of the tasks required of the village collective are usually the responsibilities of the government such as economic development, provision of public amenities and social services, Pan Jiawei and Zhou Xianri, 2004, pp 97-101.

¹⁷⁰ Ibid. p 113.

¹⁷¹ Chen Xiaojun et al., 2003, p 9

¹⁷² 7 percent thought that village group was the legal owner and 5 percent thought that the individual land user was the legal owner of the land. Ibid., p 5

¹⁷³ Ibid., p 9

no official feedback channel available to the members of the collective, represented by their elected leaders, to influence government policies. Due to the extensive control and power over the collective land by the state, some critics have said that collective land is in fact subject to dual-ownership, which are the collective and the state ownership.¹⁷⁴ In many cases, the power of the state is so overwhelming that it is clear that collective's ownership is subordinate to the interest of the state. Describing the nature of the collective, Zhou Qiren wrote, 'the collective system is not a 'co-ownership or co-operative type of private property', it is also not purely state ownership; instead, it is a type of rural socialist property rights system that is controlled by the state but the consequence of which is shouldered by the collective.'¹⁷⁵ He also pointed out that in the vast and fluid institution of collective governance, all activities are carried out by the 'Agents', and the 'Principals' cannot be identified.¹⁷⁶ In short, the collective has arguably become more independent following the policy shift since the late 1970s in relation to ownership of assets and running enterprises, but they are still far from being 'self-governing'.

4.2 Relationship between the Village Governance and Collective Members

Following the brief explanation of the nature of the 'self-governing' collective and its relationship with both the central and local governments, the relationship between the collective representatives and collective members will be looked at. In relation to village governance of rural land use, the collective could be seen as both too powerful on the one hand and too weak on the other. Before we proceed, it has to be pointed out that the collective in rural China plays not one, but three important roles: grassroots administrative unit; collective economic unit; and democratic organisation of the masses.¹⁷⁷ As pointed out above, the collective is given extensive power to govern rural affairs, ranging from economic development and control of production to the provision of public services. And since village elections were introduced and the village administrative level was made self-governing, the collective has also become the only democratic organisation of the masses in China. Whether or not these roles

¹⁷⁴ Wang Pingjie, 2004

¹⁷⁵ Zhou Qiren, 2004, p 7. He also pointed out that in an organisation where individual ownership of the resources is prohibited, it is not possible for the individuals to choose the economic organisation or to shoulder the corresponding financial responsibility.

¹⁷⁶ In Liu Fengqin, 2005, pp 205-206

¹⁷⁷ Pan Jiawei and Zhou Xianri, 2004, p 96.

make the collective a coherent entity, and whether or not the collective in its present form best represents the rural population will be discussed below.

The power of the collective can sometimes be overwhelming when it comes to rural land use control. For example, the collective not only retains the land ownership right, the collective administrative body also oversees how the land is used, and sometimes this even includes what crops to plant on the land. This over-supervision is possible mainly due to the fact that until recently, the law had not given enough protection to land users to resist interference from the governing body.¹⁷⁸ This is also caused by the fact that the collective body, acting on behalf of its members, is the owner of the land and subsequently wields enormous power over the economy of the village. As pointed out above, collective ownership of rural land in China means that the land is owned by the collective as one unified entity; ownership is not broken down into separate units held collectively by individual households.¹⁷⁹ Hence, the village committee and village leaders, who are acting on behalf of the collective, make most of the land-use decisions. In many places, village cadres act as the *de facto* owner of the collective land. This concentration of power in the hands of a small group of people has given rise to corruption and abuse of power.¹⁸⁰ An example of abuse of power by the village cadres took place in Datong Village in Guangning County, Guangdong Province in 2006.¹⁸¹ In that case, the village cadres decided to sell 300 mu of the village's protection forest to an outside investor who was going to establish a fast-growth plantation forest. They subsequently set a fire to destroy the plantation forest in preparation for the sale. Not only was this carried out without prior consultation with the collective members¹⁸² (who are the *de jure* owners of the land), the protection forest was destroyed without approval from the provincial forest bureau.¹⁸³

¹⁷⁸ See Chapter Two above.

¹⁷⁹ Pan Jiawei and Zhou Xianri, 2004, p 205

¹⁸⁰ For examples of abuse of power by village committee members, see Pan Jiawei and Zhou Xianri, 2004, pp 208-210, and Cai Yongshun, 2003, pp 666-670.

¹⁸¹ Fu Miao, 6 August 2007

¹⁸² Article 19 of the Organic Law of Villagers Committee 1998 provides that consultation with collective members is required before the village committee make certain decisions, such as the method of collection of charges and fees and their use; the use of profits from collective economic activities; and the planning of collective economic activities. The village cadres in this case might have breached the last requirement.

¹⁸³ Article 23 of Forest Law prohibits commercial destruction of protection forest; Article 24 provides that protection forest cannot be logged without the approval of provincial forest bureau.

Being both the governing body and the landowner at the same time also gives the village cadres enormous power to influence and control local affairs. Apart from that, there is also the inherent conflict of interest in relation to the use of the collective property. Like public property, collective property, controlled by the collective governing body, is used for public purposes.¹⁸⁴ On the other hand, the same collective property is also subject to private use, which aims to increase private utility and efficiency. In China, the collective interests dominate the use of collective land. The practice of constant land reallocation to reflect demographic changes highlights the public utility of the land. Interferences of right may not always be prompted by corruption or abuse of power by local leaders. Very often implementation of administrative orders and policies involve interfering with the farmers' land use rights.¹⁸⁵ This is not only because land is one of the main resources at the disposal of the governing body to control rural affairs, but also because as most land held by farmers now was allocated to them free of charge, it inevitably adds some 'false legitimacy' to the control of the governing body.

However, the overwhelming emphasis given to the public utility of collective land has enabled village cadres to disguise and justify actions that are actually detrimental to the collective interests. Sometimes land use rights are sold off in the name of public interest although they actually benefit the village leaders and their cronies.¹⁸⁶ One instance of misuse of power by village committees and village leaders took place in Datang Village in the Guangdong Province in 2001.¹⁸⁷ In that case, during land reallocation, the village committee and village leader either kept some land for themselves unlawfully or sold the land for profit. When this was found out, violent clashes between the villagers and village cadres ensued. The situation was only rectified when the county government intervened on the villagers' behalf. It is very difficult for the members of the community to dispute or for the court to adjudicate

¹⁸⁴ Pan Jiawei and Zhou Xianri, 2004, p 208. A good example is the use of land as a means of providing social security. As pointed out above, this creates the need to reallocate land (in the absence of a land market) when demographic changes take place.

¹⁸⁵ This is particularly common in relation to the enforcement of the one child policy in rural China. For example, Article 5 of Beijing City's Regulation on Punishment and Restrictions Upon Infringement of Family Planning Law (《北京市违反〈计划生育条例〉限制与处罚办法》) provides that families that have infringed the Family Planning Law are not entitled to extra family and responsibility plots, and are not entitled to extra allocation of construction land.»

¹⁸⁶ Pan Jiawei and Zhou Xianri, 2004, pp 209-210

¹⁸⁷ Ibid., pp 133-134.

cases of alleged abuse of power as the line between public and personal interests has blurred. As a result, it is an inevitable outcome that the overall private utility derived from the property is lower.

On the other hand, in many cases the collective administrative body is deemed to be too 'weak' to represent the interests of collective members. This is particularly true in relation to land requisition by the state. As already mentioned above, the state has the exclusive right to requisition agricultural land and then sell it for non-agricultural uses. It has been argued that rural households can use *ex ante* and *ex post* measures to protect themselves from land requisition.¹⁸⁸ *Ex ante* measures include objecting to and thwarting land requisition efforts. However, as the collective landowner is placed at the bottom of the state's administration hierarchy, its power is too weak vis-à-vis the state and local officials. As already highlighted, even though local leaders are elected by the members of the collective, their main role is nevertheless to act as an agent of the government to oversee village administration. As a result, rural households can only resort to *ex post* measures such as staging protests and appealing to a higher level of government.¹⁸⁹ This shows that the notion of 'collective ownership' is neither independent nor comprehensive, and in some cases it is even meaningless given the fact that the state exercises so much control over collective affairs and administration.

One exception to the state monopoly over land is the new legislation that was adopted in the Guangdong Province.¹⁹⁰ It allows collective land to enter the land market¹⁹¹, where it can then be rented out or transferred to a third party for commercial or non-agricultural purposes.¹⁹² The regulation requires collective land to be treated on the equal footing as state-owned land, and that at least 50 percent of the profits from land conversion must be spent on the welfare and security provisions for the affected

¹⁸⁸ Cai Yongshun. 2003, pp 663-664

¹⁸⁹ In 1998, the Central State Council Letters and Visit Office received 460,000 letters and appeals, two thirds of which consisted of peasants' complaints. Unauthorised fee collection, usurpation of farmland and corruption are the most common complaints, *ibid.*, p 672.

¹⁹⁰ Guangdong Province Decision on Management and Transfer of Rural Land Development Right (《广东省集体建设用地使用权流转管理办法》). This legislation came into force on 1 October 2005. <http://www.gze.cn/show3-20324-1136121046473.html>

¹⁹¹ According to the regulation, transfer of collective land can only take place with the approval of more than two thirds of the villagers; however, development of commercial housing is prohibited. Guangdong Province: Collective Land can Enter the Land Market but Development of Commercial Housing is Prohibited. 2 October 2005

¹⁹² Transfer or rental of land use rights must be approved by either two third of the village committee or two third of the village representatives, Article 7.

households. This new piece of legislation injects some market and democratic elements into the management of collective land in the Guangdong Province. As with the earlier legislations, this regulation merely reflected the existing (albeit unlawful) practices of many villages that transferred land use rights to commercial developers without going through the State.¹⁹³ The possibility of this policy being implemented nationwide is questionable due to the unique characteristics of the Guangdong Province, which has one of the most developed market systems in China and where pressure on land from commercial use is enormous.

Apart from being the 'agent' of the state, another reason why the collective does not and could not truly represent the interest of the farmers or forest users concerns the mandate of the collective: it is not an 'exclusive' or 'specialised' body that only handles matters related to farming or forestry. The collective is not the usual farmers' 'co-operative' as commonly found that are specially set up to protect the interests of its members; nor is it a 'forest community' that sets out to protect mainly the interests of forest users.¹⁹⁴ As explained above, the collective in China works as an administrative body for the government that manages all aspects of rural affairs, and crop harvest may not be the sole concern of the governing body, with forestry even less so. Furthermore, there are plenty of political factors that affect the decisions taken by the village leader or governing body. Thus, to expect the collective to act in the best interests of the farmers or forest users is unrealistic and impractical. Although it can be argued that the presence of one governing body that oversees and balances all the aspects of rural affairs including social and economic development is desirable as a more comprehensive approach, it is also true that it is highly susceptible to political influence and the failure to achieve a proper balance.

In addition, village affairs are influenced and controlled by higher levels of government, such as the township and county government. As already pointed out above, the township government has the responsibility to provide 'guidance, support and assistance' to the village/collective administration. However, in some places, the

¹⁹³ Yu Li. 30 September 2005

¹⁹⁴ From the analysis of the literature on community forestry from all over the world, it shows that regimes that have work successfully are those who are supported by and represent the interests of local forest users. This is expected as the mandates of these communities have not been diluted by other non-forest related concerns or issues, Colfer, C.J.P. and Capistrano, D. (eds), 2005.

village collective is virtually under the control of the township government.¹⁹⁵ This sometimes means that township government treats collective properties as its own and disposes of them as it wishes. One example is the requisition of rural land by the township government for local development that took place in Qingkou Town, Minhou County in the Fujian Province in 1995.¹⁹⁶ In that year, an announcement was made in some villages in Qingkou Town about the impending requisition of 2,400 mu of land to build a 'car factory city'. According to the announcement, every individual would get 10,000 yuan of compensation¹⁹⁷ and those over 50 years old would be getting 60 yuan per month as pension, and it was also guaranteed that at least one member of every household would be employed by the new car industry. These conditions were deemed satisfactory by most villages and 20,000 of farmers handed over their land before compensation was paid. However, after a year, farmers whose land had been requisitioned were only paid 800 yuan per person and so far no one had been employed at the factories. Upon investigation, it was found that the county and township government had detained the rest of the compensation money and used it to invest in the new venture. A party representative at the county government provided a common excuse used by higher level of government when detaining compensation money, namely that the compensation money would have been squandered off because the 'quality'¹⁹⁸ of some farmers is low. He also said that most of the money had been put into agricultural funds. However, when asked about whether or not consent from farmers had been obtained and who would be responsible if the venture failed, the party representative could not give any answer. In the end, following several protests and visits by farmers' representatives at the provincial level, the county government agreed to gradually return all the money it had detained.

To further undermine the independence of the collective, leaders of all these other levels of government are not elected by the people but rather selected by the government. A direct consequence of this is that they are not answerable to the

¹⁹⁵ As already pointed out above, more than 60 percent of Chinese villages are hardly independent, and are under the control of the township government. In these villages, village administration is viewed as merely a subordinate agency to the township government. Pan Jiawei and Zhou Xianri, 2004, pp 102-103.

¹⁹⁶ Zhou Qiren, 2004, pp 96-99.

¹⁹⁷ It was later found out that Fuzhou City government (which was the mastermind behind this development project) had promised to pay 33,000 yuan per mu to the township government, 10,000 yuan of which was to be given to the villagers, *ibid*.

¹⁹⁸ Here it generally refers to the educational background and wealth level of the farmers.

people. As a result, the interest of the state (sometimes disguised as the public interests) always takes precedence over the interests of the individuals and the collectives. Collective leaders are powerless when it comes to confronting the state's interests. Furthermore, in most villages, village leaders are 'assisted' by local party leaders who also interfere with village administration.¹⁹⁹ Article 3 of the Organic Law provides that local Communist Party representatives have an important role to play in the village governance. Local party leaders should be 'at the centre' of leadership and that their relationship with the village committee should be one of 'support and guarantee'. Their tasks include implementing the Party's policies and manifesto; to promote the socialist ideology; and to establish a close tie between the Party and the people.²⁰⁰ It has been pointed out that theoretically these party representatives should play only an advisory role (like the township government but only in relation to things concerning the Party).²⁰¹ However, there have been cases where party representatives took power into their own hands, usually with the collaboration and support of township government or party representatives at higher levels.

One case in the Guangdong Province illustrates the seriousness of the arrogation and excessive power of party representatives and the vulnerability of village 'democratic election'.²⁰² To explain it briefly, in Hongxing Village, villagers had been subject to the control of township government and party representative until 1999 when a local election was carried out. But after the village committee was set up, the township government appointed the party representative (who was not elected to the village committee) to preside over the local economic cooperative, which basically controlled the finance of the village. To compete with the elected village committee, the party representative set up his own committee, which issued notices and made decisions about village affairs. Thus, there were two different entities that governed the village at that time, one democratically elected and one appointed by the township government. Even though the party representative had in fact usurped the power of the village committee, his position was acknowledged by the higher level of government. This is an extreme example whereby the power of the village committee

¹⁹⁹ Cai Yongshun, 2003

²⁰⁰ Pan Jiawei and Zhou Xianri, 2004, pp 143-144.

²⁰¹ Ibid., pp 144-145

²⁰² Ibid., pp 145-146

was usurped by a non-elected body but it nevertheless shows the vulnerability and weaknesses of the ‘self-governance’ model of village/collective administration.

The underlying causes of the problems discussed above are associated with the nature of the rural collective institution itself. The ‘top-down’ nature of the institution denotes a lack of independence from the government. Instead of representing the interests of the rural population, the collective institution acts as a medium to channel government’s excessive power and control to the lowest level of governance. Furthermore, as pointed out above, despite the fact that the overhaul of the collective system following the de-collectivisation process in the 1970s was aimed at separating the administrative, economic and social aspects of the village governance, in reality this has not been successful.²⁰³ In addition, the judiciary system does not always give protection to the rights of the collective and its members when local government oversteps its power. This is not only because very often local courts lack judicial independence, they are also often biased in favour of parties from the local regions to which the courts belong.²⁰⁴ The lack of independence and the presence of ‘local protectionism’ are the results of the organisational problem, where the local judiciary is ‘completely dependent on the local government in terms of funding, and personnel decisions relating to the local judiciary are also in the hands of the local party committees and local people’s congresses’.²⁰⁵ It has been pointed out that in fact, many leaders of the local government regard local courts as subordinate departments of the local government.²⁰⁶

Another complication associated with collective ownership of land is that it sometimes can jeopardise the very fabric of the democratic foundation of the village administration. This is because in reality, there are sometimes conflicts between the role of the collective as the landowner and the role of the collective as the administrative body. All members of the collective are endowed with the right to elect a body that governs collective affairs independently from the government. However,

²⁰³ Pan Jiawei and Zhou Xianri, 2004

²⁰⁴ Chen, Albert, 2004, p 153

²⁰⁵ Ibid.

²⁰⁶ In some extreme cases, these leaders even express to judges their views on individual cases pending before the courts, *ibid*, pp 153-154.

not all members of the same collective are entitled to the collective-owned land.²⁰⁷ Land is one of the main assets to be owned by the collective, and is one of the most important components of the rural economy. Decisions on land use will not only affect land users, but also non-land users through the state of the economy generally. In many places, local regulations provide that only land users (or those entitled to land use) are given the right to participate in decision-making concerning land use.²⁰⁸ Hence, even within the collective governance itself, self-governing is compromised by the dichotomy between land users and non-land users.²⁰⁹ Furthermore, as long as the collective acts as both the administrative representative of the state, and also as the landowner, village economy will always be subject to state control. This in turn defeats the very aim of granting the self-governing right to the villages in the first place. It has been pointed out that without having economic independence, there will not be political independence.²¹⁰ Thus, the emergence of a true democracy at the village level will only take place when the community is economically independent.

Following the discussions of the weaknesses inherent in the collective institution in rural China, one has to doubt whether or not collective ownership of land is conducive to economic, social and political development in rural China. If the Chinese government wishes to bring economic growth whilst at the same time give the rural population the autonomy to govern its own affairs, it is vital that it separates the administrative control from the economic control (via land). One may argue that this problem can be solved by promoting accountability and transparency of the village governance. However, a more open and democratic collective governance still cannot solve the problem of the intrusion of rights if the collective still has extensive power to control and dictate land use. As a result, it has been suggested that the current use rights arrangement should be replaced by a regime that allows permanent leasehold of land.²¹¹ This not only will improve the efficiency and openness of village governance, it will also produce tenure stability and increase private investment.

²⁰⁷ These may include non-farmer members of the collective or outsiders who have moved into the village but are yet to be allocated land.

²⁰⁸ Pan Jiawei and Zhou Xianri, 2004, pp 174-175

²⁰⁹ Ibid. p 210

²¹⁰ Ibid. pp 211-213

²¹¹ Ibid. pp 218-221

As a conclusion, the historical evidence, households' feedback and the nature of the collective do not support an extensive role for the collective administrative body to govern rural productive land use. To exaggerate the role and capability of the collective is to ignore the fact that in reality in many places, the collective acts more as a hurdle to than as a promoter/protector of private interests. The above analysis suggests various reasons why the collective system in China is not capable of representing the best interests of China's rural population. The most important reason seems to be due to the nature of the collective: it is a 'top-down' institution that is in charge of rural political, social, administrative and economic affairs. Furthermore, the underlying function of the collective is to act as the government's administrative agent rather than to represent the collective members. The overly extensive mandate of the collective and the strong government interference inevitably increase instances of conflict of interest. As a result, in order to better protect the rights of the collective members, the government should change the nature of land use governance in a way that insulates private rights from unwanted interferences. Of course this should not deter or prohibit individuals' initiative from establishing a collective-based management regime, but to super-impose a defunct institution on the regulation of rural land use is unwise. The 'collective ownership and private use' arrangement merely represents a compromise between the reformists and anti-reformists, it does not represent a better model of land use arrangement, not just in terms of economic performance but also in terms of social justice. This is the main reason why collective ownership and management of rural land can be arbitrary and inefficient.

5. Conclusion

The underlying tenet of the chapter is that maintaining the existing land ownership arrangement will hinder the future development of private rights in rural China. This is mainly due to the fact that the collective system does not, and could not, represent the rights and interests of the collective members. Even though the collective governance system has evolved alongside the production and property rights reforms in the 1980s, it is nevertheless 'trapped' in the rigid political framework set up by the government. For example, although there are now democratic elections at the village level, the state still has overriding power over the governance of rural affairs. Furthermore, the role and functions of the collective have remained the same under

the new ‘self-governing’ system. Democratic elections in China do not mean democratic representation of the people as there is no opportunity for the public to participate in policy-making and to make policy-makers accountable.

The discussions in this chapter show that the justifications for collective ownership of land are based on shaky grounds. Some of the justifications are no longer applicable to the current state of rural economy and society which have experienced great transformation in the past two decades. In particular, the changes in the income and labour structure have had a great impact on the land use pattern. And as the rural society becomes more and more dynamic, the top-down, ‘agriculture-centred’ nature of collective governance will increasingly come into conflict with the demand and expectations of the rural population. And as the analysis of the collective system during the pre-HRS period shows, when the institution fails to work in a way that reflects the reality, it will face opposition, directly and indirectly, from the people. The problem of information asymmetry is also compounded by the rigid and top-down relationship between the government and the collectives. It is reasonable to predict that continuous rural economic and social development will again push for changes in the collective governance system in the future.

One of the changes that should take place is the abolition of collective ownership of rural land. The current arrangement not only allows economic decisions on land use to be dominated by political considerations, it also allows private interests to be overwhelmed by the public utility of the land. ‘Public utility’ in relation to rural land is widely defined in rural China where many characteristics of a socialist society, such as egalitarian allocation of land, are still retained. This coupled with the authoritarian governance system mean that rural land is open to abuse and exploitation by those in power. Private interests and rights are thus severely compromised under the collective ownership regime. As a conclusion, the current half-hearted private rights reforms in China may no longer be sustainable. The Chinese government needs to seriously look into the few fundamental issues that are having an impact on the direction the country’s private rights regime is moving towards. Apart from recognising the benefits of a more complete private ownership right regime, the government should also face the reality of the declining role of the collectives in relation to land use management. The next chapter will again highlight the inadequacies of the current

collective governance system by using the general theory of common property regime and a comparative case study of the relatively successful community forestry regime in Mexico.

Chapter Four

China and Forest Use Management: Institutions for Governance Solutions

1. Introduction

Having looked at the evolution of land use rights and the nature of collective land ownership, this chapter will analyse the viability of collective forest management in China. In particular, the chapter will focus on the issue of institutions and will question whether or not the collective ownership (and management) of forest will be able to meet both present and future challenges. Although the studies of collective management of natural resources are relatively new, many theorists have contributed extensively to this discipline since the 1970s. Looking at the theoretical model developed from empirical studies of collective regimes all over the world will help to shed some light on the advantages and shortcomings of the collective forest management regime in China. Of course China's collective regime may not necessarily be conducive to such comparison; it is nevertheless useful to identify those features that are likely to make collective management more successful.

As the previous two chapters have illustrated, the current arrangements of collective forestland ownership and use are still overrun with some fundamental problems. In response to this, the government has recently launched a second round of collective forestland reform that aims to complete the devolution of management rights of collective forestland. As will be seen below, however, the reform has left the underlying ownership rights structure untouched. It can be argued that the Chinese government needs to address the problems related to collective forestland tenure if it wants to take its collective forestry to the next level. This is because land tenure affects not only the pattern of forest resource use but also the future investment in forestry.¹ To do this, the Chinese government does not necessarily have to 'explore in the dark'; instead, it can refer to existing models of community-based forest management regime around the world. Although each model is set against a different social, cultural, legal and political background, there are nonetheless some general

¹ See Chapter One above for the discussions of the theory of property rights.

attributes that can be used as points of reference for the Chinese government. Comparative studies not only help to highlight the inadequacies of collective forest management in China, they also provide some guidance for the future direction of collective forest regime in China. In particular, they show that flexibility and public participation in decision-making not only are essential for the success of a community-based organisation, they are also important for the building of social capital among rural communities.

The next section takes a look at the theory of common pool resource management. It is built around the findings of some of the leading theorists in this field such as Elinor Ostrom, Arun Agrawal and Mancur Olson, and will explain and set out the general characteristics of common pool resource management identified by these theorists. These characteristics will then be discussed in the context of China's collective forest regime to assess how many of the attributes are present in the regime. The third section then briefly compares the different community-based forest management regimes in different parts of the world. In particular, it will point out why some of these regimes are radically different from the collective regime in China and thus make them incomparable. Section four looks in detail at one community-based forest regime that is most comparable to China. The constitution of community-based forest ownership and management in Mexico is very similar to collective forest regime in China, which is why it is highly relevant to this research. It is hoped that the experience in Mexico can provide some useful lessons from which China can learn. In the fifth section, the latest collective forest reform in China will be looked at. In many ways, this reform is the continuation of the forestland contract responsibility system that was adopted in the early 1980s. The launch of this new round of change signifies that there are still problems with the current collective management (and ownership) system. The impacts of this reform so far will be briefly discussed.

