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Transformation of the law on farmland transfer in China

Li, Linlin

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Transformation of the Law on Farmland Transfer in China

From a governance perspective

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday, 7 January 2016 at 17.45 hours

by

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Abbreviations

ADR	Alternative Dispute Resolution
APL	Administrative Procedure Law (PRC)
CCCPC	Central Committee of the Communist Party of China
CE	Conservation Easement
CPL	Civil Procedure Law (PRC)
CPR	Common-Pool Resources
CSR	Corporate Social Responsibility
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FAO	Food and Agriculture Organization of the United Nations
FAR	Floor Area Ratio
FDI	Foreign Direct Investment
FPIC	Free, Prior and Informed Consent
FUR	Farmland Use Right
GPCL	General Principles of the Civil Law (PRC)
HRMS	Household Registration Management System
HRS	Household Responsibility System
ICEs	Industrial and Commercial Enterprises
LAL	Land Administration Law (PRC)
LARR	Land Acquisition, Rehabilitation and Resettlement Act (India)
LAT	Land Value Tax
LAURE	Law on the Administration of the Urban Real Estate (PRC)
LDR	Land Development Rights
LFPC	Law on Farmers' Professional Cooperatives (PRC)
LGAF	Land Governance Assessment Framework
LGI	Land Governance Indicators
LMARLCD	Law on the Mediation and Arbitration of Rural Land Contracting Disputes (PRC)
LTS	Land Tenure Security
MEP	Ministry of Environmental Protection
MLR	Ministry of Land and Resources
MHURD	Ministry of Housing and Urban-Rural Development
MOA	Ministry of Agriculture

MOHRSS	Ministry of Human Resources and Social Security
MOJ	Ministry of Justice
NCCPC	National Congress of the Communist Party of China
NDRC	National Development and Reform Commission
NIE	New Institutional Economics
NPC	National People's Congress
PML	People's Mediation Law (PRC)
PL	Property Law (PRC)
PRC	Peoples' Republic of China
RCML	Right to Contract and Manage Land
RDA	Regionally Decentralized Authoritarianism
RILAL	Regulation on the Implementation of the Land Administration Law (PRC)
RLCL	Rural Land Contracting Law (PRC)
SCNPC	Standing Committee of the National People's Committee
SIA	Social Impact Assessment
SPC	Supreme People's Court
SSRA	Social Stability Risk Assessment
TCE	Transaction Cost Economics
TDR	Transferable Development Rights
TLQ	Transfer of Land Quotas
TVE	Township and Village Enterprises
URPL	Urban and Rural Planning Law (PRC)
VC	Villagers' Committee
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

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1 Introduction

1.1 The strict government regulation of collective land use in China

This research deals with the farmland transfer system in China. More precisely, it focuses on the design of a sound and balanced transfer system which can protect individual farmers' land rights from (undue) public interventions. Land use in China is regulated overall by a land use control system (*tudi yongtu guanzhi zhidu* 土地用途管制制度). To some extent, the land system in China is the most special and most complicated land system in the world (Ba, 2013). In general, this complexity is reflected in three aspects.

First, it is characterized by an urban-rural divide (*chengxiang er'yuan fen'ge* 城乡二元分割). In accordance with the Constitution, public land ownership is adopted in China — urban land is owned by the state and rural land is owned by the collective (Article 10). Individuals only enjoy a right to use the land. Compared with the rural land, a relatively comprehensive transfer system has been established for the urban land. As the transformation from a 'free use' to a 'paid use' or from an administrative allocation system to market transactions, the urban and state-owned land has been gradually commercialized (Keng, 1996; Xie et al., 2002; Ho and Lin, 2003). However, the use and especially transactions of the rural collective land are strictly limited by law. The state actually has final control over the use of collective land, including farmland use rights, even after the implementation of the Household Responsibility System (HRS) in rural China (Q. Zhang, 2014: 42-46) (see 3.1.4).

Second, the land market is totally monopolized by the government under the land use control system. The transfer of all the land in urban areas is controlled by the state who is the only owner of urban land in accordance with the law, and represented by governments at different levels. On the basis of the prohibition imposed on free transactions of the collective land and the barely restricted expropriation power of the state (see 4.4.1), (local) governments become the only supplier of land on the market.

Third, land resources in China are allocated primarily through non-market mechanisms. A planned land use control system based on a series of land quotas has been adopted. In fact, the main content of local land use plans is various land quotas allocated by higher levels of governments. On the basis of control over the quantity of construction land and farmland in specific areas, the quality and the use efficiency of local land is ignored (see 9.1.1).

Furthermore, state control over collective land does not rely on an effective land use planning system, but a series of restrictions on the exercise of the collective

land rights in law. As members of specific collectives, individual farmers' land use rights are consequently limited. In total, three types of collective land use rights exist under the collective land ownership — the right to contract and manage (agricultural) land (RCML), the right to use collective construction land, and the right to use homestead. As the most important land use right, which relates closely to farmers' survival, the RCML now can be transferred by a variety of means. However, it is still subject to many restrictions, especially the right to contract and manage farmland or the farmland use right (FUR) used in this research. Regarding the collective construction land use right, only the land use rights of the township and village enterprises (TVEs) may be transferred in case of bankruptcy or merging or for other reasons, and can be mortgaged together with the factories and other buildings of the enterprises. Other rights to use collective construction land cannot be transferred, including the right to use the allocated homestead. The homestead can only be sold or transferred together with the house on it, but the former landholders cannot apply for another homestead to the collective.¹ Under this urban-bias land system, Chinese farmers suffered greatly from their incomplete and unprotected land use rights (Dang, 2005). The lack of land (transfer) rights also leads to an underdeveloped land market in rural China (Ho and Lin, 2003: 703; Zhu and Riedinger, 2009).

Technically speaking, the land market in rural China is only limited to a transfer market for farmland which can only be transferred freely for agricultural purposes. The transfer of farmland for non-agricultural use and the development of other collective land are strictly controlled by the government through land quotas.² Moreover, after the desired land is obtained by the government through withdrawal (of state-owned land) or expropriation (the acquired collective land will become state-owned land after the expropriation), it will be granted to investors by different means in accordance with the purpose of land use. For the land used for profit-oriented purposes, it is granted through market transactions such as bidding, auction or listing for trading. The land transfer income is owned by the government

1 Rules concerning the restrictions on the transfer of the right to use collective construction land and the right to use collective homestead are provided by Article 43 and Article 62 of the Land Administration Law issued in 1998 respectively.

2 There is an exception concerning the conversion of farmland in the collective. In accordance with Article 60 of the Land Administration Law, the collective may apply for certain collective construction land and use it for setting up enterprises, provided that it is in line with the overall land use plan and the annual land use plan in local areas. If the land concerned is farmland, another application for farmland conversion has to be submitted to the governments who approved the local land use plans. That is, the collective actually has a right to develop its own land, even though it is limited to start TVEs and has to be approved by local governments in accordance with local land use plans.

as the grantor.³ In accordance with the 1998 Land Administration Law (LAL), land used for public purposes such as the construction of buildings for state organs and the urban infrastructure projects is granted through administrative allocations (*huabo* 划拨) (Article 54). The government monopoly in land (sales) market/the primary land market is thus evident. In order to reduce the administrative control over land use and better protect the land rights and interests of collective farmers, transactions of land quotas have emerged in local practice. The market transfer of collective land, including the land used by TVEs and the homestead of individual households is also allowed to be experimented in certain areas under the guidance of the central government (see 6.5.2). These local innovations in market transfers of rural collective land contribute to future reforms in the rigid land use control system.