2. Collective Management in Theory

Collective or community management of natural resources is one of the four main forms of resource management regimes identified so far: private, state, open access and common property regimes. The theory of collective actions or management shows that common property should be distinguished from the open access situation where

nobody owns the resources and access is open to all. In an open access regime, everyone has the incentives to withdraw more units out of the resource before it is exploited by others. As a result, the tragedy of the commons will ensue where the resource is quickly depleted due to uncontrolled and competing withdrawal. Garrett Hardin concludes in his famous 1968 article that: “Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that belies in the freedom of the commons.”²

The theory of common property regime points out that when a resource belongs to, and is managed, by a distinct group of people or a community, the use of the resource involves a different set of considerations. Most importantly, there is no open access to all; only members of a particular group can have access to the resource. Furthermore, more often than not there will also be internal rules that govern access, ways and volumes of exploitation or withdrawal. In short, the theory aims to highlight the fact that ‘the tragedy of the commons’ is not the inevitable result whenever a group of individuals share the use of a resource, and that use of common resource can be sustainable.

Apart from highlighting the differences between open access and common property regimes, the theory of common property also provides explanation as to why and how common management regime arises and functions. Many theorists have looked at different community-based resource management regimes all around the globe, in both developed and developing countries.³ Even though these case studies come from different cultural, social, political and legal backgrounds, they nonetheless share some similar characteristics. These characteristics have been incorporated into a coherent

² Hardin, G., 1968, p 1244.

³ Community-based forest management regimes have been looked at in Nepal (Acharcya, K.P., 2002; Adhikari, B. et al., 2004; Adhikari, B. and Lovett, J.C., 2006; Agrawal, A. and Ostrom, E., 2001; Dev, O.P. et al., 2003; Edmonds, E., 2002; Mehta, J. and Kellert, S., 1998; Timsina, N.T., 2003); the Philippines (Dolom, P.C., 2003; Gauld, R., 1998); Cameroon (Brown, D. and Schreckenberg, K., 2001); Zimbabwe (Campbell, B. et al., 2001); India (Conroy, C., Mishra, A. and Rai, A., 2002; Hobley, N. and Shah, K., 1996; Kumar, S., 2002; Saigal, S., 2000; Sekher, M., 2001; Agrawal, A. and Ostrom, E., 2001); Switzerland (Ostrom, E., 1990; Küchli, C. and Blaser, J., 2005); Scotland (Ritchie, B. and Haggith, M., 2005); Mexico (Richard, M., 1992; Bray, David B. and Merino-Pérez, Leticia., 2002; Klooster, D., 1999; Klooster, D., 2000)

analysis of common property regimes.⁴ The discussions in this section will help to shed light on the situation of collective land ownership and collective forest management in China.

2.1 Common Pool Resources

It has been pointed out that all common pool resources share two important attributes: first, it is costly to exclude individuals from using the good either through physical barriers or legal instruments; and second, the benefits consumed by one individual subtract from the benefits available to others.⁵ The first attribute (non-excludable) is typical of the nature of public goods such as air and national defence, while the second attribute (rivalry) is associated with private goods such as houses and food.⁶ Some examples of the common pool resources discussed in the literature are water, fish and hunting game. Strictly speaking, forests may not necessarily be common pool resources because their physical boundary can be easily established and access can be controlled in some circumstances,⁷ and in fact, many forests in the world are treated as private properties.⁸ However, there are three reasons why forests are subject to common property management, one of which only became apparent recently.

First, in many parts of the world, forests have always been treated as common properties.⁹ This could be due to historical, cultural or practical reasons. For example, at the time when user groups were small and large-scale commercial exploitation of forest resources was non-existent, forests were managed as common pool resources so that the management costs could be kept as low as possible.¹⁰ However, as the trade in, and market value of, forest resources increased, it became worthwhile to carry out large-scale exploitation of forest. In this scenario, forests were usually either

⁴ See Ostrom, E., 1990

⁵ Ostrom, E., 2000, p 337-338

⁶ Ibid.

⁷ This refers to the situation where physical boundaries have been clearly defined, there are enough resources that are dedicated to guarding the forest, and there is an effective property rights regime that offers protection to forest users or owners.

⁸ Most of these private-owned forests are situated in industrialised countries such as the United States, Sweden, South Korean and Japan, Yao Shunbo, 2005, pp 55-75.

⁹ Colfer, C.J.P. and Capistrano, D. (eds). 2005

¹⁰ This was particularly true in relation to forests managed by indigenous communities where reliance on forest resources was mainly for subsistence purposes rather than for commercial exploitation.

nationalised by the government and turned into public property¹¹, or put under a private property regime, which is made feasible by the commercialisation of forest resources as profits from forest exploitation could now cover the management costs under a private property regime.¹² However, collective management of forest is now making a ‘come-back’ as devolution and decentralisation of forest management takes place in many parts of the world.¹³ This is mainly due to two reasons: first, as human population expands and the size of the resource has become smaller or depleted, a common management regime can facilitate a more equitable and fair access to forest resource;¹⁴ and second, state management of forests has proved to be less than desirable and evidence of misuse and mismanagement of public forests abounds.¹⁵ In relation to the latter, it is argued that more sustainable exploitation of forest resources can be attained if local forest users have more control over the management of the resources.¹⁶

Second, community-based forest management can also be the product of intentional social-engineering by the government, where under certain political ideology, community ownership and management of natural resources is considered a more ideal form of arrangement (as opposed to private ownership). This is the case in China, where forests were put under the ownership and management of the collective units that had been constituted according to the communist ideology at that time.¹⁷ Along with collective ownership, central planning was also a strong feature of the communist regime; and the activities of these administrative collective units were

¹¹ Nationalisation of forestland in many developing countries took place after independence, largely following the footsteps of the colonial governments that put natural resources under the control and ownership of the state, Lynch, O.J. and Talbott, K., 1995, pp 31-65.

¹² The transition from common property to private property over a natural resource is well illustrated in Harold Demsetz’s article *Toward A Theory of Property Rights*. Under private ownership where the community recognised the owner’s right to exclude others, resource extraction became more sustainable and the concentration of benefits and costs on owners created incentives to utilise resources more efficiently, Demsetz, Harold, 1967

¹³ Lynch, O.J. and Talbott, K., 1995; Colfer, C.J.P. and Capistrano, 2005; Edmunds, D and Wollenberg, E. (eds), 2004

¹⁴ The Joint Forest Management regime in India and the Community Forestry regime in Nepal were constituted to halt further degradation of forests and to grant access to local communities, Agrawal, A. and Ostrom, E., 2001. Resources are put under common management instead of private management because the former provides a more equitable access to the resources. Fair and equitable access to resources is particularly important in places where there is widespread poverty and members’ participation in the market is limited.

¹⁵ Repetto, R. and Gillis, M., 1989

¹⁶ Pierce, C.J. et al., 2005; Edmunds, D. and Wollenberg, E. (eds), 2004

¹⁷ The ideological debates about collective ownership in China has already been discussed in the previous chapter, see Chapter Two above.

coordinated according to the central government's plan.¹⁸ As a result, the collectives enjoyed very little independence or autonomy under the communist regime.¹⁹ Normally, as political ideology changes, the forms of ownership will also tend to change. This is manifested in the former Soviet Union states where state and collective ownership were replaced by private ownership regime following the end of the communist rule. In China, as the political transition was gradual, so were the changes in the ownership structure.²⁰ As a result, collective ownership of forest is still prominent in China, although its significance is increasingly subject to question.²¹

Lastly, forest provides ecological or environmental benefits that 'spill over' its physical boundary. Usually in a private property rights regime where access can be controlled, benefits from the use of forest are accrued to the property owner or to anyone to whom the right to receive benefits has been assigned. Many of the environmental services provided by the forest, however, cannot be contained, and this creates the problem of 'externalities' that are not accounted for. The importance of environmental services provided by forest has increasingly been recognised. As a result, policymakers have tried to turn these services into valuable commodities that can be purchased and sold in the market.²² With the increasing awareness of the significance of the environmental services provided by forest, the issue of 'free-riding' has become prominent, especially in relation to ecological or protection forest. In short, while the owner (or owners) invests in and maintain the forest, he or she (or they) cannot prevent other people from benefiting from the environmental services that are provided by the forest. And unless the owner (or owners) can derive some sort of incomes or benefits from the forest that makes it worthwhile to continue that particular type of land use, he or she (or they) will be tempted to opt for commercial exploitation of the forest if the payoffs are higher.

¹⁸ See Chapter Two above.

¹⁹ See Chapter Two above.

²⁰ Clarke, D., Murrell, P. and Whiting, S., 2005, pp 31-33

²¹ This issue will be looked at below when the latest collective forestland reform in China is discussed.

²² A few of the main functions provided by forest that have been widely discussed are carbon sequestration (relevant to the debates on climate change), protection of biological diversity (relevant to bio-prospecting), and as important watershed. Some of the functions have even been highlighted and recognised in international treaties such as the Convention on Biological Diversity (CBD) and the Kyoto Protocol on Climate Change.

With this in mind, forest can be subject to common management where community members share the cost and benefits of forest management. This can serve two purposes: first, environmental benefits that are accrued to the community as a whole can be 'internalised'; and second, community as a management unit can deal with other parties that are receiving environmental services from the forest more effectively. In relation to the first, it is particularly true in relation to environmental benefits that are accrued locally, such as prevention of soil erosion, protection of biodiversity and water source, and even regulation of the micro-climate. These benefits can be at least partly 'internalised' when the burden and costs are shared among the members of the community, and the problem of free-riding can be ameliorated.²³ In relation to the second, the transaction cost of 'selling' environmental services can be reduced if the 'suppliers' can act together to deal with the 'buyers'.²⁴ Furthermore, the community as a whole may have more bargaining power than individual collective members if they were to negotiate with the buyers separately. In particular, more often than not forest communities in developing countries practice traditional customs and may lack the necessary institution (such as a legal framework that recognises and protects private property) that supports private ownership and the creation of the market. In these cases, collective management of forestland may provide the best alternative that can internalise both the cost and benefits of forest management. So far, however, there is little evidence that forest communities are actively involved in negotiation with third party buyers of environmental services.

The discussions above show that although forest may not necessarily be a common pool resource in all cases, there are circumstances in which common property management may be desirable or preferred. This is by no mean definite or unchangeable; as already discussed in the previous chapters, the institution of

²³ An example of the benefits of internalising both the benefits and costs of forest management can be seen in the case of watershed management in Sukhomajri, India. In this case, standoff arose after the building of a check dam and runoff ponds between villagers above and below the ponds. The upstream villagers had no incentives to protect the watershed against erosion as the irrigation provided by the ponds did not benefit them. To solve this problem, pipes were laid so that most fields in the village would receive water; and more importantly, all households would equally share the ownership of the water in the catchment ponds. These water rights accrued to both the landed and landless households, and these rights were tradeable, Kerr, J., 2002, pp 63-76.

²⁴ Costs of gathering and disseminating information, negotiation and decision-making can presumably be lower when a single entity, guided by internal rules and constitution, is empowered to adopt decisions on behalf of the different 'suppliers'.

property rights is complex and is influenced by various factors.²⁵ The following subsection will look at some of the important characteristics identified so far by theorists of common pool resource management.

2.2 Important Characteristics of Common Pool Resource Management

The study on common pool resource management has provided useful insight into the nature of this type of regime, especially the environment in which this regime is most likely to exist. This subsection will provide a brief overview of the factors that may have an impact on the success or failure of a collective management regime. The discussion of the common characteristics of collective resource management will hopefully shed some light on the viability of the collective forest regime in China. In particular, it will be able to give some explanation as to why the regime has or has not worked. Hence, in this subsection, the description of each attribute is followed by a discussion of the situation in China.²⁶ It will be shown that China's collective forest regime lacks most of the attributes that are deemed to be essential for the success of a common pool resource regime. The attributes outlined below are derived from the findings of Elinor Ostrom, who is one of the most prominent theorists in the study of common resource governance.²⁷ The following analysis is derived from both her earlier and latter works.²⁸

The characteristics of a collective governance of common pool resource can be roughly grouped into four categories, which are the nature of the resource, the nature of the users, the nature of the institution, and the relationship between the collective institution and the government. In relation to the nature of the resource, it is provided that the boundaries of the resource must be clearly defined, and so must the

²⁵ See Chapter One for the theory of property rights and see Chapter Three for the discussions of the theory of institution in relation to China's collective regime. In particular, the institution of property rights is affected by the changes in price and technology, the characteristics of the users and the characteristics of the resource.

²⁶ Again, the discussions of forest collective entities here mainly refer to the mainstream non-indigenous communities. Indigenous communities in China are given more autonomy to govern their common resources and have different social institutions that make collective governance more robust compared to non-indigenous communities.

²⁷ Ostrom paved the way for the studies of common property regime, especially in relation to the management of common resources. Her analysis has been widely accepted and is used by many in the subsequent studies of the same area. Her works are still regarded as authoritative and are representative of this area of research.

²⁸ Ostrom, E., 1990; Ostrom, E., 2000. Subsequent analysis of the characteristics of common property regime by other authors mostly expands on Ostrom's findings. For one example, see McKean, M.A., 2000, pp. 43-50.

individuals or households who have rights to withdraw resource units from the common pool resource.²⁹ Without clearly defined boundaries, there is a risk that 'outsiders' will be able to reap the benefits produced by the efforts of the community members without contributing to the venture themselves. This will effectively amount to the 'open access' situation discussed above where the resource is continuously depleted at an unsustainable rate. Apart from the boundary issue, the value of the resource may also be a factor, although there is no single definite indicator. For example, in places where the value of production per unit is marginal but essential, collective management regime is set up to reduce the costs of maintaining and protecting the resource.³⁰ On the other hand, there are instances where collective management of resource is still preferred although the value of the resource is high. One example of this is community forestry in Mexico where communities are not only involved in subsistence use of forest resources, but are also involved in commercial production of timber, which can be a lucrative business.³¹ Hence, the value of the resource itself is not conclusive; other factors remain equally important.

In the case of China, it has been pointed out that forestland in China is particularly affected by boundary disputes as 'land was never systematically registered and there is no cadastre'.³² As a result, there are hundreds of forest disputes involving hundreds of thousands of hectares of forestland each year, and most of these cases are unresolved.³³ The deficient land registration system is particularly detrimental to collective forest because unlike the arable land, forestland is presumed to be state-owned unless collective ownership can be proven.³⁴ It has been argued that as a result of the boundary issues, the government has merely assigned ownership of the rural land to the 'collective' even though there is no clear definition of the 'collective' entity.³⁵ This is to avoid the explosion of boundary disputes which could potentially cause widespread social unrest. Furthermore, the lack of clear boundaries has given

²⁹ Ostrom, E., 1990, pp 91-92.

³⁰ Together with low value of production per unit, high variance in the availability of resource units, low returns from intensification of investment, substantial economics of scale will also make collective management of resource more attractive, Ostrom, E. 2000, p 344.

³¹ Bray, D.B. and Merino-Pérez, L., 2002

³² Ho, Peter, 2005, p 100.

³³ *Ibid.*, p 119

³⁴ *Ibid.*, p 100. Art 8 of Land Management Law and Art 2 of Regulations on the Implementation of Land Management Law

³⁵ Ho, Peter, 2005, pp 45-68. The problem of definition ambiguity of collective ownership has been discussed in Chapter Three above.

local authorities or even the central government plenty of opportunities to exploit the situation.³⁶

In relation to the nature of the users of the resource, there are three important factors, namely the number, homogeneity and commitment of the users. In early literature, it has been argued that common property regime is only feasible if the number of users is small.³⁷ The evidence, however, is not conclusive³⁸, although it is true that the larger the group of users, the higher the transaction costs in reaching agreement will be.³⁹ The same is true for group homogeneity. Although the importance of homogeneity is not conclusive, it has nevertheless been pointed out that group heterogeneity⁴⁰ can increase transaction costs and conflicts between users.⁴¹ Lastly, the commitment of the users plays a substantial role in securing the success of a common property regime. For example, a collective management regime is more feasible if the participants share a common understanding about the necessity of, and benefits and risks associated with, the collective regime. Furthermore, a collective regime will also likely be successful if the participants share generalised norms of reciprocity and trust, which will reduce the costs of negotiation, implementation and monitoring.⁴² Active and sincere participation in decision-making is also an indication of a vibrant and healthy collective regime, although a precondition to this is that users should also have access to accurate information at relatively low cost about the condition of the resource and the expected flow of benefits and costs. When the above-mentioned attributes of resource users are present, common property regime is more likely to succeed than when they are not.⁴³

³⁶ In fact, the lack of a poor land registration system means that it is always difficult for the collectives to prove ownership, especially if they invoke customary titles, *ibid*.

³⁷ Olson, Mancur, 1982, pp 53-65

³⁸ Agrawal, A., 2000

³⁹ However, the increase in the group size will also decrease the burden borne by each participant for meeting joint costs, and it will also increase the size of the assets held by the collective, Ostrom, E., 2000, p 347

⁴⁰ Differences within the user group may come in many dimensions including the cultural belief systems, wealth, production technologies, time horizons and the degree of reliance on the resource, Ostrom, E., 2000, p 348

⁴¹ *Ibid*.

⁴² Other characteristics of participants that are conducive to the selection and performance of common property regime are the following: the user group is relatively stable; and participants plan to live and work in the same area for a long time (similar time horizon), Ostrom, E., 2000, pp 346-347.

⁴³ It has been pointed out that instead of taking the attributes of participants as given, one way of coping with a common property regime is to change the composition of the participants. By increasing the proportion of participants who have a long-term interest in sustaining the resource, and are likely to

Users of collective forest in China range from a few hundreds to a few thousands depending on the entity of the collective owners. For example, if a forest is owned by a natural village or village group, then it is likely that the number of users will be less than a forest community whose forest is owned by the administrative village. Even though the number of users tends to be relatively large, management of collective property is not impossible as day-to-day administration is carried out by the representatives chosen by the users. And given the fact that many villages are tribal- or clan-based⁴⁴ and that not all residents (especially outsiders who have moved into the village) have the right to obtain land use right⁴⁵, it can be safely assumed that group heterogeneity is not a huge problem in rural China. Having said that, there is very little evidence to suggest that users of collective forest in China share the commitment or enthusiasm for a fair and successful collective regime.⁴⁶ A few factors may explain why this is the case.⁴⁷

First, the establishment of the collective or user group was not initiated by the users themselves; rather, it was imposed on them by the government as part of the state-planned economic system. The lack of initial voluntary participation may affect users' commitment to the arrangement. Second, the use of forestland is tightly controlled by the government and users possess little autonomy in relation to the use and transfer of the land. This is especially true after the adoption of the Natural Forest Protection Programme by the Chinese government in 1998, which not only imposes a logging ban on collective forests but also designates the use of certain collective forests as protected forests and as a result severely limits their use. Without real autonomy over the use of forest, there is very little incentive for users to be enthusiastic about

use reciprocity and trust, the likelihood of a successful common property regime is higher, Ostrom, E., 1999, *Coping with Tragedies of the Commons*, p 23.

⁴⁴ Han Mingmo, 2001, pp 173-176

⁴⁵ Pan Jiawei and Zhou Xianri, 2004, p 210.

⁴⁶ For example, according to a survey carried out in the Fujian Province, when asked for the reasons why farmers were against unified management of forestland, almost all interviewees stated that unified (collective) management failed to provide effective motivation and that farmers could benefit more from individual management, Wang Chunfeng, 2005. Some possible exceptions are communities that have taken active steps to improve collective governance and welfare of their members, such as those that have participated in the share-holding system mentioned in Chapter Two above. Having said that, more often than not the establishment of a successful collective management regime in China is driven by the inspired local leaders, rather than from the initiatives of the members themselves.

⁴⁷ These include only internal factors that are caused by the nature of the collective institution itself; they do not include external factors such as the timber market or the tax policy that affects the profitability of forestry industry.

resource management. Third, individual users have little opportunity to participate in decision-making and as already seen in Chapter Three above, collective affairs are mainly managed by the village leader or party secretary. The lack of active participatory right not only dampens users' motivation to participate in collective management, but also makes it impossible for users to influence decisions about the use of the common resources.

The nature of local institution has a substantial influence in the success of a common property regime. Institution here refers to not only the existing rules and norms, but also refers to the robustness and adaptability of the current governing structure. Rules and norms consist of both procedural and operational rules, which also encompass sanctions and conflict resolution mechanisms. Operational rules refer to rules that govern the day-to-day use and management of the resource. They affect users' decisions 'concerning when, where, and how to withdraw resource units, who should monitor the actions of others and how, what information must be exchanged or withheld, and what rewards or sanctions will be assigned to different combinations of actions and outcomes'.⁴⁸ In short, these rules affect issues such as appropriation, provision, monitoring and enforcement.⁴⁹

Procedural rules are mainly concerned with the decision-making processes, and can be divided into two levels: collective choice rules and constitutional choice rules.⁵⁰ Collective choice rules govern policy-making, management and adjudication at the local level, which involve the resource users, their representatives, and / or external authorities. These rules can be promulgated by the communities⁵¹ and provide the basis for policy making in relation to how a common pool resource should be used. Constitutional choice rules govern decision-making at a higher level where the decisions on which communities are eligible and what specific rules to be used in crafting the set of collective choice rules are made. Constitutional choice rules are usually made by the government that set the boundary or extent of collective management of resource.

⁴⁸ Ostrom, E., 1990, p 52.

⁴⁹ Ibid., p 53.

⁵⁰ Ibid., pp 50-55.

⁵¹ China's village-level regulations provide a good example of the collective choice rules. See Chapter Three above.

There are three important issues relating to the rules and norms that govern common property regime, namely participation, sanctions and conflict resolution. The first concerns the role of the members of the user group or any external authorities in shaping the operational rules. This would depend on the content of collective choice rules, which determine who can, and how to, shape or modify operational rules.⁵² Generally, it is assumed that a common property regime is more sustainable if most individuals affected by the operational rules can participate in shaping or modifying the rules. This is because of two reasons. First, the fact that operational rules are designed or made by users (as opposed to rules imposed by some external authorities who have less information about the use of the resource than the users themselves) may encourage compliance of the rules.⁵³ Second, users possess information about local conditions that may have an impact on resource use. It is imperative that rules governing pattern and mode of use, provision of labour and so forth reflect the local conditions and the specific attributes of the resource because only then suitable arrangements can be made.⁵⁴ Suitable or appropriate arrangements are important because they promote sustainable exploitation and decrease instances of conflicts.

To help improve compliance, graduated sanctions are essential.⁵⁵ To be effective, sanctions must be perceived to be fair and proportionate by the users; heavy-handedness by enforcers may prompt resentment and produce the opposite effect. Lastly, given the fact that conflicts will always arise either between resource users or between resource users and outsiders (including government officials), rapid access to low-cost local conflict resolution facilities is important.⁵⁶ The questions of what type of conflict resolution mechanism should be adopted, how it should be constituted and who can have access to it are determined by the rules. And apart from locally instituted conflict resolution arenas⁵⁷, resource users may also resort to formal adjudication institutions such as courts and mediation centres.

⁵² Ibid., pp 93-94

⁵³ Ibid.

⁵⁴ Ibid., p 92

⁵⁵ Ibid., pp 94-100

⁵⁶ Ibid., pp 100-101

⁵⁷ These refer to local institutions that are presided by members of the community that resolve conflicts in accordance with rules that govern local resource use. Examples of these institutions can be found in Ostrom, E., 1990.

A local resource management institution is very much characterised by the players within the institution and the rules and norms that shape its constitution. The interactions between the rules and the players not only influence the day-to-day operation of the collective management regime, but also determine the robustness and adaptability of the institution. When an institution is robust, it can insulate itself from threats from both within and outside the institution.⁵⁸ The closer the rules reflect the local conditions and the more effective conflict resolution mechanisms are, the more robust an institution will be. On the other hand, the institution also needs to be adaptable to changes that are taking place within and outside the institution. As the society evolves, the belief systems and societal values may change; if an institution is too rigid, it is most likely that it will collapse when the underlying shared understanding that makes the institution a cohesive body in the first place falls apart. Extensive public participation in decision-making processes and a strong feedback system may help to boost the adaptability of an institution as changes can be swiftly adapted through the input of the members of the user group.

The many shortcomings of the institution of the collective in China have been discussed in Chapter Three above. The lack of a genuinely democratic process that allows members of the collective to choose their representatives, the overwhelming power of the state over the collective affairs, the rampant corruption and incompetence of local government officials and even collective leaders, and the failure of the justice system to protect the rights of the collective members⁵⁹ are reasons why an overall successful collective forestry regime has eluded rural China. The collective regime in China is, at best, still in the infancy of 'self-governance' with the capability to improve, or at worst, merely the 'administrative agent' of the state with little or no autonomy. There has been no genuine intention to build up the social capital and expertise needed for successful collective regime by the government. The failure by the government to provide the necessary platforms that encourage the collective and its members to develop the necessary skills and expertise is prominent

⁵⁸ The threats do not include minor or occasional conflicts that can be resolved via the conflict resolution mechanisms. They refer to more serious infractions or interference that challenge the very existence of institution or the collective management regime. Threats from outsiders refer to intervention by third parties that potentially have control or power over the local institution such as government officials.

⁵⁹ The problems of China's justice system will be discussed further below.

when compared to the effort by the Mexican government in helping to set up genuinely independent community entities, as will be discussed below. Although village governance (in terms of public participation and autonomy) in China has come a long way since 1978, the truth is that it is still very much controlled by the government and is hardly a truly independent entity that represents the best interest of its members. This is perhaps inevitable in a country governed by a one-party government that still practices centrally planned economy to a great extent.⁶⁰

Lastly, the relationship between the collective institution and the government also has an impact on the feasibility of a common property regime. Local collective resource management regimes do not exist in isolation; more often than not they form part of the wider structure of the government administration.⁶¹ This is because most community forest management regimes exist within the boundaries set by the government, and because members of the user group use public services, such as access to the formal adjudication institutions to resolve conflicts and protect their rights. It has been pointed out that for a common property regime to succeed, there should be at least some minimal recognition by the external governmental authorities of the community's rights.⁶² This 'external recognition' is important in relation to two matters, which are the right to organise and legitimacy of the rules. Without the recognition of the right to organise, forest communities risk losing their forests to the government or third parties whose interests are recognised as legitimate by the government.⁶³ In addition, if the 'internal' rules of resource management are not recognised by the government, any person who wants to get around them may go to the government to get the rules annulled. This will create a situation where different

⁶⁰ The government's control over the economy is not only confined to the agricultural sector, even the commercial and industrial sectors are largely under the influence of the government via the shareholding regulations, see Hutton, Will, 2007, pp 142-170, for more information.

⁶¹ This is true in relation to most of the community forest management regimes that emerged the last few decades. These regimes were either set up or endorsed by the government, and formed part of the administrative structure of the government. For example, the Panchayats of the forest community regimes in India and Nepal act as the lowest administrative units in the governance system. See note 3 above. This is not unlike the situation in China where the collective is the governing bodies at the village level.

⁶² Ostrom, E., 1990, p 101

⁶³ This took place in many developing countries at the beginning of last century when ownership claims by indigenous communities were ignored and forests were nationalised by the state. The indigenous communities not only lost the ownership rights, they also lost their right to use the forests, Lynch, O.J. and Talbott, K., 1995.

users apply different rules and the collective system will eventually collapse.⁶⁴ This is why it is unlikely that a common property regime will be able to survive without at least some minimum recognition from the government.

However, too much interference from the government will also jeopardise the success of the common property regime. As already pointed out above, public participation in the decision-making process and the compatibility between the rules and local conditions are important factors in ensuring the success of a common property regime. More often than not the government, represented by the forest department, has little interest in, or understanding of, local circumstances, and may be primarily interested in forest revenues rather than the welfare of forest-dependent communities.⁶⁵ Furthermore, the government may also want to impose one set of rules that work best for an entire jurisdiction, regardless of their compatibility with local conditions.⁶⁶ Incongruence between the rules and local circumstances may jeopardise the survival of local common property regimes.

The relationship between the government and collectives in China has been discussed in detail in Chapter Three. It suffices to say that the government is an active party in the formation and supervision of collective affairs. This is mainly accomplished via the control over land ownership and the employment of party representatives at all levels of governance, including the village level, even though the latter is officially not part of government structure. As pointed out, the party secretary sometimes usurps the role and power of the elected collective leader; or in a more direct way, the party secretary is sometimes chosen as village leader to govern collective affairs. It is fair to say that the government plays a direct and active role in the development of the collective regime in China not least because it wants to make sure that the collective regime conforms to the values endorsed by the government and to avoid major upheavals in the rural areas. The extent of intervention of government in collective affairs is most clearly illustrated by the development and growth of Township and

⁶⁴ For an example of this, see the collapse of the fishing arrangement in Sri Lanka in Ostrom, E., 1990, pp 149-157.

⁶⁵ Larson, Anne M. 2005, p 44

⁶⁶ Ostrom, E., 2000, p 32

Village Enterprises (TVEs), which was impossible without active the support of the local governments.⁶⁷

As a conclusion, common property regime cannot exist in just any situation; there are certain important attributes that need to be present before it is feasible. Furthermore, even if a common property regime can be established, it does not mean that the regime will persevere unless certain attributes are present. The analysis above is based on the conclusions drawn from the many studies on various common property regimes in different parts of the world, which include forest and non-forest regimes. The discussions shed light on how common property regimes work. By using these attributes as points of reference, it is quite clear that China's collective forest regime is far from the independent and efficient common pool resource management regime described by Ostrom. Recognising the need to improve its collective forest system, the Chinese government launched the latest reform of collective forest in 2003, which aims at further devolving management rights to households and to make collective forestry more competitive. Due to its short period of implementation, it is still unclear whether or not the reform has significantly improved the collective regime, although initial results show that the reform has not yet solved some fundamental problems that are imbedded in the collective institution. But before we move on to the analysis of the latest collective forest reform in China, some comparative studies of different community-based forest management regimes will be looked at. It is hoped that they will further help with the diagnosis of China's collective forest's present condition and future prospect.

3. Examples of Collective Forest Management in Practice

Successful community forestry regimes around the globe have been documented, which come from both the developed and developing world.⁶⁸ This section will look at whether or not all or some of these success stories can be replicated in China. The different successful community forestry regimes can be divided into three main groups: the first two involve community forestry mainly in developing countries

⁶⁷ Hutton, Will, 2007, pp 104-109; Clarke, D., Murrell, P. and Whiting, S. 2005, p 10; Whiting, Susan. 2001, pp 118-120; Li, Ping. 2005

⁶⁸ Colfer, C.J.P. and Capistrano, D., 2005; Ostrom, E., 1990; Edmunds, D. and Wollenberg, E. (eds), 2004.

while the third involves community forestry in developed countries. In the first case, some developing countries in Asia and Africa have devolved forest management rights to local communities, such as the Joint Forest Management scheme in India and the Community Forestry scheme in Nepal. Local communities are usually 'contracted' by the government to regenerate forestlands and in return are given the ownership rights over the trees planted and other forest resources.⁶⁹ Most of the forestlands involved in these programmes are marginalised lands that have little or no economic value to the governments. Furthermore, these rights are usually limited in the sense that the use of forest resources are only allowed for subsistence purposes and not for commercial activities.⁷⁰ This is in contrast with China where commercial uses of forest resources are not banned from collective forests.⁷¹

The second group refers generally to community forestry in some Latin America and Asia-Pacific countries such as Mexico, Papua New Guinea and Fiji. In these countries, community ownership of forestland is prevalent. For example, in Papua New Guinea, 97 per cent of all forestland is owned by clan or tribal groups under customary law.⁷² Similarly, in Fiji, the majority of the forestland is owned by some 6000 Fijian communities.⁷³ Community forest management in Mexico is slightly different in that community forests are owned by both non-indigenous (known as *ejidos*) and indigenous groups (known as *comunidades*). Many collectives that manage and own forestland also run the logging and timber processing operations for profits.⁷⁴ The major difference between this type of community forestry and China is that these communities (whether or not they are part of the administrative structure of

⁶⁹ Unlike China, the ownership of these forestland still resides with the state, and communities were only given the usufruct rights. Agrawal, A., and Ostrom, E., 2001; Sarin, M. et al., 2004, in Edmuds, D. and Wollenberg, E. (eds), 2004, pp 55-126; Ferguson, I. and Chandrasekharan, C. 2005, pp 69-70

⁷⁰ This is true in relation to the Joint Forest Management regime in some places in India and the Parks and People system in Nepal where the priority is to conserve the forests. Since the establishment of community-based forest management in Nepal in the late 1970s, a series of new legislations have been passed to expand the area of forests managed by local user groups and more significantly, to allow user groups to harvest forest products for commercial processing and sale. Lynch, O.J. and Talbott, K., 1995; Agrawal, A. and Ostrom, E., 2001.

⁷¹ There are in fact a few private joint-ventures between companies and the collectives, which is an emerging phenomenon in China. For more details, please see Lu Wenming et al., 2002, pp 81-98.

⁷² Ferguson, I. and Chandrasekharan, C., 2005, pp 70-71.

⁷³ Ibid.,

⁷⁴ This is particularly true in relation to Mexico, Bray, D.B. and Merinio-Pérez, L., 2002. In Papua New Guinea and Fiji, although indigenous groups' ownership of forestland is unequivocal, the government and third party concessionaires play an active role in facilitating and carrying out commercial exploitation of forest, although small-scale community-run logging and sawmilling operations have been created with the help of foreign donors, Ferguson, I. and Chandrasekharan, C., 2005, pp 70-72.

the government) are much more independent than their Chinese counterparts. For example, these communities have the final say as to how their forests are to be used, and they are entitled to profits derived from the use of the forests.⁷⁵ More importantly, their entitlement to the forestland is secure and is protected against encroachment by any third party including the government.⁷⁶ This is in contrast with the collectives in China where forestland use is still tightly controlled by the government and the role of the collectives is limited to the fulfilment and enforcement of various administrative tasks and targets assigned by the government.

The third group of community-based forestry refers to those that exist in developed countries. Countries like Switzerland and the UK (especially Scotland) have relatively successful community-based forestry regimes.⁷⁷ However, there are fundamental differences between these communities with the collectives in China: first, these communities exist in post-industrial societies where forestry is a small part of the GDP; second, there are no forest-dependent communities; and third, forest management for timber and pulp is uneconomic and highly subsidized.⁷⁸ Forests in China still serve a useful purpose in providing food, fuel, and income to local communities. Hence, the planning for forest management in China and industrialised countries involves different considerations that reflect the socio-economic differences.

Having looked at some of the successful examples of community forest management regimes and the features that set them apart from collective forestry in China, the author would like to discuss in more detail one particular community-based forest management regime that, in the author's opinion, most closely resembles China's collective forest regime. It is hoped that the comparative studies may provide some useful insights into the strength and feasibility of collective forest management regime in China. The regime that will be looked at is the community forestry in Mexico. As pointed out above, community forestry is well established in Mexico where the majority of the forests are owned and managed by local communities. Many of these communities were created by government decree (as opposed to the continuation of traditional forest communities), just like the collective regime in

⁷⁵ Ibid., and Bray, D.B. and Merino-Pérez, L. 2002

⁷⁶ Ibid.

⁷⁷ Küchli, C. and Blaser, J. 2005; Ritchie, B. and Haggith, M. 2005

⁷⁸ Küchli, C. and Blaser, J. 2005, pp 152-155, and Ritchie, B. and Haggith, M., 2005, pp 212-228.

China. The following section will outline the key characteristics of community forestry in Mexico and the key lessons that can be learned from it.

4. A Comparative Case Study and Lessons for China: Community Forestry in Mexico

In Mexico, communities own around 80 percent of the forests.⁷⁹ Large-scale transfer of Mexico's forest natural assets from the government to the community took place between 1950-1980, during which around 40 percent of the forests changed hands.⁸⁰ The agrarian reforms continued in the 1990s where the control of community over forestland was further strengthened.⁸¹ Community forests in Mexico are divided into two groups: *ejidal* land (managed by *ejidos*) and *comunidad* land (managed by *comunidades*). As pointed out above, the former are non-indigenous groups while the latter are indigenous groups of forest users. Community forestry in Mexico is one of the most important examples of community-based forest management in the world, not only because it covers a huge proportion of the forest area in Mexico, but also because the forest communities play a non-marginal role in the commercial production of forest products.⁸² In particular, forest communities have representatives not only at the local level, but there are also national organisations that allow these communities to coordinate their effort and to have their interests represented.⁸³

4.1 Key Characteristics of Community Forest Regime in Mexico

Community forestry in Mexico took root in the Mexican Revolution in 1910, when a massive and ongoing distribution of land (including forestland) to groups of peasant farmers⁸⁴ had the consequence of allowing the communities to be in charge of the

⁷⁹ Bray, D.B. and Merino-Pérez, L. 2002, p 2

⁸⁰ Ibid.

⁸¹ Brown, Jennifer, 2004. This reform will be discussed in more detail below.

⁸² The community-based forestry in Mexico is hailed as the world's few examples of 'formal market-oriented community enterprises established on the basis of a common property resource', Bray, D.B. and Merino-Pérez, L. 2002, p 20. However, forest production plays only a minor role in the overall Mexican economy. In 1995, the World Bank concluded that forestry sector in Mexico had underperformed due to high production costs, inefficient community-managed forests and lack of infrastructure that made most of the timber inaccessible, *ibid.*, p 12.

⁸³ *Ibid.*, pp 52-63.

⁸⁴ The Constitution of 1917 of Mexico mandated that land to be taken from large landholders and granted to landless labourers: groups that consisted of at least 20 people could hold land communally. These groups are subsequently recognised as '*ejidos*'. Similar mechanism was provided for indigenous

natural assets on their community lands.⁸⁵ Land held by both the *ejidos* and *comunidades* is divided into several classifications, which are not too dissimilar to the collective land in China. These categories are as following: first, parcelised arable land held and worked by collective members; second, common land, generally consisting of forest, mountain, grazing or waste land, which is monitored and managed by a governing body⁸⁶ democratically elected by the community members; and third, land for human settlements.⁸⁷ The composition of the rights and power of the community and its members over the management and ownership of these different types of land vary. For example, plots for human settlements are fully owned by the individual holders, while some arable land can also be privatised.⁸⁸ For common land, including forestland, it is usually inalienable and members have permanent use rights.⁸⁹ Privatisation of community land is a key feature that sets the Mexican community-based regime apart from the Chinese collective regime. As Chapter Two and Three above pointed out, collective land in China cannot be privatised; unlike their counterparts in Mexico, collective members in China are only given land usufruct rights.

In relation to the internal governance and membership, there are generally three governance units in an *ejido* or *comunidad*: the assembly, which comprises of all members; the comisariado, which is the elected executive leadership body; and the vigilance council, which is elected to monitor the comisariado.⁹⁰ Not everyone who

communities to reclaim their historic landholdings, which are subsequently known as 'comunidades'.
Brown, Jennifer, 2004, p 4.

⁸⁵ Bray, D.B. and Merino-Pérez, L. 2002, p 3. Community forestry here does not refer to traditional forms of community-based forest management which were not recognised by the government. Instead, it refers to legally established community-based regimes that were sanctioned by the government.

⁸⁶ This body is known as the comisariado, Brown, Jennifer, 2004, p 8.

⁸⁷ Ibid. Collective land in China is also divided into arable land that is contracted out to individual households (which consists of both family and responsibility plots), collectively managed land such as forest and wasteland, and private land for residential purposes, see Chapter Two.

⁸⁸ Generally only *ejidal* land can be privatised; a *comunidad* land cannot be privatised unless it first converts to an *ejidal* land. *Ejido* can either privatise all *ejidal* lands by disbanding the *ejido*, or privatise parts of its land after the assembly votes to approve the transaction. In the latter case, members of the land holder's family and the members of the *ejido* have the right of first refusal to purchase the plot. According to the finding of a research, the main reasons anyone would choose to privatise the land were for the purpose of selling the land and to have access to formal credit. Generally most land holders feel that the permanent use rights they have over the land are secure, Brown, Jennifer, 2004, pp 20-22.

⁸⁹ Common land can be transferred under limited circumstances, such as if a two-third majority vote allow common land to be transferred to a civil company in which the community members participate, ibid., pp 21-22.

⁹⁰ Brown, Jennifer, 2004, p 12.

lives or works within an *ejido* or *comunidad* can be a member of the assembly: only those who hold land use rights are considered members and have the right to vote.⁹¹ The comisariado consists of at least a president, a secretary and a treasurer while the vigilance council consists of a president and two secretaries. According to the finding of a research, election of the comisariado takes place once every three years as required by the law, and communities are generally aware of the law that prohibits consecutive terms.⁹² In some communities, fairness and transparency have been built into the governance system: elaborate systems whereby members rotate during their lives through a series of 15 posts, including the leadership positions, have been adopted.⁹³

Recent reforms in Mexico have sought to curb the powers of the comisariado and the vigilance council by making the assembly responsible for most of the management decisions.⁹⁴ To protect the rights of the members, the recent reforms have also required a representative of the Procuradía Agraria (a federal agency created to assist community members in discerning their new rights under the 1992 reforms⁹⁵) to be present at meetings where certain major decisions, such as privatisation of land, are made.⁹⁶ *Ejidos* and *comunidades* can devise their own rules, which must be registered with the National Agrarian Register.⁹⁷ The structure of the internal governance of these communities is quite similar to the governance structure of the collectives in China which comprises of a village assembly, a village leader, the village committee and sometimes local party secretary.⁹⁸ However, there is no supervisory body that monitors the works of the village leader and the village committees. Also, no central government official is required to be present at important meetings to make sure that irregularities do not happen.

A democratically elected governing body and locally devised regulations mean that *ejidos* and *comunidades* have considerable independence and autonomy to govern

⁹¹ Ibid.

⁹² Ibid., p 13

⁹³ Ibid., p 14

⁹⁴ Ibid.

⁹⁵ Ibid., p 7

⁹⁶ Ibid., p 12

⁹⁷ Ibid., p 13

⁹⁸ For the governance structure of the collectives, see Chapter Three.

their own affairs. Like the collective in China, each *ejido* or *comunidad* is a self-governing body. It is, at the same time, an ‘instrument of political control, a mean for the organisation of production, and a body of peasant representation’.⁹⁹ The 1992 agrarian reforms have sought to give these communities more power to administer local affairs, including the exploitation of forest resources, and to reduce state control.¹⁰⁰ Although the decisions taken by the communities must comply with the law of the state such as the zoning and planning law and the Agrarian Law, the communities nonetheless have wide discretion to exercise autonomy in affairs that fall outside the ambitions of the law.¹⁰¹ The community land owners can establish regulations to govern the use of the communal property and there are no over-restrictive legislations that limit the land to certain types of uses, unlike in China where neither the collective governing body nor its members can change the nature of the land from agricultural to non-agricultural.

The obligations of the *comisariado* (the equivalence of village committee including the village leader in China) include monitoring and managing common land, the exploitation of common resources and the management of human settlement land.¹⁰² Like their counterparts in China, the *ejidos* and *comunidades* also provide services that either complement, or overlap, with the duties of local municipality such as policing activities and the local school committee.¹⁰³ Community members share the obligations to provide these services; and in some places, any member that leaves the community for an extended period of time is required to make a payment to the *comisariado* to make up for the fact that he or she was not available during the time for service.¹⁰⁴ Like in China, these local communities also face financial difficulties as they do not receive government’s help or grant in performing these duties.¹⁰⁵ However, there is no evidence to show that the administrative duties provided by

⁹⁹ Bray, D.B. and Merino-Pérez, L. 2002, p 51. As pointed out by Chapter Three, the collectives in China also play three important roles, which are grass-root administrative units, collective economic units, and democratic organisation of the masses. These roles are virtually identical to the roles played by the *ejidos* and *comunidades* in Mexico.

¹⁰⁰ *Ibid.*, p 19.

¹⁰¹ Brown, Jennifer, 2004, p 13.

¹⁰² *Ibid.*, pp 13-14

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, p 14

¹⁰⁵ *Ejidos* and *comunidades* raise money through fines of service charges imposed on the use of common goods, *ibid.*, p 15. For the discussions of financial impasse experienced by the collective and local governments in China, see Chapter One above.

these communities are as great as those shouldered by the collectives in China. Collectives in China are responsible not only for all kinds of services that are usually provided by local municipality, such as healthcare and education, but also for carrying out government policies such as the one-child policy.¹⁰⁶

Another major difference between the forest communities in Mexico and the collectives in China is the presence of second- and third-level organisations in Mexico. Many of these organisations were established to meet the requirements of the provision of the forest technical services.¹⁰⁷ Most second-level organisations are quite limited in the collective activities they undertake, which usually surround the issues of provision of forest technical services and the lobby for various forms of government support.¹⁰⁸ Second-level coordination of forest management and marketing, however, is absent mainly due to the lack of trust among the different community groups.¹⁰⁹ Third- or national level organisations were strongly promoted by the government and three different national organisations have emerged, which were created at different times.¹¹⁰

The latest third-level organisation (known as the National Union of Organisations of Forest Communities) was created in 1993 and like the other two earlier organisations, it consists of both second-level organisations and individual community groups.¹¹¹ The organisation was established with the support of the Mexican government as it was hoped that a strategic alliance with the government would result in more financial assistance flowing from the government to the communities.¹¹² Although it is a national organisation, most activities it undertakes take place at the regional level; the national structure serves primarily to facilitate communications between members and

¹⁰⁶ See Chapter Three above.

¹⁰⁷ The fourth Forest Law adopted in 1986 allowed either individual communities or organisations to administer their own forest technical services. However, communities were urged by the government and outsider organisers to band together as this was deemed to be the more efficient measure to provide forest technical services, Bray, D.B. and Merino-Pérez, L. 2002, p 56.

¹⁰⁸ *Ibid.*, p 57

¹⁰⁹ *Ibid.*, p 58. Apart from the problem of lack of trust, second-level organisations also face the problem of high costs of collective action: they often suffered from the defections of the largest members because the perceived costs of collective action were higher than the benefits, *ibid.*, p 3.

¹¹⁰ *Ibid.*, pp 59-63.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, p 61

to carry out national lobbying.¹¹³ The organisation gets financial help¹¹⁴ from both the government and other donors (both foreign and local), and has so far established several projects in marketing, women's projects, and certification of timber product.¹¹⁵ Despite its modest success, it has been pointed out that without the support of the Mexican government and foreign foundations, the national level organisation might not have survived as they have received very little material support from the member organisations.¹¹⁶ Furthermore, the presence of a few such organisations divides communities and prevents a unified voice representing all forest communities in Mexico.¹¹⁷

Forest communities in Mexico are not all identical. Apart from the indigenous and non-indigenous dichotomy, forest communities are also classified into different groups according to the degree of their involvement in the production of forest resources.¹¹⁸ It has been proposed that there are five different types of forest communities in Mexico: potential producers; producers who sell timber on the stump; producers of forest raw materials; producers with capacity for transformation and marketing; and producers with capacity for processing of sawnwood.¹¹⁹ Potential producers are 'owners of forestlands with capacity for sustainable commercial production that currently do not carry out logging because they lack an authorised forest management plan or sufficient means to pay for its elaboration'.¹²⁰ These forest communities do not run any kind of community forest enterprises (CFEs). The second group is also known as the 'stumpage communities' as they, the owners of the forestlands, contract the forests out to third parties for commercial exploitation and do not get involved in any phase of the extraction process, although some may participate as labourers.¹²¹

¹¹³ Ibid.

¹¹⁴ The organisation competes with another third-level organisation to get government's funding and has even resulted in instances of inter-agency rivalry within the government, *ibid.*, p 62.

¹¹⁵ Ibid.

¹¹⁶ *Ibid.*, p 63

¹¹⁷ Ibid.

¹¹⁸ *Ibid.*, pp 14-17. This is, however, not official classifications of forestland by the Mexican government.

¹¹⁹ *Ibid.*, p 16

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

The third group is also known as the ‘roundwood communities’ where the owners do participate directly in some phases of the productive chain. For example, some communities may own their own logging teams, and some may even own equipment such as skidders and trucks.¹²² The fourth group, also known as the ‘sawmill communities’, refers to communities that not only produce raw forest materials, and also have infrastructure for its primary transformation and carry out the marketing of their products.¹²³ The last group of communities refer to ‘producers of roundwood that have a sawmill as well as other diversified processing infrastructure to give value-added to the sawnwood’.¹²⁴ This is the most ‘advanced’ form of community-run forest enterprises where local communities are involved in all processes of the production of final goods, and do not have to share the proceeds with any third parties.

4.2 Comparisons between Mexico and China: Lessons to be Learned

So far, we have seen that there are many similarities between community-based forest management in Mexico and collective forest in China. For example, community land is divided into different categories according to its uses (such as arable land, common land and human settlement land). In addition, the internal governance structures of both the Mexican communities and the collectives in China are quite similar: both institutions are headed by democratically elected leaders and governing members, who make most, if not all, important decisions concerning common land use and community affairs. Lastly, both types of communities are not concerned exclusively with the use of forest and forest resources; both are local administrative units and must (to different extent) provide various kinds of services to the members of the community. More fundamentally, many of these collectives (in China) or communities (in Mexico) are not indigenous groups who claim their titles from traditional usage of the forests, but are administrative units created by the governments that actively pursue the policy of community-based forest regime.