1.2 Government intervention in farmland transfer process

There is no doubt that this urban-bias land management system facilitates a rapid development of the Chinese economy (James, 2007: 452-453; Zhu and Prosterman, 2012). However, it is at the expense of the development of rural China. In order to develop the economy, the use of land resources is controlled strictly by the government (see 4.4). Through the restrictions on the transfer of collective land and the land expropriation system, the benefits derived from land transactions are mostly used in urban areas. On the one hand, the unequal land use system infringes the land rights and interests of Chinese farmers as the real owner of collective land; on the other hand, it results in an overall unsustainable use of land as the government intervention in land use is decisive. This research primarily focuses on the government intervention in the transfer of the contracted farmland (use rights), the so-called FUR. Both the market transfers of farmland and the compulsory transfers/expropriation of farmland will be involved.

As a matter of fact, after the implementation of the HRS in rural China, farmers have more autonomy to use and make profits from their contracted farmland (Yu, 2011: 83). Based on this individualized farmland use right (FUR), the basic living of most Chinese farmers is guaranteed; yet it also results in serious fragmentation

³ The grant of land used for industrial purposes is different in practice. Before 2004, industrial land was mostly granted through an agreement between the government and the would-be transferee. In order to attract more investments in local industries, the transfer price asked by local governments was usually low and sometimes even zero. Since the issuance of the Decision of the State Council on Deepening Reform and Strengthening Land Management (*guowuyuan guanyu shenhua gaige yan'ge tudi guanli de jue ding* 国务院关于深化改革严格土地管理的决定) in 2004, a standard of the lowest price for granted land through agreements has been required to be set by the provincial governments. Also, the local government is now encouraged to grant industrial land through an open market. However, in practice, the transfer price of industrial land is still low (Ba, 2013).

of farmland (Zhang et al., 1996). With the aim of promoting scale farming, the transfer of the contracted farmland has been greatly supported by the central government since the early 1980s. In the meantime, in order to protect farmers from being landless, certain restrictions are imposed on such transfers, especially the permanent transfer/assignment of the contracted farmland (see 4.3). It is worth noting that government support of the market transfers of farmland originates primarily from the central policies such as the yearly No.1 Document from 1984. The promulgation of the Rural Land Contracting Law (RLCL) in 2002 and the Property Law (PL) in 2007 further strengthens the legal protection of farmers' land rights, including the protection in the transfer process. On the basis of those legal rules and other regulations from central agencies like the Ministry of Agriculture (MOA), an initial system for regulating (market) farmland transfer has been established. However, it mainly focuses on the local administration system related to farmland transfer. Rules concerning the participation of collective farmers in the transfer process are ignored (see 4.2.4). More notably, the land rights of individual households/farmers are frequently suppressed by the vague collective land ownership in large-scale transfers of farmland involving commercial investments (see 7.1.2). To some extent, poorly defined collective ownership and its relationship with the individualized FAR facilitates the government intervention in the transfer process.

Government intervention in land expropriation is even stronger as the state controls all the non-agricultural development of collective land. Under the current legal system the expropriation power of the state is barely restricted (see 4.4.1). Although certain rules and regulations on the participation of the affected farmers have been made by the central government and the Ministry of Land and Resources (MLR), they are limited to the compensation and resettlement caused by land expropriation. Farmers cannot challenge the expropriation decision made solely by local governments. As the issuance of a special regulation on the expropriation concerning state-owned land — Regulations for Expropriation and Compensation for Houses on State-owned Land (*guoyou tudi shang fangwu zhengshou yu buchang tiaoli* 国有土地上房屋征收与补偿条例) in 2011 — a broad participation framework is provided for the affected house owners (L. Chen, 2014). However, there are still no unified rules for the participation of affected farmers in the expropriation of collective land, not to mention the making of special regulations (see 8.3). It can be said that the insufficient empowerment and participation of farmers and the barely restricted public powers over land management result in the proliferation of government intervention in farmland transfer. A further question is whether this necessarily means that farmers should be endowed with more rights to use and transfer land.