Despite the similarities, there are stark and fundamental differences between these two regimes. The Mexican model represents a more comprehensive and ‘advanced’

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

version of community-based forest regime. This is mainly because of the fact that the community's autonomy over its affairs, including land use, is more extensive in Mexico. Chapter Two and Chapter Three above have shown the limitations of both the private usufruct rights and the collective ownership rights of land in China. In particular, community's land ownership rights are more absolute in Mexico in the sense that land that are used by individual households (such as arable land and human settlement land) can be privatised; even common land can be privatised under limited circumstances.¹²⁵ In China, collective land cannot be privatised. Unlike in Mexico, however, collective forests (which are common land in Mexico) in China are also contracted out to households for private management and use.

The following subsections will look at the lessons that China can learn from the experience of Mexico. These lessons are broadly divided in two categories, which are the lessons on land and land use, and lessons on community forest management. In relation to the former, Mexico has a more liberal land policy which allows communities to exercise greater autonomy over their land. This autonomy has been further enhanced following the 1992 reforms that allow *ejidal* land to be leased, mortgaged, transferred, and if approved by two-thirds of the members, privatised.¹²⁶ The consequences of these reforms on land holding and the composition of the community can be used as references by the Chinese government. In particular, it would be interesting to look at the implications of the rights to privatise and to mortgage land, and how the communities cope with internal demographic changes. The Mexican experiences are not only relevant to collective forestland, they can also help to illuminate the future of collective land reform in China generally.

The second category looks particularly at community forest management. Unlike in China, community-owned forests are still managed as common land in Mexico, and forest common property is usually managed by a single community enterprise.¹²⁷ Just like in China, however, multiple types of community forest management regimes have sprung up.¹²⁸ These different arrangements have devised rules on the

¹²⁵ See n 89 above.

¹²⁶ Brown, Jennifer, 2004, p 3. Communal land, including forestland, is still subject to stricter restrictions compared to arable land.

¹²⁷ Bray, D.B. and Merino-Pérez, L. 2002, p 72

¹²⁸ Ibid., pp 72-74

management of forests that reflect the local conditions; and given the fact that these communities face less restriction from the government on the use of land, they are able to adopt policies that serve the best interests of their members.¹²⁹ In particular, there are community-run forest enterprises that are actively and directly involved in the commercial exploitation of forest resources.¹³⁰ If China intends to revive its collective forest management regime, it can arguably learn from the experiences of these community forest enterprises in relation to the issues of management structure, benefit sharing, the role of the government, and so forth.

4.2.1 Lessons on Land Use Arrangement

The Mexican government introduced the agrarian reforms in 1992 to ‘revitalise the social sector of Mexican agriculture’, which was why it had eased the restrictions on community land’s transferability and alienability.¹³¹ Apart from allowing privatisation of and relaxing the restrictions on transferability of *ejidal* community land, the government has also introduced a no-cost registration process that aims to secure the title of land owners.¹³² The following paragraphs will look at the implications of these reforms on collective land use in Mexico based on the findings of a research that was carried out in Oaxaca State in 2002.¹³³ In particular, it will focus on four key issues that could potentially be highly relevant to China, namely land privatisation, mortgage of land, registration of community ownership, and dispute resolution mechanisms.

Before privatisation can take place, approval of the village assembly needs to be obtained, and members of the community have the right of first refusal. Both partial and full privatisation requires a quorum of 50 percent, a two-thirds majority vote of those attending, and the presence of a representative of the Procuradía Agraria and a public notary. Furthermore, only recognised members can vote, which means most

¹²⁹ Ibid.

¹³⁰ The different types of community forest enterprises (which vary according to the degree of their involvement in the commercial exploitation of forest resources) have been discussed above.

¹³¹ Brown, Jennifer, 2004, p 3

¹³² Certificates are issued to those who have registered their titles. However, certificates are issued to the members of the community individually, rather than to the entire family or jointly to both the spouses. This has the effect of turning a household resource into the property of the individual member, usually the male head of household, ibid., pp 15-16.

¹³³ This research was conducted by the Rural Development Institute (RDI). Oaxaca State is situated in southern Mexico and is one of Mexico’s poorest states where much of the state’s rural population practices subsistence agriculture. Half of Oaxaca’s population is indigenous and 85 percent of the land is held by either *ejidos* or *comunidades*, ibid., p 3.

women are precluded from participating as they do not hold the land rights (only the head of the households, usually male representative, is issued land certificate).¹³⁴ According to the research, the only reason anyone would choose to privatise his or her land was for the purpose of selling the land. In other words, if a farmer wished to continue using the land, there would not be an incentive to privatise the land. It was pointed out that 'farmers feel that the permanent use rights that certification affords them are secure and see little incentive to privatising'.¹³⁵ Apart from selling the land, another possible reason why farmers would want to privatise the land was to increase the ability to access formal credit, although not many farmers have shown interest in that.¹³⁶ In addition, privatisation also entailed higher land taxes, which acted as a disincentive to land privatisation.¹³⁷ The research concluded that it seemed not many community members would want to privatise land, except those who held land close to the urban centres where land had higher value for development.¹³⁸

Although the situation in Mexico may not be directly applicable to China, it may nonetheless provide an indication of what might happen if land privatisation is allowed in China. If China follows the model of Mexico, the right to privatise will not be automatically endowed on all land users; rather, there will be steps that these users have to take to 'activate' the right to privatise. In short, there will not be an outright privatisation of collective land; rather there will be an *option* to exercise the right to privatise land if the collective and its members choose to do so. Although there will be farmers who would privatise and profit from the land, there is also a strong indication that if the farmers can derive enough income from the use of land and that usufruct right is secure there will be no incentive to privatise. Hence, it can be argued that instead of withholding the right to privatise, the Chinese government should make sure that there are incentives for the farmers to keep hold of the land.

The second issue concerns transferability of land, especially the right to mortgage. As pointed out in Chapter Two above, collective-owned land (except wasteland) cannot

¹³⁴ Ibid., pp 20-21

¹³⁵ Ibid., p 22

¹³⁶ Although non-privatised land can also be legally mortgaged, many farmers have complained that banks would not usually accept them as collateral, *ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

be mortgaged or used as collateral in China.¹³⁹ The research in Mexico points out that although the 1992 reforms have allowed community land to be mortgaged in Mexico (with the hope that it would increase access to credit in rural area), access to formal credit was still limited.¹⁴⁰ Interviewees pointed out that they could not use their land as collateral to get a loan because the bank simply did not accept *ejidal* plots as collateral.¹⁴¹ This is likely to be due to the fact that if foreclosure occurs, the bank would only be able to sell an un-privatised *ejidal* parcel to another *ejidatario* (a member of the *ejido*), hence reducing the value of land for resale purposes.¹⁴² This problem can also be faced by Chinese farmers if mortgage of collective land were to be allowed.

The experience from Mexico shows that access to formal credit does not exist automatically once land is allowed to be mortgaged; the general rules on transferability will also affect the value of the land as collateral. In Mexico, the general rules on transferability state that an *ejidatario* can transfer their land rights to other *ejidatarios* or residents from the same population centre, whether or not the land is privatised.¹⁴³ However, the member's spouse and children have the first right of refusal to claim such land.¹⁴⁴ This is not too dissimilar to China where the Rural Land Contracting Law specifies that members from the same collective should be given the priority if a land user wishes to transfer his or her right.¹⁴⁵ The research found that although transfers between *ejidatarios* did occur, they were not very frequent.¹⁴⁶ Although the existing law does not require any approval for transfer of land, some members believe that the transfers must be approved by the *comisariado*.¹⁴⁷ Generally, communities in Mexico face the same limitations in relation to transfer of land as their counterparts in China: being common property, emphasis is given to the use of land by members of the same community; and the regime is subject to potential manipulation by those who are in charge.

¹³⁹ Article 49 of Rural Land Contracting Law 2002

¹⁴⁰ Brown, Jennifer, 2004, p 26

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ The first time a privatised plot is sold, family members of the land holder, other *ejidal* members, and the residents of the *ejido* population center have the right of first refusal to purchase the plot, *ibid.*, p 20.

¹⁴⁴ *Ibid.*, p 21

¹⁴⁵ Article 33 of RLCL 2002. Also see Chapter Two above, p 27.

¹⁴⁶ Brown, Jennifer, 2004, p 22

¹⁴⁷ *Ibid.*

The third issue relates to the registration and certification of rights. The registration process seeks to register the rights of the community as a whole and its individual members, and certificates of entitlement will be issued to the *ejidal* members who are registered as land holders.¹⁴⁸ This is similar to the situation in China where there is a two-tier registration of land rights: collective ownership and private usufruct rights. Unlike in China, however, registration is not compulsory and a vote of simple majority is needed to approve the registration process in Mexico.¹⁴⁹ Prior to registration, external boundary assessment of the *ejido* or *comunidad* has to be carried out and any boundary disputes must be resolved. Maps are created to show not only the boundary of the community land but also individual parcels of land held by the community members.¹⁵⁰ Each *ejidatario* would receive a certificate describing his or her land parcel and a map showing the exact boundary of the land. Each *comunero* (a member of the *comunidad*) has a certificate that describes his or her right to a certain percentage of the *comunidad*'s land.¹⁵¹

Like the collectives in China, *comunidades* in Mexico also suffer from the dilemma between providing tenure security to its members on the one hand, and accommodating for demographic changes on the other. The research found that this dilemma has been handled in three different ways.¹⁵² First, like in China, some communities left part of the common land unassigned so that future members could receive a percentage of the land.¹⁵³ Second, some communities plan to re-issue new certificates with new allocations of land to accommodate the change in membership number. Lastly, some communities have indicated that new additional members will not be allowed, and that new members can only obtain rights through the death or withdrawal of an existing member. Thus, it seems that communities in Mexico are also struggling to cope with the impact of demographic changes on the composition of collective land use rights. As long as the land is still collectively owned and members

¹⁴⁸ Ibid., pp 15-16

¹⁴⁹ Ibid., p 16.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., p 17. The difference between the two types of communities is that an *ejidatario* can have ownership right over a parcel of land while a *comunero* only has usufruct right.

¹⁵² Brown, Jennifer, 2004, p 18.

¹⁵³ Ibid. This corresponds to the 'two-tier' land system in China, see section 2.4.1.2 in Chapter Two above.

of the collective have legitimate entitlement to the use of land, this dilemma will always persist.

The last issue to be looked at is conflict and dispute resolution. The 1992 reforms in Mexico established a separate court system with jurisdiction to resolve conflicts over the *ejidal* and *comunidad* lands.¹⁵⁴ This court system consists of a total of 49 *Tribunales Agrarios Unitarios* and one *Tribunal Superior Agrario*.¹⁵⁵ These Agrarian Tribunals are responsible for adjudicating *ejidal* and *comunal* disputes, including boundary disputes, succession of members' rights and tenancy conflicts.¹⁵⁶ *Ejidos*, *comunidades* and their members can seek legal advice and representation from the Procuradía Agraria, whose role is to defend the rights of, *inter alia*, *ejidatarios* and *comuneros*.¹⁵⁷ According to the findings of the research, in practice, most disputes tend to be solved via negotiations or through a ground survey of the land with the help of the representatives from the Procuradía Agraria. If the matter is still not resolved, the case will then be brought before the Agrarian Tribunal by the Procuradía Agraria on behalf of the side that first contacted the office.¹⁵⁸ In the state of Oaxaca, a special *Junta de Conciliación Agraria* was also established to resolve land boundary disputes between separate *ejidos* or *comunidades* mainly via conciliation. The Board or Junta organises meetings for the feuding parties and once an agreement is arrived at, both the parties sign a covenant which is then sent to the Agrarian Tribunal to be given legal effect.¹⁵⁹ It has been pointed out that communities rarely 'break' the covenant once it is made because the agreement was reached by mutual consent.¹⁶⁰

The presence of a special court system that is dedicated to dealing exclusively with rural disputes including land not only helps to expedite the process of land registration, it also offers a venue through which both the communities and their members can protect their interests. The special tribunals also offer expertise that normal courts may not have. Contrast this to China where not only there are no special courts or tribunals to deal with rural land disputes, there is also no special

¹⁵⁴ Brown, Jennifer, 2004, p. 26

¹⁵⁵ Ibid., p 8

¹⁵⁶ Ibid., p 26.

¹⁵⁷ Ibid., pp 26-27

¹⁵⁸ Ibid., p 27

¹⁵⁹ Ibid., p 28

¹⁶⁰ Ibid.

government agency that provides legal advice and representation to rural land users. In China, local land disputes are usually dealt with by the village leaders or local governments via negotiation and mediation.¹⁶¹ However, if mediation does not work, or if the feuding parties refuse to have mediation, they can bring the case to the court for adjudication.¹⁶² The lack of a fast and easy access to legal recourse in China may compromise the interests of rural land users. This is particularly true in relation to disputes involving rural land users and the government as existing system has been found to favour the government over the interests of the people.¹⁶³ Furthermore, it has been pointed out above that boundary disputes are rife within the collective forest regime¹⁶⁴; this situation is exacerbated by the failing judiciary system. It is arguable that until and unless land registration processes are improved and an expedient and impartial court system is established to help to resolve rural land disputes, further land reforms that aim to devolve land use rights to private entities will be problematic.

4.2.2 Lessons on Community Forestry

Having looked at the Mexican's model on land use and ownership arrangement, this section will discuss the community forestry regime in Mexico. The main features of community forestry in Mexico have already been pointed out above, including the internal governance structure, the entitlements and obligations of community members, and the second and third-level organisations. This section will complement the discussions above by looking at the community forest enterprises (CFEs) in Mexico. These refer to forest enterprises owned and run by communities that are directly or indirectly involved in commercial exploitation of forest resources. The following analysis include a brief history of the evolution of CFEs in Mexico and the building of social capital, the different models of CFEs, and lastly, the difficulties encountered by the CFEs. It is hoped that the experience in Mexico will provide some reference to collectives in China that wish to be actively engaged in the forest industry.

¹⁶¹ According to a survey of three provinces in China, 64.2 percent of the interviewees chose to settle land disputes via mediation that involved village cadres, 4.2 percent chose mediation by township government officers, while only 2.7 percent chose to settle the disputes via the court, Chen Xiaojun et al., 2003, p 44.

¹⁶² Chen, Albert, 2005, p 131-150. Apart from adjudication, the court is also obliged to deal with complaints brought to their attention via the 'letter and visit' channel, *ibid.*, pp 146-147.

¹⁶³ See Chapter One above. Problems of the judiciary system in China, including lack of independence and corruption, are discussed in Chen, Albert, 2005, pp 151-159.

¹⁶⁴ Ho, Peter, 2005, pp 100 – 119.

The first CFEs in Mexico were established in the 1960s as a form of opposition to the domination of private companies in the exploitation of timber, where communities felt that their interests had been disregarded.¹⁶⁵ Two agencies or organisations established by the government played a particularly important role in promoting the proliferation of the CFEs during that period, which were the National Fund for Ejido Development (FONAFE)¹⁶⁶ and the General Directorate of Forest Development (DGDF).¹⁶⁷ FONAFE was put in charge of promoting the formation of CFEs to become suppliers of forest raw materials to the timber parastatals.¹⁶⁸ The DGDF further spurred the establishment and independence of the CFEs by promoting the development of community capacities to manage their own forests, independently from the parastatals.¹⁶⁹ This was facilitated mainly via the provision of technical advice and assistance.¹⁷⁰ As a result of these efforts, private concessions and parastatals were gradually replaced by community forest enterprises. The growth of CFEs during this period was said to have increased dramatically the income of the communities and their members.¹⁷¹

Community forest enterprises underwent a few modifications during the 1990s. As pointed out above, community land tenure (especially *ejidal* land) was further liberalised where land privatisation and transfer were made possible. The main aim of the reforms was to encourage forest plantations and to turn over the management of natural forests to the market as much as possible.¹⁷² In addition to the land tenure reforms, some other measures were also introduced to facilitate the transition of Mexican's forestry to the market system. For example, the law relating to the paperwork required for logging, transporting and processing wood products was

¹⁶⁵ At the time, although timber resources were generally the properties of communities and private landowners, logging concessions were given to private enterprises and were administered by the state. Under the system, communities complained of 'arbitrariness of the companies, the failure to live up to the agreements and depredations of their forest', Bray, D.B. and Merino-Pérez, L. 2002, p 33.

¹⁶⁶ FONAFE was a government trust fund that carried out field operations to promote rural development. It was funded by the stumpage fees paid to the communities and according to law, 70 of the funds went to FONAFE accounts in the community's name and the other 30 percent went directly to the community. *Ibid.*, p 34

¹⁶⁷ The DGDF was a unit within the Forestry Subsecretariat of the Secretary of Agriculture, *ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, p 36

¹⁷⁰ *Ibid.*, pp 37-38.

¹⁷¹ *Ibid.*, p 39

¹⁷² *Ibid.*, p 40

simplified, and the provision of forest technical services was privatised.¹⁷³ Furthermore, a ‘national consultative technical forest council’ was created to increase public participation and transparency in the formation of forest policy.¹⁷⁴ Two other major programmes that have also had an impact on the CFEs are the Programme for the Development of Commercial Forest Plantations (PRODEPLAN) and the Forest Development Programme (PRODEFOR). The former concerns the government’s initiatives to spur investment in commercial plantations by providing subsidies to cover the start-up costs.¹⁷⁵ The second programme concerns sustainable management of natural forests where the government again provides subsidies (with contributions from forest operators) to natural forest owners to encourage them to carry out sustainable development of forest, reforestation and rehabilitation.¹⁷⁶ These two programmes were implemented under the 1997 Forest Law.¹⁷⁷

So far, the discussion on the evolution of Mexico’s CFEs reveals one important difference between Mexico and China, which is the degree of public participation and democratic decision-making processes that are present throughout the history of CFEs in Mexico but are lacking in China. Community forest and community forest enterprises started as communities struggled for the protection of their right to land; they have since been actively promoted by the government and other third parties such as non-governmental organisations and universities.¹⁷⁸ A lot of these communities have had more than 50 years of experience in managing community forests. Although there are some that have been unsuccessful and disbanded, most of the communities have survived and flourished.¹⁷⁹ It is arguable that the fact that these communities were created on a voluntary basis increased the chances of survival as community members may have more inclination to make sure that it works. The creation of ‘supra-ejidal’ organisations (organisations at the regional and national levels) is also an indication of the will and ability of the communities to build up the

¹⁷³ Ibid.

¹⁷⁴ The consultative body consists of representatives from government agencies, academics, industry, non-governmental organisations and peasant organisations, *ibid.*, pp 40-41

¹⁷⁵ *Ibid.*, pp 43-47

¹⁷⁶ This programme was part of the Programme for Forestry and Soil 1995-2000, *ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ This is evidenced from the presence of various government agencies that were set up to represent the interests of the communities, and the various programmes that sought to give support to community forest enterprises. *Ibid.*, pp 48-54

¹⁷⁹ *Ibid.*, p 65

social capital necessary for the coordination of efforts at a higher level. Multi-party dialogues and the participation of the interested parties in decision-making processes have ensured that community forestry in Mexico continued to grow and to adapt to new challenges.

Furthermore, the success of the community forestry in Mexico is also helped by the fact that the community members recognise some elements of community life as fundamental, such as 'consensual decision-making, ritual offices, voluntary community labour, feast days and other moments in community life'.¹⁸⁰ In short, community members show their commitment in the well-being of the common property regime by participating in community activities and most importantly, consensual decision-making processes. Consensual decision-making is vital for the survival and success of a CFE as it is via this process that problems and issues are debated and resolved. This is particularly relevant as the CFEs not only aspire to maximise profits, they are also concerned with generation of employment within the communities, the conservation of the forests, and the maximisation of community participation.¹⁸¹ The operation of a CFE is a complex task as it touches upon the social, economic and cultural aspects of the community. As a result, democratic decision-making process is necessary to allow members to deliberate on how their common properties should be used. For example, the community needs to decide on issues such as who should be in charge of the operation of the CFE, whether managerial roles should be rotated, how labour policies should be decided, what financial management and business strategy to be adopted, who can participate in decision-making, and how to deal with issue of corruption and mismanagement.¹⁸² All these issues will impact on the efficiency and equity of the CFE.

There are four general models of community forest enterprises in Mexico. These different models range from entirely communal-based forest management to individual appropriation of common resources. The first model is where forest common property is undivided in any way and is administered by a single unit. Both the stocks and flows (profits from and products of forest resources) are treated as

¹⁸⁰ Ibid., p 65

¹⁸¹ Ibid., p 76

¹⁸² Ibid., pp 74-76

common property and are shared by the members.¹⁸³ The second model concerns community management of private land. This is where private landholders are persuaded to join community-run logging operations. In return to the landholders' agreement to follow a community management plan and to allow the community to log on their land, a stumpage fee is paid. Hence, although the stocks are privatised, the flows from the forest are communal.¹⁸⁴ In contrast to this, under the third model, the stocks are treated as communal properties but the flows are divided up into a number of separate enterprises. Instead of a single communal administrative unit, a few 'work groups' have been formed and share the annual authorised logging volume on a proportional basis.¹⁸⁵ The fourth model consists of the combination of two management types. While the stocks remain to be communally-owned, the annual authorised logging volume is divided into two groups: the first consists of individual members who have obtained the right to log, and the second consists of several 'work groups'. Hence, the flows are appropriated in an equal volume by both individuals and work groups.¹⁸⁶ The last model closely resembles the arrangement in China in relation to land contracted out to individual households. Under this model, communal forest is internally and informally parcelled out among the *ejidal* members (bearing in mind that forest is formally regarded as common property). Each member is entitled to appropriate timber resources on the land allocated to him or her in accordance to a communal management plan where the authorised volume that is divided and shared proportionally by all land users.¹⁸⁷

The different models of CFE in Mexico show the flexibility that is enjoyed by the communities in managing their common properties. In a way, this is similar to China where different types of management regimes have been adopted by collectives according to the local conditions.¹⁸⁸ However, it is arguable that the presence of community forest enterprises is minimal in China compared to Mexico. This could be because management of most collective forestland has been devolved to private

¹⁸³ One community that has adopted this model is El Balcón in Guerrero, *ibid.*, p 72.

¹⁸⁴ An example of this model can be found in the community of San Juan Nuevo Parangaricutiro in Michoacan, *ibid.*

¹⁸⁵ The community of Petcacab in Quintana Roo has adopted this model, *ibid.*, p 73.

¹⁸⁶ This model can be found in four ejidos in the Unión de Ejidos Forestales de Tamaulipas, *ibid.*

¹⁸⁷ The community of Cuauhtémoc in Quintana Roo has adopted this model, *ibid.*

¹⁸⁸ Some examples of these different models are the share-holding, private association and public association regimes. See Chapter Two above.

households. Furthermore, most community-company deals in China involve merely the collective providing the land while the operations are carried out by private companies.¹⁸⁹ Also, timber production in China has always been dominated by state-owned forest enterprises, which have control over most of China's natural forest.¹⁹⁰ With the focus now shifted from natural forest to plantation forest as sources of timber following the adoption of the Natural Forest Protection Programme, it is arguable that collective forests, where the majority of plantation forests are found¹⁹¹, can play a greater role in timber production in the future. If the Chinese government indeed wishes to develop its collective forest industry in the future, it should promote the establishment of community forest enterprises that not only just contribute the land, but are also actively involved in the production operations so that more benefits can be accrued to the community. As seen above, a robust and dynamic social capital is an indispensable ingredient if a community forest enterprise is to succeed. Based on the experience of Mexico, there are many things the government can do to build up the necessary social capital, including the creation of government agencies and programmes that provide financial, technical and legal assistance to community members. Collective management and ownership of forestland can be enhanced by letting the collectives to have a genuine control over the use of their common properties.

Despite the dynamism of Mexican CFEs, some communities and their members still face with some major problems in relation to the management of community forest enterprises. Among the problems resulted from internal institutional arrangements are illegal logging, corruption, elite domination and professionalism. In particular, lack of management plans has spurred illegal logging.¹⁹² Furthermore, corruption has also led

¹⁸⁹ The Eastern region of China managed to attract a few large-scale foreign timber companies to invest in forest plantation. For example, Finland's Stora Enso Oyj, one of the world's leading paper manufacturers, has invested US\$150 million in a 150,000-hectare plantation in Guangxi. In addition, Singaporean paper firm Golden Eagle recently invested US\$500 million in forests in the Jiangsu Province whilst Asia Pulp & Paper, which is one of the world's top four paper producers, has been planting trees in China since 1995 and now manages forests in the Guangxi, Guangdong and Hainan provinces, Godfrey, Mark, 2004. These companies usually set up joint-ventures, facilitated by the local government, with local communities who would provide the land and the raw materials, Mayers, J. and Vermeulen, S. 2002, pp 144-145.

¹⁹⁰ Rozelle, Scott, et al., 2000, p 105

¹⁹¹ Ibid., p 104; Liu Dachang and David Edmunds, in Hyde, W.F. et al., 2003, p 32.

¹⁹² It was pointed out that only half of the communities with forest of potential commercial exploitation have management plans, Klooster, 1999, p 367.

to clandestine logging and timber smuggling, which resulted in forest degradation in at least one community.¹⁹³

A comparison between the forest community plagued by corruption and inefficiency, and the forest communities that have been successful has highlighted some important elements that have an impact on the different outcomes.¹⁹⁴ The successful forest communities are able to enforce restrictions on individual uses of the forest, and run effective logging operations under community control. First and foremost, it was found that a strong and well-attended community assembly with vigorous monitoring increases greatly the effectiveness of the governance structure. This also promotes transparency and accountability in the decision-making process. Secondly, successful communities also have accounting and reporting practices that provide a healthy flow of information to their members. Thirdly, these communities distribute both the benefits from logging and the restrictions on forest use fairly. This has helped to avoid discontentment and frictions among community members. Fourthly, the successful communities also participate in technical aspects of forestry. Community members who are trained in forestry science provide technical advice and assistance to the managers of communal forests. In short, active participation by the members and transparent decision-making processes reduce the incidents of corruption.

Lastly, another problem that needs to be addressed is the issue of professionalism. This is particularly relevant to communities that have their own forest enterprises. The issue of professionalism refers to over-restrictive social practices that shut out external professional help which ultimately hampers the development of CFEs.¹⁹⁵ These over-restrictive practices are known as 'communal fetters', which prevent a CFE to become more competitive and efficient in the market place. It is a common trait of certain business organisations where cultural practices and community ties dominate economic decision-making.¹⁹⁶ However, this problem can also be easily

¹⁹³ Ibid., p 372. The author compared the case of San Martín Ocotlán, a corrupted and failed forest community in Oaxaca, with seven other successful forest communities in his studies of the impact of institutions on the outcomes of community forest management.

¹⁹⁴ Ibid., pp 374-376

¹⁹⁵ Bray, D.B. and Merino-Pérez, L. 2002, pp 66-68.

¹⁹⁶ Business organisations run by Chinese families provide good examples to the understanding of this phenomenon. A social researcher Fukuyama argued that 'the Chinese family provides the social capital with which to start up new businesses, but it also constitutes a major structural constraint on these

solved by training professional managers from within the community.¹⁹⁷ Professional managers assisted by technical staff, all of whom are members of the community, will not only bring in the professionalism required, but will also enhance the autonomy and independence of the community.

4.3 Conclusion

The extensive experience of community forestry in Mexico has been discussed in this section. The purpose of the discussion is to provide China with a viable comparison with which it can use to either model China's collective forest on or to predict the future direction its collective forest should move towards. From the analysis above, it seems that forest communities in Mexico are more dynamic and independent compared to the collectives in China. This is due to a few features that are unique to forest communities in Mexico: first, forest communities are established by the initiation of the community members themselves, rather than being forcefully imposed by the government; second, communities are given more extensive autonomy to deal with community affairs including use and privatisation of land; third, the government and non-governmental organisations have given much financial and technical support to communities in establishing community-owned enterprises that provide employment and incomes to community members; fourth, there are special government agencies and a special court system that are set up to promote and protect the interests of forest communities; and fifth, there are second and third tier organisations that push the forest communities' agenda beyond the community level.

As a result, community forestry is more vibrant in Mexico compared to China.¹⁹⁸ It is also arguable that with community members fare better under the former as protection of rights, transparency and democratic decision-making seem to be stronger in Mexico than in China.¹⁹⁹ The experience in Mexico shows that collective and private land ownership regimes can exist side by side; and that if the Chinese government

enterprises that in many cases prevents them from evolving into durable, large-scale institutions.', *ibid.*, p 67.

¹⁹⁷ *Ibid.*

¹⁹⁸ For example, in the Oaxaca state alone there are 42 profitable community forest enterprises that range from 'stumpage' communities to 'finished product' communities, *ibid.*, p 85.

¹⁹⁹ The author refers exclusively to members of forest communities and not the wider rural community. The differences in the impact of the community land regime in Mexico on its overall rural welfare compared to the impact of the collective regime in China can only be speculated.

decides to continue to emphasise collective ownership and management of forestland, it needs to play a more active role in facilitating and promoting the establishment of more viable forest communities. To do this, the government should first relax the control over land use and let the collectives decide (within the ambit of general land use law such as planning and zoning law) how to use the land according to local conditions. It should also provide more financial and technical assistance to further build up the social capital that are required for the collective self-governing regime. Although there have been improvement in private land use rights in China since the 1970s reform, over-restrictive land use control by the government and the inherent weaknesses in the collective governance system (as discussed in Chapter Three) have continued to obstruct the emergence of a truly independent collective regime.

5. The Latest Forestland Reform: The Panacea?

Having looked at community forestry in other places and Mexico, this section takes a look at the latest collective forestland reform in China to see if it offers any viable solutions to the existing problems. In particular, China seems to be stuck between extremely conservative concept of private rights²⁰⁰ and under-developed collective self-governing institution. Despite the government's effort to introduce stability into the tenure system by introducing new legislations (the latest one being the Property Law), development of collective forest is still riddled with problems. This is not only because of the many restrictions imposed by the government on land use, but also because of the nature of the arrangement which makes it impossible for China to transform its rural economy. The existence of these restrictions is closely related to the fact that ownership of rural land still resides with the collective, and that, as explained above, the collective entity is by no means effective or independent.

Even though China has the largest plantation forest (here generally refers to man-made forest) in the world, many of them consist of shelterbelts and economic forest.²⁰¹ It is an undeniable truth that China is not even close to supply enough timber

²⁰⁰ The shortcomings of the HRS in relation to the wider property rights issue has also been discussed by Donald Clarke in Clarke, Donald, 2000, and Clarke, Donald, 2002.

²⁰¹ Economic forest here refers to orchards. In 1998, around one third of the total plantation (man-made) forests consisted of fruit trees, Country Report, 2003, p 12

to fulfil its domestic demand.²⁰² Even though the growth of plantation forest is the quickest and highest in its collective forest²⁰³, it has not grown in a pace fast enough to meet the supply shortage, especially after the implementation of the logging ban in 1998.²⁰⁴ There has not been more investment by the collectives partly due to lack of resources²⁰⁵ and lack of household participation.²⁰⁶ In addition, one of the most-cited examples of successful collective management based on the share-holding system has also failed to hold up in many places.²⁰⁷ Lastly, there is also dissatisfaction among rural households in that some village leaders were treating collective forestland as their own and abusing their position to make profit.²⁰⁸

Furthermore, although it is true that a large area of wasteland has since been contracted out and planted with trees, trees on these lands are mostly reserved for ecological protection purposes.²⁰⁹ The government has set a target of establishing 13.4 million ha of new plantations during the period 2001-2015.²¹⁰ According to the statistics, between 1991 and 2001, the four main forest regions²¹¹ in China had established 3.3 million ha of new plantations.²¹² Out of these plantations, only around half were timber forests.²¹³ In order to increase domestic supply of timber, the government needs to take vigorous steps to encourage and increase private investment. In particular, the stock volume in plantation forest is very low, accounting for only around 10 percent of the total.²¹⁴

The latest forestland reform in the southern provinces of China aims to address the existing problems faced by collective forests. The catalyst of the reform was the State

²⁰² See Chapter One above.

²⁰³ In 1998, collective forest accounted for around 81 percent of the total plantation area while state forest accounted for only around 19 percent. Country Report, 2003, p 12

²⁰⁴ See Chapter One above.

²⁰⁵ Yin Zhijuan and Liu Huagen. 2006, p77.

²⁰⁶ Wang Chunfeng, 2005.

²⁰⁷ For example, there were more than 400 share-holding forestland management regimes across Hunan Province in the 1990s, but only around 20 of them were left now, Liu Jinnlong, 2006, p15.

²⁰⁸ Liu Chang and Dong Wei. 24 August 2006

²⁰⁹ Art 46 Rural Land Contracting Law 2002

²¹⁰ Nilsson, S. et al., 2004

²¹¹ The North-East (mainly state forests), South-West (mixture of both state and collective forests), South (mainly collective forests), and the Three-North farm forest region. Forest resources are mainly concentrated in the first three regions, and taken together, they account for 84 percent of forest cover and 90 percent of timber standing stock, Démurger, S. and Yang W., 2006

²¹² Ibid.

²¹³ 1.55 million ha, ibid.

²¹⁴ Country Report, 2003

Council's *Decision to Accelerate the Development of Forestry*, issued in 2003. The participating provinces produced individual laws that govern the implementation of the reform, although most of them focused on the same issues: tenure and tax reform.²¹⁵ This reform, however, has failed to address other equally, if not more, important issues such as the logging quota and further marketisation of forestry. In relation to land tenure, one of the important features of the reform involves devolution of collective forestland that have not been contracted out to private individuals and rural households. Under the reform, land use rights can be devolved to the household level via various ways, including auction, administrative allocation, contracting out with a fee, share-holding system and so forth.²¹⁶ The use of market mechanisms is in stark contrast to the early reform in 1980s where most of the forestland were allocated on an egalitarian basis. In addition, apart from devolution of use rights to the households, the reform also aims at increasing the efficiency of collective management of forest. For forestland that is still subject to collective management, either a share-holding²¹⁷ or an association²¹⁸ system was introduced.

The reform also aims to improve the transferability of forestland. The right to transfer land and land use rights is enhanced by the reform and many provinces will indeed allow transfer to take place with less restrictions, including the abolition of the right of first refusal by the village members.²¹⁹ Furthermore, the right to mortgage is granted under the new reform in some provinces.²²⁰ In relation to the tax reform, the aim is to reduce the financial burden of farmers and to increase profitability of the forest industry. So far it seems that Jiangxi Province's tax reform has gone the furthest: it not only abolished the Special Agricultural Tax (SAT) and other (county

²¹⁵ For Fujian Province, see Fujian Province People's Government's Opinion about Introducing Collective Forest Property Rights Reform (2005)

For Jiangxi Province, see: Jiangxi Province Proposal for the Implementation of the Trial of Forest Property Rights Reform (2005)

For Hebei Province, see: Hebei Province People's Government's Opinion on the Further Reform of the Collective Forest Property Rights (2005)

For Liaoning Province, see: Liaoning Province People's Government's Opinion about Collective Forest Property Rights Reform (2006)

²¹⁶ Qiu Ju, et al., 2006; Sun Yan, Xu Jintao and Li Ling, 2006; Yin Zhijuan and Liu Huagen, 2006.

²¹⁷ Under a share-holding system, households were not allocated land; instead, they received shares of the land.

²¹⁸ Associations usually take the form of village groups, or grouping of village households.

²¹⁹ The right of first refusal by the collective members, however, is retained by Liaoning Province and Hebei Province.

²²⁰ Hebei, Liaoning, Fujian and Zhejiang Province, *supra* n 215 above.

and local level) associated charges and fees for timber and bamboo products, it has also re-adjusted the rate of charges for afforestation fund. In addition, it has also re-adjusted the percentage of the sharing of afforestation fund between the provincial government, county government, township government and the village governance.²²¹ Hebei Province has also halved the afforestation fund contribution rate from 12 percent to 6 percent.²²² Furthermore, 100 percent of the afforestation fund is now retained by the county government. Thus, it seems that apart from aiming to increase profitability of production of forest resources, the reform also seeks to increase afforestation activities.

One success example of the collective forestland reform is the change in benefit-sharing arrangements in Huangsha Village, Shixing County in Guangdong Province.²²³ There were 28,000 mu (1,866 hectare) of collective timber and economic forest in the administrative village: 16,000 mu had been contracted out to households in five village groups while 12,000 mu (that belongs to eight village groups) were still under collective management. Following the latest round of forestland reform, sharing of forestry incomes from the second group of forest has been re-arranged: 25 percent went to forest management unit that manages (including planting of trees) the forest; 5 percent went to the village government; the remaining 70 percent went to the village groups whose trees have been logged. The paid forest management tasks were carried out by members of the collective who have won the right to manage via competitive auction. This new arrangement has two main positive implications: collective forest management has become more efficient; and the legitimate interests of the collective members as owners of the land are recognised as they are allocated the largest share of the income. However, the new arrangement is still plagued by two major difficulties, which are the restraints imposed by the logging quota and lack of public participation in decision-making processes.²²⁴

It is still too early to assess the overall impact of the new reform on collective forestland. A few studies on the results of the reform have highlighted some positive development in forestry in the participating provinces, such as the increases in land

²²¹ Supra n 215 above.

²²² Ibid.

²²³ Xiao Jian, 22 January 2008

²²⁴ Ibid.

transfer transactions, afforestation rate and household income.²²⁵ According to surveys already carried out in one of these areas, the results are promising as forestland area and income of households from forestry have both increased.²²⁶ In particular, devolution of management rights and the introduction of market elements into the existing regime have greatly improved efficiency.²²⁷ However, there are still many issues that are left unresolved. For example, even though land use transfer has increased²²⁸, they are by no means efficient. The three main problems associated with land (and land use) transfer are lack of proper agreements, unreasonable transfer fees, and lack of capital.²²⁹ In relation to the first problem, contracts have not been used in all transactions²³⁰; even if there are written agreements, some important provisions are either not inserted or are vague.²³¹ Calculation of transfer fees is not scientific and does not reflect the market price. This usually results in abuse of transferors who may not have access to the relevant market information.²³² Lastly, lack of financial capital prohibits more widespread land exchanges. Furthermore, as long as the issues of harvesting quota and excessive taxation are not addressed, forestry will stay unprofitable and land exchanges will be limited.²³³ If the problems associated with land use transfer are not addressed, there is a danger that devolution of land use rights to household level may not achieve the aims the reform sets out to accomplish. Land use transfer is particularly important in the case of forestland because fragmented tiny plots of forestland are not prone to effective management. Hence, effective and efficient forestland management in a modern economic setting requires uninhibited exchanges of land use rights so that land can be consolidated in the hands of those who have the resources and willingness to invest.

Similarly, even though forestland is now allowed to be mortgaged, it has proved to be difficult in reality.²³⁴ Apart from the less than straightforward procedure, valuation of

²²⁵ Zheng Linxun and Jiang Hong, 2006; Qiu Ju, et al., 2006

²²⁶ Qiu Ju et al., 2006

²²⁷ Cheng Yunxing, 2004, pp 175-194.

²²⁸ Hu Baoyu, 2006; Qiu Ju, et al., 2006

²²⁹ Hu Baoyu, 2006

²³⁰ Zheng Linxun and Jiang Hong, 2006

²³¹ One example is the obligation to reforest the land once the trees have been cut down, *ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ Kong Xiangzhi, 2006

land or forest stock is also proved to be costly.²³⁵ Furthermore, forest farmers do not usually get sufficient capital from mortgage alone. In addition, mortgage of forest stock may affect application for harvesting quota.²³⁶ If this is so, it will defeat the very purpose of the reform in land mortgage since without being able to harvest the trees, there would be no incentive to invest in reforestation.

Besides the issues of land transfer and mortgage, the reform has also failed to increase investment in forestry significantly. According to the results of a survey in Fujian Province, labour and fertiliser investment in forestry have not really increased.²³⁷ In particular, the data shows that use of fertiliser is only significantly related to the size of the land, namely the bigger the size of the plot the more the fertiliser will be used. This lack of investment is deemed to be caused by low (or lack of) profitability of the forestry industry itself. Low profitability is mainly caused by excessive taxation (plus charges and fees) and the imposition of the logging quota. Even though taxation and charges are part of the reform, its impact on the forestry industry has not been clear.²³⁸ Also, the reform fails to address the issue of harvesting quota. In short, it is arguable that the latest foreland reform itself is incapable of taking China's forestry into the next stage if other important issues related to the market are not tackled properly. In relation to land reallocation and requisition, the general laws apply although as already seen in Chapter Two above, implementation has not always been straightforward nor effective. Lastly, in relation to collective management, in many places it still suffers from the same drawbacks, namely lack of legitimacy, abuse and incompetence.²³⁹ It has been pointed out that the half-governmental and half-self-governance nature of collective body is not able to fully represent the interests of members of the community.²⁴⁰ Even though the share-holding system has received

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Forestry tax reform has been discussed in Chapter One above. The discussion points out that although tax reform is essential for the development of forest and forestry in China, local governments suffer from shortage of income as a result of the reform. This inevitably impacts on the ability of the local governments to provide public services and amenities or to pay for the day-to-day running of the administration. As a result, covert charges and fees have sprung up again.

²³⁹ Hu Baoyu, 2006; Liu Jinlong, 2006

²⁴⁰ Liu Jinlong, 2006

mainly positive reviews since the inception of the SHIFT system in Sanming, Fujian, it has not worked well in every place.²⁴¹

Hence, even though the new collective forestland tenure reform in China has set out to tackle the issues of tenure security, land transfer and mortgage discussed above, the impacts are far from clear. This section shows that there are still problems within the households contracting out system. The early HRS reform succeeded in injecting the much-needed incentives into household management of agricultural land, including the forestland. However, the reality shows that mere 'fine-tuning' of private use rights may not be sufficient for further development, as many of the difficulties are associated with the collective ownership regime. There are still many hurdles to a properly functioning private rights regime. In particular, the current regime inhibits the establishment of a properly functioning land market that enables land to be exchanged and to be put to the most efficient use. For this reason, it is questionable whether the current 'collective ownership and private use rights' of forestland is tenable. It is debatable that China is now ready for and will benefit from a private land ownership regime; and that there is no reason for China to cling to the ideology of collective ownership, as pointed out in Chapter Three above. And even if the government thinks that radical and ownership reform is currently unacceptable, it is important to recognise that there are alternative arrangements, such as the community-based forest management regime in Mexico discussed above, that are viable or even more desirable.

6. Conclusion

This chapter provides an overview of the theory of common property management and the community-base forest management regime in Mexico. They offer some yardsticks against which the rationality and viability of China's collective forest regime can be measured. Although community-based timber production in Mexico can hardly be hailed as a great success, it nevertheless embodies some features that may make a community-based forest management regime more sustainable, such as voluntary association and public participation. It seems that China's collective forest

²⁴¹ Liu Jinlong, 2006

regime does not have the essential attributes of a successful common resource management regime identified by the theorists discussed above. For example, forest boundary disputes are abound; collectives' autonomy to make decisions for the collective property is greatly restricted; members' participation in decision-making is weak; effective conflict and dispute resolution mechanisms are lacking; and last but not the least, there is no regional or national organised associations that represent the collective interests of the members of the forest community, especially against the intrusion by the state.

The latest attempt by the Chinese government to further liberalise the collective forest regime has not introduced any radical changes to the collective forest system. It merely intensifies the contracting out processes (where collective land is contracted out to private households or individuals for management purposes), and attempts to reduce taxes and charges that have kept the profitability of forest industry low. The actual impacts of the reform on the forest industry and reforestation (and afforestation) activities are still too early to be discerned. However, all the 'new' measures are introduced within the existing framework of insecure property rights and a weak collective governance structure. It is difficult to envisage how collective forest regime in China can be significantly improved without addressing the underlying institutional limitations. Furthermore, a radical reform in the forest sector itself will not be able to achieve the desirable results; as Chapter Three above pointed out, forest and rural land use in China are greatly influenced by the socio-economic conditions of rural China. For example, development and rural-city migration have impacted on not only the demography of rural area (and subsequently the supply of labour), they have also had an impact on land use. Also, without the improvement in the legal and judicial systems, protection of private property rights (which is one of the main elements in the latest round of forestland reform) will not be complete or effective.

The next and last chapter will look at the future direction that, in the author's opinion, the Chinese government can take in order to improve its forest and forestry sector. Given the development path China has taken and the social changes that are taking place in its rural area, there is one thing that is certain for the future transformation of its rural land holding: public participation and democratic decision-making are indispensable 'ingredients' for a more successful and sustainable non-state forest

management regime. These are crucial attributes whether the government chooses to further improve its collective forest regime by strengthening the collective management (and ownership) system or by allowing privatisation of collective land.

Chapter Five

Conclusion: Property Rights Reform

1. Introduction

The last chapter concludes the findings of the research by discussing the future land ownership reform of China's collective forestland. Land ownership reform not only is necessary for the improvement of social justice and the economy in rural China, it also has the potential for greatly improving forest governance. Chapter One has discussed how property rights theory explains the role of property rights in promoting the efficient exploitation of resources¹, and the importance of formal property institutions in promoting sustainable development of a thriving economy.² It is assumed that 'once a right or value is created, the owner has an incentive to maintain that value so that they can maximise the profits that accrue from selling that right'.³ Accordingly, private property rights are deemed to be able to induce the most efficient outcome (at least in a market economy) because of the obvious and direct relationship (which also indicates low transaction costs) between effort and reward. For other forms of property rights, the causal link is not always straightforward and as a consequence may result in inefficient and unsustainable use of resources.⁴

A private property regime, however, does not mean that the government has no role to play in regulating resource use. In China, the government has opted to regulate land use via the ownership regime. As a result, households' land use rights exist within the framework of the collective ownership and are subject to various (and excessive) restrictions imposed by the government. The rigid land use framework is exacerbated by the fact that policies are imposed in a 'top-down' fashion, including the creation of the collective regime itself. In this circumstance, public participation in decision-making and accountability are limited. Without the 'bottom-up' feedback system, the probability of the government making the ineffective policies is higher. Policies are

¹ Demsetz, H., 1967; Posner, R., 2007

² North, D., 1990; Chen, Lei, 2007, p 5.

³ Gunningham, N., and Grabosky, P., 2007,pp 70-71.

⁴ In an 'open access' regime, the causal link between efforts and rewards is tenuous or absent altogether so resource are depleted very quickly (see Chapter Four above). For state and collective ownership, the causal link may sometimes be too tenuous; as a result, monitoring costs can be high which in turn increases the inefficiency of resource use (see Chapter Two above).

ineffective when they fail to take into account the actual socio-economic conditions of the society, and when they produce unproductive or inefficient use of resources. As the pre-household responsibility system period shows, ineffective government policies could bring devastating consequences not only to the government but also to the people. Instead of controlling resource use via ownership rights, in most market economies, the government exercises control over resource use via public regulations.⁵ This creates a ‘win-win’ situation where private property promotes efficient management of resources at a low cost (to the government) and public regulations allow the government to control the externalities of individual activities by re-allocating property rights.⁶

Apart from its significance in inducing economic growth, rural land reform is also important for China’s legal and social development. A legally protected private rights regime allows individuals to have access to legal mechanisms to have their rights upheld. As seen in the previous chapters, protection of private property rights is only starting to be taken seriously recently in China with the adoption of the new Property Law. How significantly private property rights will advance against the power of the state is open to question as the new law has not curtailed some of the most arbitrary powers held by the state against private and collective properties.⁷ It is fair to say that although China’s society and economy have transformed beyond recognition in the last three decades, its political and legal reforms are still lagging behind. Having said that, the rapid economic growth has ‘propelled’ the government to play ‘catch-up’ with its legal system and China has churned out hundreds of new laws since 1978.⁸ As the rule of law is being strengthened in China⁹, it is highly likely that an evolution towards a more secure private property regime is inevitable. It is arguable that in an authoritarian state where individuals do not participate in democratic elections and

⁵ Public regulations such as zoning and planning law, pollution control legislations, and forest management law aim at balancing the interests of individual resource owners with the general public interests. Public regulations usually prohibit certain types of activities or demand certain desirable actions to be taken, and imposes sanctions or incentives accordingly.

⁶ See Coase’ theory of social cost for more discussions on the role of property rights in affecting the allocation of social resources and the social costs, Coase, R., 1960.

⁷ One example is the right to requisition land for development purposes. See Chapter Two and Three above for discussions.

⁸ Since 1978, more than 350 laws and 6,000 lower-level regulations have been passed, Peerenboom, Randall, 2002, p 239

⁹ For problems associated with the lack of rule of law in China, including the judicial system, see Chen, Albert, 1999, pp 104-105.

decision-making processes, private property rights can enhance the protection of individual rights as they can be used as a protective 'shield' against potential state oppression. The reform of property rights, however, will not be complete without the reform of China's judicial system. As will be discussed below, without an independent and impartial judiciary, private rights will be devoid of meaning.

The chapter will begin by discussing the results of some case studies that looked at the significance of tenure security on investment in and use of forest resources. They show that the problem of unsustainable use of forest resources could be solved by enhancing private rights of resource users, especially ownership rights. This is followed by the discussion of property rights reform in relation to China's forestland. At present, three options have been identified in relation to the possible property rights reform of rural land: nationalisation; privatisation; and further refinement of the collective ownership regime.¹⁰ So far, no radical moves have been taken to either nationalise or privatise collective forestland; preservation of the status quo seems to be the preferred choice. Yet, discussions in the previous chapters show that the current attempts by the Chinese government to improve tenure security are inadequate. As a result, it can be argued that privatisation or permanent leasing of land should be the next step forward. This does not mean, however, that land privatisation should be executed immediately and without reservation. In order to avoid destabilising the underlying fabric of the rural society, rural land rights reform in China should be carried out gradually and be accompanied by other social and legal reforms.

Lastly, the power of the state to interfere with forest management in the name of public interest will be briefly discussed. It points out that public regulation is particularly important under a private ownership regime to prevent and control the externalities ensued from individual activities that are imposed on the wider society. In this case, the government, equipped with the necessary information that reveals such externalities, has to step in. The state can, however, sometimes over-step or abuse its power, which may leave private individuals in a very disadvantaged position. Hence, it is important to look into how a balance can be achieved between

¹⁰ Cheng Yunxinig, 2004, pp 50-51; Chen Xiaojun et al., 2003, pp 220-227.

private property rights on the one hand and the government's power to impose public regulation on the other. The chapter will conclude that in order to attain a balanced growth, private individuals need to be given the right to protect their properties, and to participate in the decision-making processes. Only when the feedback system is efficient can the government make informed decisions about land and resource use.

2. Property Rights Reform

Rural, or more specifically forest, land ownership reform is not only aimed at increasing agricultural productivity, it will also bring far-reaching social changes to China's rural population. In particular, it means that private usufruct rights will be free from arbitrary interference from not only the state but also the collective land owner. The rural land ownership reform also means that Chinese farmers can, for the first time, reap the fruits of the spectacular economic growth in China. Land can be exchanged or sold and be put to the most efficient use. The value of rural land has increased significantly in China, especially in areas near the cities.¹¹ Currently the farmers and the collective owners do not benefit from the increase in value because they cannot sell their land for non-agricultural use;¹² the state has a monopoly over the supply of land for development purposes. In addition, once an area has been designated as a city, the ownership of all land is effectively changed into state-ownership.¹³ As already pointed out in Chapter Three, the rigid rural land ownership arrangements are not only 'short-changing' the farmers, they have also created opportunities for government officials and collective leaders to abuse their power and exploit their position. It is fair to say that lack of land tenure security has put the rural population in a very disadvantaged position and stifled rural income growth. Hence, it has been pointed out that without a strong private property institution, China's future economic development is not favourable.¹⁴

¹¹ See Chapter Two above

¹² In addition to their inability to sell the land, both the collective owner and private land users do not always receive adequate compensation for the land that the state has requisitioned. For more information, see Chapter Two above.

¹³ Article 8 of Land Management Law 1998 provides that all city land belongs to the state.

¹⁴ In fact, it has been predicted that China will experience slower growth in the future partly due to its flawed property rights system, Hutton, W., 2007, pp 195-218. Even a theory that seeks to question the 'rights hypothesis' (which says that economic development is not possible without a legal system that offers predictable and stable rights of property and contract) in China recognises that basic protection

China has come a long way since the beginning of the reform in agricultural production in the late 1970s: household-level production is now predominant; individuals now have private land usufruct rights; private property rights are allowed and recognised by law; and more importantly, democratic election is now taking place at the village level. In relation to property rights, the trend is pointing at a gradual shift to a private regime. Since the 1990s, although cautiously at first, the Chinese government has adopted different laws that recognise and give protection to private property rights.¹⁵ Furthermore, there is no indication that the government is reversing or likely to reverse this course: it will be politically impossible to do so even if the government wishes to as private ownership is now prevalent in Chinese society.¹⁶ With this fact in mind, it is right to suggest that rural land ownership reform is now feasible and a land market should gradually be introduced into the economy.

2.1 Tenure Security and Forest Management

Tenure security is usually associated with private ownership of property where the owner has, *inter alia*, the rights to use, to derive income from the property, to dispose of the property and to exclude others.¹⁷ Some empirical studies have been carried out to look at (though not exclusively) the relationship between tenure security and investment in forestland, especially in developing countries. The results of almost all of these studies confirm that there is a positive relationship between tenure security and use of forest resources, meaning that the more secure the tenure the less wasteful forest resource use would be.

Some early studies have suggested that secure land property rights provide the incentive for efficient forest management, such as long-term planning, and discourage uncontrolled deforestation.¹⁸ One study in particular looked at two scenarios where

of property from unpredictable confiscation by the government or any party is essential for the future growth in China, Clarke, Donald, 2003.

¹⁵ See Chapter Two above.

¹⁶ In fact, literature on the development of rule of law in China has painted an optimistic picture of the future adoption of a better functioning legal system where private rights will be respected and protected by the state. It is said that China is now in the critical stage of social, cultural, economic, legal and political transition; the emerging market and civil society will push for the adoption of a formal and rational rule of law, Chen, Albert, 1999, pp 111-112.

¹⁷ See Chapter One above.

¹⁸ Mendelson, R., 1994. Deacon, R.T., 1994.; and Besley, T., 1995

property rights might play a substantial role in influencing forest use.¹⁹ One was a model of 'land development' at the Amazon frontier where property rights were granted to those who 'improved' the wilderness; the second scenario involved squatters in forests in Thailand. The author looked at how access to property rights, and the lack of it, influenced the behaviour of the forest users, and whether or not their use was sustainable. In the first scenario, the high costs of obtaining and defending ownership title could offset the value of the resource. As a result, more resources were exploited so that benefits from the use could be maximised. In relation to the use of forestland by squatters, the author found that the possibility of eviction (because of the lack of tenure security) led the users to choose short-term destructive land uses with lower present values. The author concluded by stating that in order to avoid these problems, property rights must be secured in an efficient and prompt manner. This could be achieved via, *inter alia*, market allocation of property rights (price bidding and competition), empowerment of users (financial help by the government for the poor) and the adoption of a scientific approach (by allocating land according to the optimal size of the best land use in mind).²⁰

Some recent studies on forestry in China also come to the same conclusion that tenure security is vital in improving forest management and land use.²¹ These studies mainly focus on the impact of the de-collectivisation process that took place in the 1980s on the investment in forestry. All of them have provided unequivocal evidence to show that China's forested area and investment from private households have increased since the inception of the de-collectivisation process, although in some places in southern China, deforestation preceded forest expansion due to the distrust of farmers.²²

A couple of observations can be made about these findings. Firstly, tenure was not the sole factor that was looked at in these studies. Most studies also looked at other factors such as the market reform and population pressure. Market reform included

¹⁹ Mendelson, R., 1994

²⁰ *Ibid.*

²¹ Liu D., and Edmunds, D., 2003; Yin R., 2003; Zhang D., 2003; Rozelle, S., Huang Jikun and Benziger, V., 2003; (all the above can be found in Hyde, W., Xu J.T. and Belcher, B. (eds), 2003) Zhang Y., Uusivuori, J., and Kuuluvainen, J., 2000; Démurger, S., and Yang W., 2006; and Qiao Fangbin, Huang Jikun and Rozelle, S., 1998.

²² See Chapter Two above.

prices of timber and other agricultural products, profitability (the issues of taxation and charges), and the flexibility in production and sale of timber products (the issues of government control and procurement). The results showed that tenure was not the only or main determinant of forest investment and management pattern; property rights reform needed to go hand in hand with other reforms. Secondly, there were regional variations between the South and the North of China.²³ Due to the differences in institution and the economic predisposition in these two regions, the outcomes of land tenure reform produced different results. In short, better tenure security and less government intervention in collective forestland in the North produced more cogent evidence of an increase in forest investment and productivity. Lastly, all studies concluded by confirming the positive impact of de-collectivisation on tenure security, with some even advocating for further improvement on tenure security.

Another study in China asked the respondent households directly the preferred form of forestland ownership regime.²⁴ According to the results, 89.12 percent of respondents preferred private ownership while only 4.1 percent preferred collective ownership.²⁵ No respondent actually preferred either township or state ownership. When asked about the possibility of state ownership of all forestland, 40.16 percent of respondents strongly opposed, 36.15 percent did not oppose²⁶ while 22.19 percent of respondents were indifferent.²⁷ Unlike the previous studies that looked primarily at the impact of the past de-collectivisation process on China's forestry development so far, this survey gives a faint indication of the future development of forestland property rights (at least according to the wishes of the farmers) in China. Despite the clear indication of the preferences of the respondents, the authors in the study came to the conclusion that the status quo, namely collective ownership and private usufruct right, should be preserved although the protection of households' usufruct right should be strengthened. According to the authors, this is due to some important factors that may render the private ownership regime undesirable: the high population-land ratio; further fragmentation of forestland; and the impediment to

²³ Yin R., 2003; and Zhang Y., Uusivuori, J., and Kuuluvainen, J., 2000.

²⁴ Xu Xiuying and Shi Daojin, 2004.

²⁵ Ibid.

²⁶ It has to be pointed out 'not opposing' is not equivalent to 'in favour of', which will make this finding consistent with the above-mentioned results of the preferred mode of ownership.

²⁷ Ibid.

large-scale management of forestland due to the unwillingness of farmers to transfer land holding.²⁸

2.2 Land Privatisation and Permanent Leasehold

Given the importance of tenure security on forest investment and resource use, the future property rights reform of China's collective forest should involve either privatisation of land or the grant of permanent leasehold, where land owners or right holders not only possess the right to dispose of the land but also the right not to have their properties taken by the government without valid reasons and compensation. Before we proceed, two issues need to be highlighted. Firstly, one can argue that instead of privatising the land, which maybe too drastic a step, the government can overhaul the collective system to make it more likely to succeed, taking into account the important attributes identified in the previous chapter. Furthermore, the Mexican model of community forestry (as also seen in the previous chapter) can perhaps provide a good point of reference in relation to the future reform of the collective forest in China. The success of the former, however, is contingent on the presence of some underlying features such as voluntary association²⁹, democratic decision-making, effective supervision³⁰, effective conflict resolution mechanism³¹, and most importantly, independence.³² As already pointed out in Chapter Four, all of these attributes are currently lacking in China's collective forest regime and any reform to introduce these elements can be as, if not more, drastic as land privatisation.³³ Eventually, future reform of the collective forest regime in China, be it an improved

²⁸ According to the same survey, 85.19 percent of the respondents stated that they would not be willing to transfer their land title if forestland were privatised. *Ibid.*, p 72.

²⁹ For example, a forest community is set up by the initiation of the members themselves. Furthermore, forest communities are allowed and encouraged to form regional or nationwide associations to represent their interests.

³⁰ This refers to not only the supervision of the work of members' representatives by the vigilance council but also by officials from the government agency created to assist community members in understanding and enforcing their rights.

³¹ This refers to an impartial and effective court system or specialist tribunal that deals with community forestland issues.

³² Forest communities in Mexico are independent units that are given the right and power to govern community affairs. State mainly plays the roles of a facilitator and mediator.

³³ Similar to Chapter Three above, discussions of forest collective entities here mainly refer to the mainstream non-indigenous communities. Indigenous communities are given more autonomy to govern community affairs and they may have more robust in-built social capital compared to other types of communities. There are examples of successful cases of indigenous forest communities although they can be differentiated from the mainstream collective entities on the ground of the nature and composition of the community, Kitamura, Kenji and Cao Guanxia, 2003; Qiao Fangbin, Huang Jikun and Rozelle, Scott, 1998; Su Yufang, 2004; Deng Weijie, 2003; Shen Maoying, 2001.

collective forest regime or a private land regime, has to incorporate some vital factors such as reinforcement and protection of private rights, public participation in decision-making, transparency and accountability of government actions, and access to fair and effective judicial recourse.

Secondly, it can be argued that privatisation may have more positive impacts, such as increased efficiency, on timber and economic forests than on protection or ecological forest. This is due to three main reasons. Firstly, commercial exploitation of forest resources is prohibited in ecological forests and the current 'management subsidies' provided by the government under the Forest Ecological Benefits Compensation Fund are far from adequate.³⁴ Hence, it may not be profitable or viable to manage these forests individually; joint or collective management may help to reduce the cost and subsequently increase efficiency. Secondly, in situations where users or owners of protected forest are plenty, joint management may be necessary as the provision of environmental services is usually contingent on the health and integrity of the whole ecosystem, regardless of the ownership boundaries. Joint management may not be necessary if there are strict and effectively enforced management regulations that are followed by individual forest owners. However, the absence of scientifically-sound management regulations and effective law enforcement in China means that collective management may be needed in order to reduce externalities caused by mismanagement of individual forest plots. Thirdly, as pointed out in Chapter Four, with the increasing recognition of the value of environmental services provided by forest and the creation of market for these services, joint management or ownership may strengthen the bargaining power of the 'suppliers' of the services. Thus, it is arguable that land privatisation may not be suitable for all kinds of forest. Until the issues discussed above have been satisfactorily dealt with, privatisation should initially be confined to timber and economic forests.

Apart from the above, there are also two land-related concerns that need to be addressed. Given that land is regarded by most rural households as their only source of social security, there is a genuine concern that rural poverty and social unrest will increase when land is sold or transferred under undue influence or manipulation. As

³⁴ See Chapter One above.

Chapter Three highlighted, in order to overcome the problem of heavy reliance on land as a source of social security, the government should accelerate the establishment of a viable welfare system in rural China. Although in recent years the Chinese government has improved the health care and education systems in rural China, these are far from adequate to ameliorate the situation.³⁵ In addition, using land as the only source of social security also harms China's economic growth as land is tied to unproductive agricultural activities. Urban and rural development can be accelerated when land is released from this constraint and enters the market where the market value of the land will be reflected.

Furthermore, it has been argued that privatisation of land is not desirable due to the concern of high population-land ratio, which would lead to fragmentation of land if land is privatised and creates impediment to large-scale land management due to households' unwillingness to give up land. It is true that land fragmentation may present a serious problem initially when the current land owners refuse to sell the land as they want their children or grandchildren to inherit it. Having said that, as China experiences continuous urbanisation and industrialisation and more and more young people migrate to the cities for job opportunities, they may not want to work on the land passed on to them and may want to sell or rent it out instead.³⁶ Thus, the worry that land will stay fragmented in small plots may prove to be short-lived, provided that land can be transferred freely between individuals and that land tenure is secure. Employment opportunities in the cities and rural-urban migration may offer the initial relief to population pressure on agricultural land; continuous urbanisation and better land use planning will provide the long term solution to the problem of land fragmentation as less and less people are involved in small-scale and unproductive agricultural activities.

³⁵ See Chapter Three above.

³⁶ However, willingness to give up land does not mean that there will be demand for the land. As pointed out in the Chapter Three above, due to the low profitability of agricultural activities, not many people want to take on more land and as a result, land is abandoned at a relatively large scale. Low profitability in agriculture is due to two main factors: high input cost and the volatile market price; and the unsustainably large number of suppliers. Until and unless agricultural production is freed up (which includes the abolition of production target for each household and the residence permit system) and the relatively smaller community of farmers are allowed to set up associations to protect their interests, agriculture will remain unattractive and large scale agricultural production will not take place.

Both the concerns discussed above present real challenges to the government, politically and socially, as their solutions are either contingent on various measures that are yet to be taken by the government or would take some time before they take effect. Hence, it is reasonable to suggest that land privatisation in rural China should be carefully planned and if necessary, should take place gradually. Many of the current land use interferences or restrictions are imposed to stop activities that the Chinese government perceives to be harmful to its national interests, especially its social stability,³⁷ although it is clear that the government sometimes seek to promote its own interests at the expense of the interests of the land users. (The lax supervision over rural land requisition is one good example of how the government puts national and self interests ahead of the rights of private households or individuals.) However, following rapid urbanisation and economic growth and the increasing involvement of China's rural population in the market system, it is becoming clear that top-down command and control over land use is denying rural households the opportunity to 'ride on the back' of the market economy, which is something that has been enjoyed by their urban counterparts. Land privatisation presents a good opportunity for the government to adopt more flexible and cost effective measures to strike a balance between social and economic development.

In this section, the author will provide neither an elaborate account of the steps that the government should take nor the timescale of the reform; instead, some general suggestions will be discussed as to what action the government can take in achieving the goal of land privatisation whilst not disrupting the fabric of rural society at the same time. It is important to emphasise that an outright privatisation of all collective forestland or a short timeline within which property rights reform should take place is not advocated. Rather, certain conditions should be imposed at the initial stage of the reform to make sure that land is not freed up too quickly and to give private households time to adjust. In addition, the discussion of forestland property rights reform may not necessarily apply to all China's rural land,³⁸ although privatisation of

³⁷ The particular issues relating to population and social security for rural residents have been discussed in Chapter Three above.

³⁸ The value and use of cropland are in many ways different from the use of forestland. For example, many rural households regard forestry as side-line activities and derive only minimal income from it. As a result, the importance of forestland as source of social security is less than cropland, Ho, Peter, 2005, pp 99.

cropland has been discussed by scholars inside China³⁹ for which the arguments for the need to privatise forestland are also equally applicable.⁴⁰ Lastly, the main reasons behind the advocacy for forestland privatisation in this section are not only to promote the development of the forest industry, but also to give the people the power and opportunities to make decisions that serve both the individual and national interests.

There are two possible ways to regulate land privatisation during the initial stage, which aim to reduce the initial shocks as much as possible. The first is to control land privatisation itself and the second is to control the scope of the land market. Control of land privatisation means that land can only be privatised under certain circumstances or if certain conditions are met. One example of privatisation control is the privatisation of *ejidal* land in Mexico. As pointed out in the previous chapter, land allocated to the members of the community can only be privatised if the matter is raised in the community assembly (ideally it should involve all collective members and not just their representatives) and the approval of the majority of the members is obtained.⁴¹ Community members can choose to either privatise all community land and to disband the community structure, or privatise only parts of the land. In the latter case, the land holder's family and members of the community have the right of first refusal to purchase the plot if it is put on sale.⁴² Hence, community members have the say over whether or not land is to stay as community land or to become private land. This arrangement allows land holders the right to propose privatisation while at the same time allows the community to have some control over the disposal of the common land. It is consistent with the underlying principles upon which the Mexican regime is built, namely voluntariness and autonomy.⁴³ However, the conditional right to privatise land is only suitable if the collective ownership regime is

³⁹ Niu Ruofeng et al., 2004, pp 62-63; Wen Guanzhong. 9 March 2008;

⁴⁰ For example, justifications such as the importance of tenure security to boost long term investment, the need to protect land users' right from interferences by the government and collective, the need to liberalise the land market to allow a more balanced rural and urban development, and the need to end land fragmentation through land exchanges and accumulation, are all relevant to the advocacy of privatisation of cropland.

⁴¹ Brown, Jennifer, 2004, pp 20-22. Although privatisation in Mexico is only allowed for arable land and not forestland, which is used as common land, the author argues that it should not be restricted as such in China.

⁴² Ibid. See n 88 in Chapter Four above.

⁴³ Forest communities in Mexico are created by groups (which consisted of at least 20 people) of private land holders who decided to pool their land and resources together, which is in stark contrast to the top-down approach of China.

to be preserved; unconditional right to privatise is necessary if current collective land ownership regime is to be abolished.⁴⁴

Due to the political nature and the inherent serious shortcomings of China's collective body, it is reasonable to argue that collective ownership of land should be abolished and collective land be privatised. This, however, does not mean that the land should be put on an open and unrestrictive land market. Given the concern for social equity and justice, and also bearing in mind the problems that emerged in the former Soviet Union members following land privatisation, the scope of the land market for former collective forestland should initially be controlled. One example is to perhaps initially limit the qualified buyers to members of the same collective. This is to give members of the same collective the right of first refusal to purchase the private plot so that the initial shock in the change of landowner entities can be reduced. Another restriction on the buyer's side is to limit either the number or size of the purchases of each buyer. For example, the government can limit the purchase of rural land for commercial development by each buyer to a prescribed number of hectares per purchase. Alternatively, the government can restrict the size of land available for sale at any one time (although there should not be any size restrictions for land that are to be rented out or mortgaged). This is to prevent large plots of land entering the market too quickly as this can potentially destabilise the rural economy and society. Another way to control the land market is to impose a minimum time limit that a landowner must retain the land before reselling it. This is to reduce instances of speculative land purchases and to introduce certain element of stability into the land market.

The above are just a few examples of how the government can regulate the process of forestland privatisation during the initial stage. While some may contest that the various limitations imposed on private land ownership are inconsistent with the principle of a liberal market that detests too much government interference, they are nonetheless justified on the ground of social fairness and stability, at least during the initial stage. A gradual approach to land privatisation would arguably induce a smooth

⁴⁴ This does not mean that any kind of collective management of forestland is not permitted. Once the land is privatised, there should be no restriction on the right to association if land holders choose to pool together their land and resources to form a collective entity, association or even private company.

transition from a state-controlled to a more open land market.⁴⁵ Of course, liberation of ownership rights in itself is not sufficient; it must also be accompanied by the relaxation of other restrictions such as the right to transfer and the right to mortgage. Without a functioning land market and a more complete (with less conditions attached) right to transfer, privatisation of land will not achieve the desired effects, which are the maximisation of land use utility and the advantage of economies of scale. A land market is essential because land can then be exchanged according to the market value instead of according to prices set by the government. Right to mortgage is particularly important for forestland due to the huge sum of capital needed for investment; mortgage could become an important source of credit as other credit facilities are less developed or absent in rural China.⁴⁶ Apart from private and commercial credit facilities, the Chinese government should improve or set up specialist credit facilities that give loan assistance to farmers for agricultural purposes including land purchase.⁴⁷ Another issue that potentially has a huge impact on the success of land privatisation is the welfare system. If frequent exchanges of private land are to become a reality, the government needs to improve the welfare system in rural China so that land is not tied up for a long time.

Apart from land-related reforms, privatisation of forestland also needs to be accompanied by deeper institutional reforms, such as the judicial reform. Without a fair and effective judiciary, private rights cannot be protected and enforced. Although China has non-judicial redress systems such as mediation, administrative supervision and petition, the growth of individual rights that makes inter-personal interactions more complex means that a more efficient judiciary is needed.⁴⁸ Judiciary in China suffers from a number of serious shortcomings such as low technical competence,

⁴⁵ In fact, China's gradual transition from a communist system to a market economy has been hailed as a success compared to the 'shock therapy' adopted by the former Soviet Union members, see Clarke, D., Murrell, P. and Whiting, S., 2005, and Stiglitz, J., 2002. China can arguably adopt the same approach in relation to the land reform. It has also been highlighted that until the right institutions are put in place, the state needs to intervene in the market to make sure that land does not fall into the hands of a few. The state can control the market forces through the restrictions or even prohibition of land sales or certain types of land rental, Ho, Peter and Spoor, Max, 2006, p 583.

⁴⁶ Around 65 percent of the loans obtained by farmers are from unofficial channels such as from friends or family members, Zeng Shaoyang and Tang Xiaoteng, 2004, p 61.

⁴⁷ The banking system receives one third of the savings from the rural population; however, only one tenth of the loan provided are to rural population. Apart from the Agricultural Bank of China, there are also co-operative-style banks set up by the farmers themselves. Two third of the loans provided by the rural financial co-operatives go to rural industry rather than to households, *ibid*.

⁴⁸ Peerenboom, Randall, 2002, pp 414-424

corruption, lack of independence, and lack of authority.⁴⁹ All of these not only affect the outcome of cases but also the accessibility to the judicial system itself. The relationship between local governments and the judiciary is particularly worrying as courts not only rely on local governments financially, but local people congresses also elect judicial personnel.⁵⁰ With the financial and personnel ties, it is difficult, if not impossible, for villagers to challenge the decisions of local government. Hence, without judicial reform, private rights will still be subject to the whim of government officials. ‘Deep’ institutional reforms for the judiciary have been suggested: the creation of a federalist system of national and local courts or a system of regional courts where local courts are not tied to local governments in relation to funding and recruitment; better training of judges; the increase of judges’ salaries to cut down corruption; and increased authority of the courts and the presiding judges.⁵¹

To summarise, collective forest in China can benefit enormously from the liberation of land ownership as it not only induces long-term investment but also improves land use efficiency. As pointed out above, land reform can take place in both the context of collective and private regimes, although the collective regime will need to have a complete overhaul to accommodate important principles such as better protection of private rights and public participation. It can be argued that the current collective regime in China should be replaced by a private regime as the former is incapable of inducing efficient and market-oriented land use. Furthermore, it has also failed to protect the rights of individual land users against the power of the state. The use of collective ownership (of land) as a tool to achieve an egalitarian goal no longer makes (economic and social) sense in modern day China where accumulation of wealth from off-farm employment is in no way controlled, which results in wealth gaps even between rural residents.

A private regime potentially is also instrumental in balancing the power of the state and private interests, provided that enforcement and protection of private rights are effective. It can improve the performance and accountability of government departments and officials, and reduce the huge transaction costs involved in the

⁴⁹ Ibid., pp 280-330.

⁵⁰ Ibid.

⁵¹ Ibid., pp 318-330.

supervision of local governments by the central government. It is arguable that a strong civil society would also induce political reforms that would eventually ameliorate some of the ‘harsh’ features of the authoritarian state. Past and future market reforms in China have shifted, and will continue to shift, the balance of power away from the state toward the society; property rights play a significant role in helping to achieve that aim.

3. The Impact of Property Rights Reform on Forest Governance

The shift of power toward the society following land privatisation does not mean that the government has no or a minor role to play in relation to the control of forestland use. On the contrary, the importance of the forest as a provider of environmental services⁵² and the creation of negative externalities from private use as discussed in Chapter Four are calling for a strong government role in regulating land use so that public interests can be safeguarded.⁵³ Public regulation is particularly important in a market economy, where the true values of forest environmental services are currently not reflected (a problem of market failure), and where the majority of the economic activities are undertaken by private entities, who are not directly answerable to the public. It is also generally agreed that various types of forests need to be regulated differently: forest that mainly produces timber should be managed differently from forest that mainly provides environmental services.⁵⁴ Management of ecological forest usually entails some negative obligations where activities that impact, or have the potential to impact, on the integrity of the forest are prohibited.⁵⁵ For example, commercial activities are usually prohibited in ecological forests.⁵⁶ On the other hand, management of timber forest usually entails some positive obligations that regulate

⁵² Forest acts as a ‘public good’ in relation to the provision of environmental services such as prevention of soil erosion, regulation of local and global climate, biodiversity and so on. These services cannot be contained geographically so the problem of free-riding is particularly acute (see Chapter Four above). As a result, the relationship between ‘benefit-payment’ and ‘effort-reward’ needs to be properly aligned so that the true values of forest will be reflected in land use decisions.

⁵³ It has to be pointed out that the protection of public interest is only one of the rationales behind public regulation identified by commentators. Other rationales include the theories of interest group, private interest and institution, Baldwin, R. and Cave, M. 1999, pp 18-33.

⁵⁴ Chapter One above has pointed out that forests in China are divided into five different categories, and forest use is most tightly controlled in relation to ecological and special use forests.

⁵⁵ Chapter Three of the Forest Law provides some general guidelines on how ecological forest should be protected, including the prohibition of mining, grazing, hunting and logging activities within the forest area.

⁵⁶ In China, ecological forests are also not allowed to be transferred or exchanged. In addition, all forestland cannot be turned into non-forestland. Article 15 of Forest Law.

the tree-planting stage, extraction process, transportation of logs and finally reforestation.⁵⁷ Public regulation plays an important role in ensuring that forests in China are properly managed.

In relation to land use in China, there has not been much requirement for legislations to regulate private land use as land is owned either by the state or the collective.⁵⁸ The existing land-use legislations such as the Land Management Law offer only broadly-specified provisions or principles on the planning and restrictions on land use. Given the fact that land (including collective land) use is tightly controlled by the government⁵⁹, these provisions resemble administrative orders more than public regulations as they are targeted mainly at government officials and departments who have extensive power over land use control.⁶⁰ Hence, if indeed forestland is to be privatised, the Chinese government may need to adopt a new set of land use legislations. These legislations should co-exist with laws that protect private ownership and land use rights.

The following subsections briefly discuss the two main forest-related legislations that may be incompatible with a stronger private rights regime. As a result, they may need to be revised if land ownership reform is to be carried out. These two legislations, the logging quota and the logging ban, are coercive measures that are adopted by the government to directly restrict the rights of forest users without compensation. The logging quota system and the logging ban have been explained in Chapter One. The logging quota is an extremely inflexible measure adopted by the government to control timber production. It interferes extensively with the rights of tree owners to dispose of and to derive income from the trees. This is exacerbated by the fact that the allocation process can be arbitrary and subjective. The logging ban involves strict prohibition of forest exploitation, especially timber harvesting, in natural forests and

⁵⁷ Chapter Five of the Forest Law lays down the basic principles that govern timber extraction, such as the adoption of annual production plan, the implementation of the logging quota system, and the acceptable ways of timber extraction.

⁵⁸ As Chapter Three above pointed out, collectives in China are not independent and in fact acting like 'administrative agents' of the government.

⁵⁹ See Chapter Two above.

⁶⁰ The Chinese (both central and provincial) government has issued many administrative orders that aim at regulating land use and planning, especially to curb wanton requisition of agricultural land. For example, in 2003, the State Council issued the Emergency Notification on the Suspension of Various Development Zones (《关于暂停各类开发区的紧急通知》) to its various departments to stop out-of-control land development.

forests in strategic areas. It is controversial because although financial assistance has been provided for state forest farms/enterprises employees, users of collective forest nonetheless are not compensated for the suspension of their rights to cut down the trees. The following paragraphs will discuss briefly the changes that need to be adopted in order to make these two legislations compatible with stronger private property regime.

The logging quota was adopted out of concern for the environment and it is not exclusive to China: many developing and developed countries adopt a timber harvest quota to control timber production and to prevent over-harvesting.⁶¹ What makes it less fair and democratic in China, however, is the fact that the quota allocation is not carried out via competitive allocation and price determination such as public auction and bidding; instead, it is subjected to the discretionary power of the decision-makers. This element of the quota system is unfavourable to, and inconsistent with, the principle of private property rights. Although it is accepted that there is a genuine concern that competitive or market-friendly methods will ultimately exclude poor farmers who do not have the resources to participate in the bidding process, there are nonetheless ways by which this problem can be solved. Firstly, farmers should have access to either the private loan market or agricultural funds set up by the government. Secondly, they should be allowed to mortgage their land in order to raise capital. As explained above, this will be more viable if land is privatised or is made subject to permanent leasehold. Thirdly, the farmers could form co-operatives that would enable farmers to pool their resources together and share the benefits of successful bids.

Apart from adopting more competitive methods to allocate the harvest quota that will also promote efficiency, the government arguably has other ways apart from the logging quota to regulate land use and timber harvest. For example, the government can require and vigorously enforce sound forest management plans, harvest practices such as selective harvest and gradual thinning, and more importantly, reforestation. Most of these are already provided by Chinese law⁶²; however, its effectiveness is questionable due to many reasons such as the lack of staff and resources, technical

⁶¹ Durst, Patrick et al. (eds), 2001.

⁶² Forest Law 1998

knowledge, technology and in some cases lack of will due to corruption.⁶³ The State Forest Administration already has a huge pool of employees who are currently involved in enforcing the quota system; it can instead train its staff to provide technical assistance and extension services, and to achieve more efficient and effective law enforcement.

China's logging ban was introduced as part of the Natural Forest Protection Programme (NFPP) in 1998.⁶⁴ The aim of the Programme was to reverse the negative environmental consequences perceived to be caused by deforestation.⁶⁵ Apart from banning timber extraction in most major timber-producing state forest farms, the NFPP also initiated large-scale afforestation programmes.⁶⁶ As the ban was initially planned to apply to only state-owned forest farms, no compensation scheme had been set up for collective forest members when the ban was eventually extended to collective-owned forest.⁶⁷ The logging ban has brought about negative social and economic consequences in some forest communities.⁶⁸ In addition, without compensation, the ban has also unequivocally infringed the rights of forest users to derive income from and to dispose of the trees. Under a private property regime, this will entitle the forest users to seek compensation.⁶⁹ Arguably, this right exists even without privatisation of forestland, as many of the forest resources (including trees) on collective land (that have been 'contracted out') belong to the households, not the collective or the state.

⁶³ Complications of law enforcement, especially at the sub-national level, are analysed and outlined in Alford, W.P. and Shen Y.Y. 1997.

⁶⁴ The logging ban was initially given a ten-year implementation period.

⁶⁵ The main objectives of the NFPP are to conserve 41.8 million ha of mainly state-owned natural forests and to establish 21.3 million ha of timber plantation from 2000 to 2005 in the upper reaches of the Yangtze River and the upper and middle reaches of the Yellow River, Yang Yuexian, 2001, p 85

⁶⁶ These afforestation efforts eventually gave rise to a separate programme called the Sloping Land Conversion Programme where the government paid subsidies to farmers to convert sloped agricultural land into forest and grassland.

⁶⁷ Xu Jintao et al., 2001. This was partly due to over-zealousness of local government officials who wished to achieve political recognition. In some cases, local authorities adopt extreme measure by cutting off completely local communities' access to non-timber forest products as well as timber.

⁶⁸ Xu Jintao et al., 2001; Shen Maoying, 2001; Su Yufang, 2004

⁶⁹ Some, however, have argued that although the logging ban may have infringed ownership rights, right holders are not necessarily entitled to compensation. According to one theory, if the government's action, in this case the logging ban, sought to correct a 'local collective action problem' (such as the failure to prevent environmental problems caused by deforestation via local collective action), then there should be no entitlement to compensation. If, on the other hand, the government's action sought to redistribute property rights among different groups of people, then those who have lost the right are entitled to compensation. Mullan, Katrina et al., 2007

Closely related to the issue of compensation is the more important question of whether or not the current ban is sustainable. A recent survey in the Guizhou Province showed that the majority of farmers were supportive of the ban, although it was believed that the ban was only a temporary measure and had a ten-year duration.⁷⁰ In particular, most interviewees agreed that the improvement in the environment was a valid reason for the imposition of the logging ban. In addition, loss of income from timber had not been great mainly due to two reasons: most of the trees were still too young to be cut (the last round of cutting occurred in the 1980s), and timber had not been a major source of income for most households due to the logging quota.⁷¹ Thus, it is arguable that the logging ban (without compensation) will be tolerated only if it is a temporary measure and that income losses from timber will be minimal. If the ban is extended indefinitely⁷², or if the harvesting quota system is terminated, it is doubtful if households will still continue to support the ban without receiving any compensation.

Hence, the long term implications and sustainability of the logging ban are still open to question. In particular, if the government wants to encourage continuous investment in forest protection and plantation, it needs to be able to provide a secure environment in which long-term forest investment plan can be executed. The arbitrary and temporary suspension of use rights without compensation sends out a negative signal to potential and existing investors that the fruits of their investment may not be enjoyed in the future. In addition, the execution of the logging ban needs to be better planned. For example, some kind of incentives could be put in place to induce voluntary compliance from the farmers.⁷³ The government also needs to ensure that enforcement is effective in tackling illegal logging. Although the logging ban can potentially help the government to achieve the long term aim, which is to source all timber from plantation forest, it is not an indispensable tool. Instead of imposing a

⁷⁰ The author was involved in a survey in Guizhou Province with a team of researchers from University College London, Cambridge University and Peking University. The results of the survey found that although income from timber had decreased, the amount was insignificant compared to the total income of the households. In addition, the survey has also found that the welfare impact was not great, and most of the interviewees seemed to support the ban, *ibid*. Zhang Shiqiu, et al., 2005

⁷¹ *Ibid*.

⁷² Although the logging ban was initially given a ten-year implementation period, the government has so far not confirmed that the ban will definitely end in 2010.

⁷³ For example, the government can compensate farmers from the existing Forest Ecology Benefits Subsidy Fund, although the current rate of compensation/subsidy is far from adequate. See Section 5.4 of Chapter One above.

logging ban, the government can encourage better and more scientific management of forestland that will balance the need for timber (and other non-timber forest products) and the need for environmental protection. Imposing a logging ban in plantation forests should be thought through properly given the fact that many of these forests were established for economic purposes in the first place.⁷⁴

4. Conclusion

Following the discussions of the collective forest regime and private land use rights in China in the previous chapters, this last chapter concludes that a reform of land ownership rights is necessary, which should involve either privatisation of land or giving land users the right to permanent leasehold. The reform is necessary not only to increase land use efficiency (and to promote economic growth), it is also vital for the social and legal empowerment of collective members who have been, for a long time, subject to discrimination and oppression by government officials. Similarly, the collective, as land owner, suffers from various inherent limitations that have prevented it from acting in the best interest of its members. Successful collective forest management and enterprises are the exceptions rather than the norm; and even those who have been hailed as ‘successful’ usually involved local elites making all the important decisions while public participation is kept to a minimum.

Like in the cities, economic reform has brought about huge social changes in rural China. As China’s economy continues to grow, the rationale behind the collective ownership of land start to look more and more untenable. In particular, the rigidity within the rural land use system itself has prohibited economic growth and widened the wealth gap not only between urban and rural residents, but also between rural residents who are engaged in off-farm and on-farm employment. Since the 1990s the Chinese government has expressed the will to tackle the ‘Three Peasant Problems’; however, more than ten years later, the battle is still not over. One of the obstacles is the prohibition on households to capitalise on the increasing market value of the land. The exclusion of private households from the land market has bred corruption and abuse of power by local officials. This coupled with tenure insecurity create an unsafe

⁷⁴ For example, logging ban should not be imposed in plantation forests (here refer man-made timber and economic forests) except forests that are situated in strategic places such as the riverine areas and on very sloped land.

environment for long-term investment in not only commercial tree-planting but also the protection of forest for environmental services.

On the other hand, land privatisation in itself is not the panacea to the existing land and forest resource use problems, which involve various socio-economic issues that cannot be rectified by the change in legal ownership alone. However, land reform will provide a step in the right direction towards a more efficient and just rural development where arbitrary interference from local officials can be kept to the minimum. Given the socialist nature of China's society, private property (especially land) rights do not need to subscribe to the libertarian definition of 'property' where these rights are inviolable.⁷⁵ Instead, certain elements of 'social responsibility' need to be incorporated into the definition of property rights.⁷⁶ In practice, the concept of 'social responsibility' is translated into government regulations that aim to achieve a balance between private and public interests.⁷⁷ The time is now ripe for China to adopt a private land regime that is governed by the rule of law. In short, instead of governing land use via arbitrary ownership arrangements, which have failed to achieve neither sustainable rural economic development nor social justice, the Chinese government should learn to regulate land use and development by using other more benevolent (and less intrusive) tools such as public regulation. Lastly, the call for greater public participation in decision-making processes will increase with the rise of a wealthier and more educated populace. Land ownership reform will certainly help China to become a more open and transparent society where state's actions can be held accountable to the people.

⁷⁵ See the theory of property rights in Chapter One above.

⁷⁶ For the discussions on the inclusion of 'social responsibility' into the definition of property rights, see Coyle, Sean and Morrow, Karen. 2004.

⁷⁷ *Ibid.*

Annex I

More Facts on China's Forest and Forestry

1. Timber Trade and Timber Market in China

Table Two below shows the supply and demand of wood in China from 1996 to 2002. It shows that even though total demand has dropped slightly, export has increased while total domestic supply has decreased. One significant change is the import figure, which has increased a few folds since 1996. This is to make up for the fall in domestic supply which has continuously dropped since 1996. There has been a timber surplus every year although the number has fallen quite a lot in recent years.

Table 2 China's Wood Supply and Demand, 1996 to 2002

		1996	1997	1998	1999	2000	2001	2002*
Supply	Surplus from previous year	3,947	4,262	3,815	3,957	4,190	4,315	4,050
	Domestic production	14,447	13,767	13,500	13,000	12,800	12,600	12,000
	- Of which industrial wood	6,710	6,395	5,966	5,327	4,724	5,100	n.d.
	Total domestic supply	18,394	18,029	17,315	16,957	16,990	16,735	16,050
	Import	318	446	460	1,013	1,361	1,686	2,009**
	- Of which coniferous	65	96	149	457	640	914	1,539
	Total supply	18,712	18,475	17,775	17,970	18,351	18,421	18,050**
Demand	Total domestic consumption	14,444	14,654	13,812	13,774	14,210	14,365	14,385
	- Of which house-building	4,127	4,158	4,230	4,250	4,360	4,300	4,350
	- Of which industrial production	10,317	10,496	9,582	9,524	9,850	10,065	10,035
	Export	6	6.3	6.1	5.8	6	6	7
	Total demand	14,450	14,660	13,818	13,780	14,216	14,371	14,392

Surplus	4,262	3,815	3,957	4,190	4,135	4,050	3,658
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Note: Figures are in 10,000 m³

*All figures for 2002 are estimates for the period from January to September only, apart from ** which are actual data for the same period; n.d. = no data.

Source: Based on data from Chinawood (May 2002 and October 2002) (Taken from Masanobu Yamane and Lu Wenming, Trends in China's Forest-Related Policies – From the Perspective of the Growing Timber Trade, Policy Trend Report 2002 p 3)

1.1 Timber Imports in China

As mentioned above, one of the prominent problems faced by China's timber market is the severe shortage of local supply to meet the demand. This is due to many reasons, such as the increase in wealth (which prompted increase in demand), increase in timber product exports and shortage of local supply of timber products. To satisfy the demand, China has to import a large amount of timber products from other countries, especially its neighbouring countries such as Russia and Indonesia. Timber product imports have also been facilitated with the reduction of import tariffs by the Chinese government, both due to the need to increase timber product import and the joining of the World Trade Organisation in 2001.

China is the world's second largest wood product importer after the United States, and is the world's largest importer of lumber and plywood. The three main suppliers of timber products to China since 1998 are Russia, Indonesia and Malaysia. Total imports of timber products from these countries amounts to over 50 per cent of all timber products imported into China every year. In particular, timber imports from Russia have increased significantly, from over 970,000 cubic metres (RWE) valued at \$93 million in 1997 to 15.8 million cubic metres (RWE) valued at \$1.059 billion in 2002.¹ The Chinese government has even given VAT preferential treatment to the border trade with Russia to encourage timber imports. Other countries that make up the second tier timber product suppliers to China are the US, Gabon, Germany, Thailand, New Zealand, Papua New Guinea and Myanmar, totalling more than 8.8 million cubic metres (RWE) valued at £1.2 billion.² Imports from all these countries have increased in recent years.³

¹ Sun Xiufang et al., 2004, p 9

² Ibid.

³ For a detailed discussions and statistics of China's wood product import, see ibid.

China has significantly reduced the import tariffs for many timber products. In particular, there has been a zero tariff for logs/lumber and pulp/waste paper imports since 1999 to supplement its domestic supply.⁴ However, tariffs for value-added wood and paper products have been continued. This is because China has a high demand for log/lumber whilst at the same time the government wants to promote value-added wood and paper industries in China. The government has also reduced the VAT rebate rates from 13 per cent to zero on a wide range of wood and paper products to discourage exports of various wood and paper products, which are in high demand in the domestic market.⁵ As a result of the shortage of domestic supply of wood and government policy, the trend of timber trade in China shows increasing imports of logs and lumber and increasing exports of finished or value-added wood products.⁶ Since 1997 the export value of forest products from China has risen from \$4 billion to \$17 billion; at the same time, wood product, including furniture, from China to the United States and the European Union have increased 1000% and 800% respectively.⁷

The increasing import of wood products has caused grave concerns in China's supplier countries. Many reports have been published detailing how the surge in China's demand of wood products has increased logging activities in the neighbouring countries.⁸ One example is the supplier country Burma (officially known as Myanmar), which is also the world's largest exporter of teak. Two characteristics of timber harvest in Burma make increasing timber export to China problematic, namely the civil unrest and hardwood harvest. China has opened up its border trading (in the Southwest of China and Northeast of Burma), and has provided financial, political and military support to both the government and military groups, in exchange for its valuable raw materials, including timber.⁹ There have been reports

⁴ China's Subsidisation of its Forest Product Industry, 2004, p 6

⁵ Ibid., p 21

⁶ The gap between the consumption and domestic forest production was 106 million m³ in 2002; the likely future gap around 2010 is estimated to be around 150-175 million m³ RWE, S Nilsson et al., 2004, pp 299-300

⁷ Forest Products Annual Market Review 2005-2006: Executive Summary

⁸ In particular, see Global Witness, 2003; Global Witness, 2005; Katsigris, E. et al., 2004

⁹ Since 1988, the ruling military regime, which calls itself the State Peace and Development Council, controls Burma's forest resources. However, a ceasefire reached with the opposition military groups provided that these arm groups have control over natural resources endowed in the areas under their control, which include the forest resources (except teaks where the government required all teak to be sold via the capital so that the government could have sole control over the sale and revenue; however, many teaks have been logged and sold to China via the border illegally). Global Witness, 2005.

that Chinese businessmen¹⁰ have business deals with both the government and the military groups to carry out timber logging and transport timber across the border. The money from these deals is used to fund the constant arms struggle between the government and the military groups, killing innocent civilians in the process. In addition, highly valuable hardwoods such as teaks are being cut down at an unsustainable speed, even though teak production is supposed to be under the control of the government. Illegal loggings are rampant at the border areas with China¹¹ and a vast area of pristine forestland has been cleared. The ongoing conflict and destruction of forests has brought particularly grave consequences to local communities.

1.2 Commercial Forest Plantations in China

The government is also giving preferential treatment to foreign companies that wish to invest in the forest industry, especially investment in plantations and paper and pulp mills. US\$1,73 billion has been designated by the Ministry of Finance to develop fast-growth-high-yield plantations by 2015.¹² Local governments have also been given the power to grant fast-track approval of integrated plantation/pulp/paper projects, bypassing central government authorisation. Among the incentives given to foreign companies are low interest loans with long-term repayment terms and tax exemption.¹³ So far China has successfully attracted a few large-scale foreign investments to its East coast region (foreign investment attraction in the Western Region has been less successful due to an inherent lack of wood fibre resources and suitable land, and poor infrastructure.). For example, Finland's Stora Enso Oyj, one of the world's leading paper manufacturers, has invested US\$150 million in a 150,000-hectare plantation in Guangxi. In addition, Singaporean paper firm Golden Eagle recently invested US\$500 million in forests in the Jiangsu Province whilst Asia Pulp & Paper, which is one of the world's top four paper producers, has been planting trees in China since 1995. The firm now manages forests in the Guangxi, Guangdong and Hainan provinces.¹⁴

¹⁰ This was usually done with the support of local officials, *ibid.*

¹¹ It was estimated that between 2001-02 and 2003-04 over 800,000 m³ (98%) of timber imported annually to China via the border with Burma was illegal; and all cross-border teak export during these periods were illegal. *Ibid.*, p 19.

¹² China's Subsidisation of its Forest Product Industry, 2004, p 3

¹³ *Ibid.*, pp 3-5

¹⁴ Godfrey, Mark, 2004

The government has also launched various reforms to encourage investment in tree planting by local companies, households and farmers; the two most important reforms are the devolution of property rights and liberation of the timber market. The government not only has granted private entities the ownership right over trees planted in the 1980s, it has also extended the land use right to 70 years (90 years in exceptional cases) in 2002.¹⁵ Timber markets were liberalised when the Unified Procurement System for timber was dropped in 1985 and households were free to sell all their timber at market prices. In addition, recently some provinces have also carried out forestry tax reforms by either eliminating or reducing the high taxes and fees imposed on timber products.¹⁶ The latter reform is particularly important as currently forest products are subject to an excessive tax burden that not infrequently eats up more than 50 per cent of profits.¹⁷ This has acted as a great disincentive to households and farmers to invest in tree planting.

Despite all the reforms, the timber market in China is still not completely liberalised. Timber harvest is still subject to the annual timber quota set by the central government every five years, which applies to all commercial and non-commercial timber harvest. Not only does a fixed production amount distort the market, the quota system also creates complicated bureaucracy and the opportunity for decision-makers to abuse their power. In addition to market liberation, another issue that needs to be addressed by the Chinese government is the issue of consumption, especially domestic consumption. Pressure on timber and timber products can be reduced if the government takes initiative to reduce demand for these products, either by introducing alternatives or increasing tax for luxury uses. Trade in wood products needs to be balanced with sustainable growth and production of timber so that not only long-term supply can be guaranteed, the transition (of timber source) from natural forests to commercial plantations in China can be facilitated.

2. Nature Reserves and the Forest Ecological Benefits Subsidy Funds

¹⁵ Article 20 of the Rural Land Contracting Law 2002.

¹⁶ These provinces include Jiangxi, Hunan, Hebei and Fujian, which are carrying out forestry reform to further encourage private investment.

¹⁷ Liu J.L. and Landell-Mills, N., 2003, p 51

Forest protection has become the central focus of Chinese government's policies on forestry. Never has forest protection and sustainable management been pursued with such zeal and scale by any government in China before. This is a result of both the awareness of the importance of sustainable development (especially in the international arena) and the serious problem of resource depletion (and the resulting negative consequences) faced by China today. China is pursuing its aim from two fronts: protecting the existing natural forests (and forests in strategic areas) on the one hand and establishing more plantation forests on the other.¹⁸ Armed with the aim to increase its forestland to 26 per cent of its total land mass by 2050¹⁹, the Chinese government not only has invested billions of yuan in silviculture projects such as the Three North Shelterbelt Programme, the Sloping Land Conversion Programme and so on, it has also adopted various reforms to encourage private investment in tree planting as already discussed above.

2.1 State-Sponsored Afforestation Projects

In China, most of the natural forests are owned by the state. For decades, these forests were regarded as mere stocks for the timber industry; production and profits were the main concerns of the state forest farms and enterprises that ran the production processes. During the 'Big Leap Forward' campaign in 1958 and the Cultural Revolution (1966-1976), most forestry programmes were discontinued, except rampant timber cutting and highly inefficient afforestation campaigns. During that time, China's forest resource base was devastated by unsustainable timber harvest and out of a total of 104 million hectares of trees planted during that period, the rate of success was a mere 20%.²⁰ Not until the late 1970s did the government start to pay serious attention to the need to establish forests in strategic places and to protect existing natural forests; numerous major silvicultural projects were launched by the central government.

In 1978, the central government introduced the 'Three-North Shelterbelt Programme'.²¹ Under this programme, a series of afforestation would be carried out

¹⁸ In fact, silvicultural investment have accounted for approximately 70 per cent of total state investment in forestry, Zhang Daowei, 2003, p 87

¹⁹ Lu Wenming et al, 2002, p 11

²⁰ Wang Sen, van Kooten, G. Cornelis and Wilson, Bill., 2004, p 74.

²¹ <http://www.3northforest.com/gcjj.htm>

across the Northern regions of China, from the Heilongjiang Province in the East to the Xinjiang Province in the West, covering 45 percent of China's territory. It was adopted to combat serious desertification and to improve the ecological environment in the North²²; the government aimed to invest RMB57.68 billion to afforest around 35 million hectares of land by 2050. The programme is to be carried out in three different stages and will take a total of 71 years to complete (1978 – 2050). The first stage was completed in 2004 and a total of 24.6 million hectares of land had been afforested. Apart from the Three-North Shelterbelt Programme, the government had also adopted other long-term major afforestation programmes in other parts of China.²³ These silvicultural projects mainly concentrated on important rivers and coasts in China. For example, afforestation has been carried out in the areas of the Yangzte River²⁴, Huai River²⁵, Zhujiang River²⁶, Liao River²⁷ and Yellow River.²⁸ Protection forests were also established in the coasts of southern provinces to protect them from hurricane invasion.²⁹ Unlike the Three-North Shelterbelt Programme, the aim of these programmes is to protect important riverine and coastal areas from erosion. All these programmes, including the Three-North Shelterbelt Programme, are funded by the central government and international loans, and are administered by the State Forestry Bureau.³⁰

2.2 Nature Reserves

Just as the government has started to carry out large-scale silvicultural projects, the number of nature reserves in China has also increased. The first nature reserve in China was set up in 1956 in the Guangdong Province; by 1983, there were 133 nature reserves in China consisting of 0.84 per cent of the total land mass. The number of nature reserves continued to increase rapidly and by 1997, there were 932 nature

²² The problem of desertification in the North was taken seriously not only because of the scale of the problem itself, but also its impact on the Capital of China, Beijing, which suffered from serious sand storms as a result of desertification in the North.

²³ For more detail of the major state-funded silvicultural projects, please see Zhang Daowei, 2003, p 97.

²⁴ 1989 and then in 2000

²⁵ 1996

²⁶ 1996

²⁷ 1996

²⁸ 1996 and then in 2000

²⁹ 1988

³⁰ In 2001, all the 14 major state-funded silvicultural projects were consolidated into five: the Beijing Area Protection Forest Project; the National Protection Forest Project; the Sloping Land Conversion Programme; the Natural Forest Programme; and the Plantation Forest Project. These five projects coupled with the Wildlife Protection Project are now known as the 'big six' forest projects, from Zhang Daowei, 2003, p 97.

reserves, which took up 7.69 per cent of the total land mass. In the year 2001 alone, 249 new nature reserves were set up, making the total of nature reserves in China to be 1,405, which makes up 11.35% of the total land mass.³¹

Nature reserves in China are categorised into three groups: ecosystem; wildlife; and natural geology. Nature reserves are also divided into national nature reserves and provincial nature reserves; designation of national nature reserves is approved by the State Council whilst designation of provincial nature reserves is approved by the provincial government. Nature reserves are subject to both unified and departmental managements: State Environmental Protection Administration (SEPA) is in charge of the general management of all nature reserves whilst the different Administrative bodies of the State Council such as forestry, agriculture, mining, water conservancy, oceanography and so on are responsible for their respective uses of forestland. Uses of nature reserves are extremely restricted, exploitative activities such as mining, logging, hunting, grazing, medicinal plant harvest and so on are prohibited.

Most of the nature reserves are situated in state forestland, and they usually are financed and managed by the government. However, some natural forests and forests in strategic areas belong to the collective, some of which have delegated the use rights of these forests to the households. Collective and households use rights over protection forests are restricted, as commercial logging is not allowed in these forests. Following the tightening of natural forests use in 2000 (the year the Natural Forest Protection Programme was implemented nationwide), many more households and collectives found that their rights to use the forests have been restricted. No compensation has been paid for the restrictions imposed on the use rights until recently, when the central government set up the Forest Ecological Benefits Compensation Fund (FEBCF).

2.3 Forest Ecological Benefits Subsidy Funds

The FEBCF represents a significant move towards the use of incentives to induce behavioural changes, which is still a rarity in China even now. It is in fact both a public compensation scheme for ecological benefits provided by private bodies, and

³¹ Zhou X.F., Xie G.B. and Fan, Z.C., 2004, p 71

also part of the rural land use planning where the government is subsidising one particular kind of land use. Due to its potential significance, this section will take a detailed look into the formulation and implementation of the Scheme. The initiative to set up a Forest Ecological Benefits Compensation Fund (FEBCF) started in 1989 when discussions were held between the then Ministry of Forestry and other Ministries. The State Council had also put forward suggestions for the establishment of FEBCF.³² However, no consensus was reached at this phase. Then in 1995, a task force was established jointly by the then Ministry of Forestry and Ministry of Finance to study the feasibility of a FEBCF. The task force proposed setting up a FEBCF and the capital should come from fees collected from units and individuals benefiting from forest's ecological benefits, embracing the 'beneficiary pays' principle. The beneficiaries targeted were large state reservoirs, travel agencies, businesses in the tourism industry and so on.³³ The State Council and Ministry of Finance did not approve this proposal mainly due to the high transaction costs involved.³⁴

After the revision of the Forest Law in 1998, Article 8 was inserted and efforts to set up a compensation fund continued.³⁵ In particular, the State Forestry Administration (SFA) proposed to the State Council that a fee scheme should be set up, whereby 3 percent of governmental funds would be transferred to the compensation fund. Governmental funds include road maintenance fees, railroad construction fund electricity development fund, the Three-Gorges Programme development fund, and infrastructure development fund.³⁶ The compensation fund would be used solely to maintain and develop ecological forests. However, due to many various reasons concerning the practicality of the fee scheme, it failed to win the approval of the State Council. At the end of 2000, the Ministry of Finance agreed to the proposal of the SFA to set up a compensation fund. Following this, classification of forestland into public interest forests (which would be covered by the fund) and commercial forests was undertaken.

³² Sun C.J. and Chen X.Q., 2002

³³ Ibid.

³⁴ Ibid.

³⁵ Article 8 provides that the government should establish a forest ecological benefits compensation fund, for the purposes of forest establishment and protection.

³⁶ Sun C.J. and Chen X.Q., 2002

In 2001, a pilot scheme of the Forest Ecological Benefits Subsidy Funds (FEBSF) was carried out in 24 state-level nature reserves and 658 counties in 11 Provinces. These 11 provinces are Hebei, Liaoning, Heilongjiang, Anhui, Fujian, Jiangxi, Shanxi, Hunan, Guangxi, Xinjiang and Zhejiang. A total of 200 million mu of protection and special-use forests were covered and 1 billion yuan was invested by the central government. The Funds paid 5 yuan per mu³⁷ per annum: 3.5 yuan went to forest management units and 1.5 yuan went to forestry departments for general protection such as fire, insect and disease control, and resource monitoring.

On 10 December 2004, the Chinese government announced officially that the FEBSF would be implemented throughout the whole country.³⁸ In the first phase, central government would invest 2 billion yuan on 0.4 billion mu of targeted public benefit forests (which consist of protection and special-use forests). Out of the 1.56 billion mu of targeted public benefit natural forests, 0.73 billion mu were included in the Natural Forest Protection Programme (NFPP) while 0.83 billion were not. And out of the 0.83 billion mu of non-NFPP target public benefit natural forests, 0.4 billion mu will be covered by the first phase of the implementation of FEBSF.³⁹ Each mu will be paid 5 yuan per annum (approximately US\$ 9 per hectare). The allocation of the subsidy is slightly different from the pilot scheme in that 4.5 yuan will go to forest management units (including private households) while 0.5 yuan will go to forest fire prevention and insect and disease prevention. The Ministry of Finance and the SFA have jointly issued the 'Central Forests Ecological Benefits Subsidy Funds Management Resolution' to guide implementation of the FEBSF. For state forest farms and state-owned natural forests, the subsidies will be allocated according to the agreement reached by both the finance department and forestry department. For collective-owned natural forests, subsidies will be allocated by the village committees according to the contracts and rules. The tending staff shall not get less than 3 yuan per mu. Subsidies for targeted public benefit natural forests owned or managed by

³⁷ 1 hectare = 15 mu

³⁸ A very similar type of public fund based environmental services compensation scheme is the Conservation Reserve Programme. The government of the United States of America pays annual rents of US\$ 125 per hectare to owners of cropland and marginal pasturelands for voluntary retirement of cropland. One important lesson learned from this programme is that a single rental rate will result in those with less valuable land over-compensated and those with more productive land unwilling to join. A median-based compensation scale is in place now to provide payments on the basis of opportunity cost calculations.

³⁹ *Nation-wide Application of Forest Ecological Benefits Subsidy Funds Scheme*, 10 December 2004

individuals will be given to the individuals, and they bear the whole responsibility of tending, protecting and managing the forests.⁴⁰

One benefit of the FEBSF is that it has (or seems to have) done justice to farmers who have invested in forest protection, as it finally recognises the investment and efforts put into tree planting and management. Under various legislations, farmers are sometimes required to protect natural forests, or to plant trees, or to restrict their access to the forest. Apart from the NFPP and SLCP, there are also the Three-North Shelterbelt Development Programme, Soil and Water Conservation Programme, Coastal Shelterbelt Development Programme, and Desertification Prevention Programme. These programmes require farmers to plant trees in ecologically significant areas. Following the implementation of the NFPP which restricts logging in many forests, the hope of the farmers that profits can be reaped from their investment has been shattered. This has generated a feeling of injustice because they are not compensated for the public benefits that the forests bring to the wider society. As a result, implementation of the FEBSF is seen as recognition of the efforts invested by the farmers who are usually from ecologically disadvantaged and poverty stricken areas. According to an official website of the Xuzhou City in the Jiangsu Province,⁴¹ some 'public benefit natural forests' have experienced positive effects since the implementation of the pilot scheme in 2001. Generally under the pilot scheme, farmer receptiveness appears to be high and there has been competition among local authorities for their forests to be included in the scheme.⁴²

Apart from the FEBSF, there are also local initiatives that sought to compensate for ecological benefits. In the Hubei Province, a Preliminary Provisions on the Use and Management of the FEBCF was implemented in 1999 where fees were collected from six sectors, namely drinking water, hydropower, scenic tourism, river transportation, mining in timberlands, and economic forest products.⁴³ Another example was the initiative taken by the Xinjiang Province where funds are collected from monthly

⁴⁰ Ibid.

⁴¹ *Bringing Security to Tree Farmers*, 14 December 2004. For example, in the Heilongjiang Province, not only have forest fires been put under complete control, forest crimes have decreased as much as 90% and insect infestation decreased by 20 percent. In the Fujian Province, 800,000 mu of sparse forestland and shrubs have been turned into forestland; forest density has increased from 0.42 to 0.51.

⁴² Sun C.J. and Chen X.Q., 2002

⁴³ Ibid.

salaries of employees in government departments, institutions and enterprises. Additional funds have also been collected from businesses involving crude oil, nonferrous minerals, scenic zones and forest parks.⁴⁴ The effectiveness and impacts of these local initiatives on local communities cannot be ascertained as no detailed studies have been carried out so far.

Another well-cited example is the 1998 Provisions on the Development, Management and Compensation of Ecological Forests adopted by the Guangdong Province. It requires that no less than 30% of the total annual forestry finance shall be used on ecological forestry, and additional funds shall be collected from water user fees and government funds on soil erosion control. The compensation rate for ecological forest owners was, at the beginning, much lower than the compensation provided under the FEBSF, standing at 2.5 yuan per mu per annum from 1998 to 2000. From 2000 to 2002, the compensation level increased to 4 yuan per mu, and from 2003 to 2007, the compensation level is 8 yuan per mu per annum.⁴⁵ Even with the increased compensation level, it is still questionable whether it is adequate. And given that a large proportion of the 'public benefits' natural forests in the Guangdong Province consists of young trees, the question of adequacy of compensation will become more acute when the trees reach maturity and hence are worth more.⁴⁶

This section gives a brief overview of China's current forest protection and preservation policy, ranging from the establishment of nature reserves, to ecological afforestation efforts and finally to the innovative ecology compensation funds. All these point to the fact that the Chinese government is taking its environment seriously and recognises the importance of forests in relation to reducing various types of environmental degradation that are plaguing the whole nation. The FEBSF represents the use of financial incentives to encourage public participation in this effort; although, as we have seen above, the amount given is far lower than the market price. It is hoped that the FEBSF will ultimately adopt the 'beneficiary pay' principle so that the market value of the services can be better reflected.

⁴⁴ Ibid.

⁴⁵ Compensation For 5,000 mu of Ecological Forest in Guangdong, 11 November 2003

⁴⁶ Guangdong Province Ecological Forest Still Needs More, 11 December 2001

3. Forest Law and Administration

There are six administrative levels in China: the central government, provincial government, prefecture government, county government, township government and the ‘self-governed’ administrative village.⁴⁷ Government officers from central to township government receive salaries from the government. The principle of ‘self-governing’ was adopted at the village level as early as 1982⁴⁸ although it was only enshrined in the national law in 1998.⁴⁹ Due to the self-governing policy, leaders at the administrative village level are not considered civil servants as such and do not receive stipend from the government. Instead, they are financed mostly by the village treasury and receive nominal compensation from the government for their services. Decisions are usually made at the upper level of administration, and are expected to be implemented accordingly by the lower level of governance. Due to the absence of popular voting or election (apart from the village level), each level of governance is made directly accountable only to the upper level of administration and not to the people as such.

The Ministry of Forestry in China was set up in 1951, and was responsible for the protection and use of all forests in China. In 1956, a separate Ministry of Forest Industry was established as a response to the increasing demand for wood and lumber products. However, two years after that, the two ministries (Ministry of Forestry and Ministry of Forest Industry) were combined and later became the Ministry of Agriculture and Forestry. In 1979, the Ministries of Forestry and Agriculture were separated. The Ministry of Forestry was later integrated into a new Ministry of Land and Resources in 1998 in order to achieve a better co-ordination of land administration. The forestry branch of the ministry is known as the State Forest Administration (SFA), and is responsible for most aspects of China’s forestry. There are twelve offices under the SFA, namely the Administration, Silviculture and Afforestation, Management of Forest Resources, Protection of Wildlife, Security, Policy and Regulation, Development Planning and Finance Management, Science and Technology, International Cooperation, Personnel Management, Party

⁴⁷ Each administrative village has several ‘natural’ villages under its governance.

⁴⁸ A provision was inserted into the Constitution in 1982, which recognised and advocated the establishment of village committees, among other things, Pan Jiawei and Zhou Xianri, 2004, pp 33-34.

⁴⁹ Organic Law of the Villagers Committee 1998

Administration, and Retired Cadre Management.⁵⁰ The change in 1998 not only 'downgraded' the Ministry of Forestry to an 'Administration Body', it has also changed the core of its responsibility. Amongst its twelve Offices, many are dedicated to forest protection and silviculture, echoing the Natural Forest Protection Programme and Sloping Land Conversion Programme adopted by the central government in 1998. The SFA has offices in all levels of administration, and the lowest level of governance is the County Forestry Bureaus. The SFA has devolved decision-making and law-making power to these provincial, prefectural and county forestry bureaus.

There are different sources of forest law and regulations in China, and these laws are arranged in a hierarchical way. The National People's Congress is the ultimate law-making body in the country, which lays down the mainframe and basic principles of China's legislations, which include the civil law, criminal law, administrative law and the Constitution. For example, the Forest Law 1984 (amended in 1998) and Wildlife Protection Law were both passed by the National People's Congress. The National People's Congress also approves the five-yearly forestry plans. These plans are put together by the State Planning Commission and upon being approved, the plans are issued by the State Council and the implementation is then in the hands of the relevant ministries and the Provincial People's Council.⁵¹ The second level of law making is the State Council. The State Council makes regulations within the scope of the Constitution and laws laid down by the People's Congress, which are mainly administrative and elaborative in nature in order to facilitate the implementation of the 'parent' legislations. Examples of State Council's regulations are the Implementation of the Forest Law Regulations 2000 and the Sloping Land Conversion Regulations 2002. The different departments of the State Council also make 'departmental' regulations (which are known as the statutory instruments in the UK), which are also administrative and elaborative in nature. These regulations guide the departments concerned in the implementation of the legislations laid down by the National People's Congress and the State Council. An example of forestry departmental regulation is the Forest and Wildlife Natural Reserves Management Decision 1985.

⁵⁰ State Forest Administration, China <http://www.forestry.gov.cn/>

⁵¹ Richardson, S.D., 1990, pp 160-161

The next level of law making body is the Provincial government level. The administrative structure of provincial governments mirrors the structure of the central government. Similarly, there is a Provincial People's Congress, which plays a similar role as the National People's Congress but on the provincial level. These People's Congresses have the power to make legislations for the specific provinces within the scope of the Constitution and laws made by the National People's Congress and State Council. One example of this is the Decision of the Implementation of the PRC Forest Law in Anhui Province, passed by the 7th Committee Meeting of the Anhui People's Congress in 1990. Not every provincial law making body is equally active in law making; less-developed provinces like Ningxia have less provincial-level legislations than other wealthier provinces such as Guangdong and Fujian. This further accentuates the disparities between different provinces, with wealthier provinces having more elaborate legislations to help them to implement central government policies. Implementation of all laws and policies at the provincial level is the responsibility of the Provincial People's Council, which reflects the role of the State council at the national level. Lastly, the provincial governments and other city governments can also pass local regulations, which are effective in the areas under the control of the local government concerned.

The major legislation governing the use of forests is the Forest Law 1984, which was amended in 1998. The Forest Law was passed in 1984 to implement the State Council's Decision on Issues Regarding Forest Protection and Development adopted in 1981. The main important change introduced by the policy was the recognition and protection of devolution of land use rights to the household level, which was incorporated into the Forest Law. In 2000, the State Council adopted the Regulations of the Implementation of the PRC Forest Law, which further elaborates the Forest Law to facilitate implementation. There are seven chapters in total under the Forest Law, namely general provisions, forest management, forest protection, tree planting and silviculture, timber logging, law enforcement and miscellaneous. Under the General Provision, the law sets out the general principles of forest management, and the different categories of forests. It also reaffirms the state and collective ownership of forestland, plus the land use rights devolved to households/farmers.⁵² It also sets

⁵² Article 3

out the protective measures the government should take with regards to forestry, namely the adoption of a timber quota, tree planting loans for private entities, public payment for ecological benefits and so on.⁵³ It also lays down the administrative structure of forest governance, specifying the different roles played by the State Forest Administration and various levels of forestry bureaus.

The chapter on Forest Management generally sets out the governance of forestland and what should and should not be done to forestland. For example, it provides that the use rights of protection and special purpose forests cannot be transferred, and that all forestland should not be converted into non-forestland.⁵⁴ Any disputes concerning ownership and use rights should be reported to either the county or township government.⁵⁵ In addition, it stipulates that if the use of forestland is necessary for construction or mining purposes, rehabilitation fees must be paid.⁵⁶ The chapter on Forest Protection provides details for the protection of forests, such as fire detection and preparation, designation of nature reserves, and prohibition of forest destruction. The protection of forests is mainly the responsibility of the local government, which must set up forest protection teams.⁵⁷ It also complements the Wildlife Protection Law by outlawing hunting in wildlife parks.⁵⁸ In the Tree Planting and Silviculture chapter, the law requires all levels of government to actively participate in tree planting in order to achieve the target set by the government.⁵⁹ In particular, it requires that wasteland and land adjacent to the roads, railways, rivers and so forth should be planted with trees.⁶⁰ This should be carried out by the local government and the departmental units (such as the railway authority) concerned. More importantly, it provides that trees planted on family plots and contracted land should belong to those who carry out the planting or those who contracted out the land.⁶¹

Chapter five regulates timber harvest. Article 29 provides that the state should control timber logging by reference to the rule that the harvest rate should be lower than the

⁵³ Article 8

⁵⁴ Article 15

⁵⁵ Article 17

⁵⁶ Article 18

⁵⁷ Article 19

⁵⁸ Article 25

⁵⁹ Article 26

⁶⁰ Ibid.

⁶¹ Article 27

growth rate of forests. Local government (starting from the county level) should provide estimates of the timber volume to be logged in one year and submit it to the higher level of government. These estimates then have to be approved by the State Council.⁶² The annual timber quota is set by the central government based on the estimates submitted by and the recommendation of the State Planning Commission. The annual production of the whole country should not exceed the quota set. The law requires that all state-own forest farms and enterprises should harvest timber according to the estimates set by the forestry bureaus, whilst private individuals should apply for a logging permit from the county forestry bureaus.⁶³ These logging permits may be attached with conditions, which usually require reforestation.⁶⁴ In relation to the permit to transport logs, once it is satisfied that the logging permit has been adhered to, the forestry bureau should then issue transport permits.⁶⁵ The law also lays down general harvest rules⁶⁶, such as mature forests should be harvested by using selective or gradual logging and so forth. All types of logging except logging for rehabilitation purposes is prohibited in protection and special purpose forests.

Chapter six provides for law enforcement and legal liabilities. Basically punishment for infringement of forest laws takes three forms: criminal liability, monetary fines and administrative reproach. It is an offence to carry out illegal logging and to have violated any of the permit requirements. Administrative reproach usually applies to violation of the law by government officials, including officers from various ministries and forestry bureaus. Many of the above-mentioned violations may also amount to criminal offences depending on the seriousness of the cases. Enforcement of law is usually the responsibility of the local forestry bureaus and they are also responsible for rectifying the damage caused or the consequences of non-compliance.

Apart from the Forest Law, there are other regulations that are closely related to the management of forests, such as the Wildlife Protection Law, Nature Reserve Regulations, Land Management Law and so on. As mentioned above, different government departments can make 'departmental regulations', including the SFA. In

⁶² Article 29

⁶³ Article 32

⁶⁴ Article 35

⁶⁵ Article 37

⁶⁶ Article 31

particular, the SFA provides regulations or administrative orders that govern the operations and responsibilities of State Forest Enterprises and State Forest Farms for the management of state-owned forestland. For collective forestland, one particularly important piece of legislation that governs the general use of forestland is the Rural Land Contracting Law 2002. The law spells out not only how forestland should be allocated, but also how they should be used and transferred. The structure and composition of private use rights under the collective system will be discussed in detail in the next chapter.

Annex II

Table of Legislation of the PRC Consulted (All in Chinese)

Fujian Province People's Government's Opinion on Introducing Collective Forest Property Rights Reform (2005) [福建省人民政府关于推进集体林权制度改革的意见]

<http://www.fjgov.cn/PubInfoDo/pageDefineAct.do?pageDefineKey=742&containerKey=139316>

Fujian Province People's Government's Opinion on Promoting the Collective Forest Property Rights Reform [福建省人民政府关于推进集体林权制度改革的意见]

<http://www.fjgov.cn/PubInfoDo/pageDefineAct.do?pageDefineKey=742&containerKey=139316>

Hebei Province People's Government's Opinion on the Further Reform of the Collective Forest Property Rights (2005) Number 97 [河北省人民政府关于进一步推进集体林业产权制度改革的意见, 冀政[2005] 97 号]

http://www.hebei.gov.cn/govaffair/law/standard_detail.jsp?id=1759

Jiangxi Province Proposal for the Implementation of the Trial of Forest Property Rights Reform (2005) [江西省林业产权制度改革试点实施方案]

http://www.lypx.cn/PartArea/open_read.asp?id=45

Liaoning Province People's Government's Opinion about Collective Forest Property Rights Reform (2006) [辽宁省人民政府关于深化集体林产权制度改革的意见]

<http://www.dfln.gov.cn/lnlm/mainsite/dtshowinfo.jsp?infoid=1000002297>

Notice on Forest Resources Protection, and the Prevention of Forestland Clearance and Illegal Occupation [关于保护森林资源, 制止毁林开垦和乱占地的通知]

People's Republic of China Forest Law 1984 (amended in 1998) [中华人民共和国森林法]

<http://www.people.com.cn/GB/huanbao/259/3493/3495/20001229/365024.html>

People's Republic of China Forest Law Implementation Regulations 2000 [中华人民共和国森林法实施条例]

<http://www.forestry.gov.cn/DB/zcfg/slss.asp?id=16>

People's Republic of China Land Management Law 1998 [中华人民共和国土地管理法]

http://www.law-lib.com/law/law_view.asp?id=419

People's Republic of China Land Management Law Implementation Regulations 1999 [中华人民共和国土地管理法实施条例]

<http://www.bjcbd.gov.cn/invest/condition/condition864.htm>

People's Republic of China Property Law 2007 [中华人民共和国物权法]

http://www.law-lib.com/law/law_view.asp?id=193400

People's Republic of China Rural Land Contracting Law 2003 [中华人民共和国农村土地承包法]

<http://law.cein.gov.cn/2.1/nongcun.htm>

Transfer of Rural Land Contractual Management Rights Regulations 2005 [农村土地承包经营权流转管理办法]

<http://www.dffy.com/faguixiazai/msf/200502/20050227085314.htm>

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