1.3 A debate on Chinese farmers' empowerment and participation

As regards whether Chinese farmers should be endowed with more land rights in future land reforms, two diametrically opposed views exist among Chinese scholars. One is represented by the economist Zhou Qiren, who advocates that more land (transfer) rights should be given to collective farmers in order to establish an equivalent rural land (including farmland) market — a liberalism perspective (Q. Zhou, 2013; Zhou, 2014 a). The other view is represented by the sociologist He Xuefeng, who conducted a large number of social surveys in rural China. He argues that the current rural land rights can provide enough protection for Chinese farmers. Giving farmers more rights, whether in market transfers of land or in land expropriation, will only harm the interests of farmers who really engage in agriculture (He, 2010). This is a relatively conservative view.

Controversies in this respect also exist in legal circles. A major controversy regarding rural land reform in the legal field was the reform of the collective land ownership. The transformation of the collective ownership to either private land ownership or public (state-owned) land ownership had many supporters during the 1990s. However, due to the firm adherence of the central government on collective land ownership, this debate on the change of rural land ownership is no longer the focus of debate. Nevertheless, problems hidden in the collective land ownership are examined by legal researchers and a series of proposals were put forward to improve the property-rights regime of collective land (Han, 2009). The main opinion is that the collective land ownership should be redefined to protect the land rights and interests of individual farmers. Furthermore, farmers themselves are entitled to participate in the making of major decisions concerning the transfer of farmland, especially in the expropriation process. The empowerment and participation of individual farmers are the focus of attention. Based on this observation, this research starts from the (lack of) empowerment and participation of Chinese (individual) farmers in the transfer of their contracted farmland in both market transfers and land expropriation.

From a global perspective, due to the special nature of farmland resources, a direct regulation on the use and transfer of land by governments is a perfectly normal thing. From the government's point of view, there are generally two means to regulate the land use. In most western European countries where private land ownership is allowed, this regulation is based primarily on a legally binding and highly participatory land use planning system; while in countries like China, where public land ownership is adopted, the exercise of private land rights is greatly restricted by public powers in related laws and policies. Although private land ownership is not a decisive factor which affects the effectiveness and efficiency of the government regulation of land, rights of the landholders should be secured to

protect their use and occupation of land (Ostrom and Hess, 2007). Characterized by strict government regulation and a lack of participation of the affected farmers in the transfer process, future land reform in China shall further strengthen private land rights and restrict the public powers concerned. The key issue, however, is how to strike a balance between the private land rights and public powers under the government regulation system. In the circumstances, a governance perspective which is based on the systems approach and the reflexive-law approach provides a new way of thinking.

1.4 Approaches involved in this research

A governance perspective will be used in this research, exploring the possibilities for a balanced regulation of land use. Governance is an interdisciplinary concept, which currently lacks a unified definition (Bevir, 2011: 1). The governance perspective proposed here has close ties with the systems approach and the reflexive-law approach. Moreover, the emergence of the reflexive-law approach relates closely to the systems approach. In order to better understand this governance perspective, the systems approach and the reflexive-law approach will be discussed first.

As this research focuses on the design of a sound transfer system of farmland in China, the systems approach can be applied first as a basic framework of analysis. Conceptually, the systems approach can be defined as a complex of interacting elements and the relationships between them, which has a potential to explore the relationship between our perceptions and conceptions and the world they purport to represent (Laszlo and Krippner, 1998: 47, 51). As the systems design pursues an understanding of a situation as a system of interconnected, interdependent and interacting problems, the solution it will propose is also based on a holistic view of the entity concerned. In addition to providing a holistic perspective in resolving various issues, it proposes tools such as empowerment and participation to guide design efforts of social systems as it theoretically evolves into an evolutionary systems theory. Correspondingly, a system should be designed on the basis of a well-informed perception of important changes affecting evolutionary systems. In short, systems design is a participatory process. Significant social changes can be created only in the event that those who are most likely to be affected by it participate in soliciting it and choose how it is to be implemented (Laszlo and Krippner, 1998: 20).

Furthermore, according to the new development of the systems approach — the action-oriented evolutionary systems design, through intensifying individual perceptions of inclusion and meaningful participation in the dynamics of change of which they are a part, adaptive strategies can be created for an evolutionary

development of a system. Put differently, empowerment and participation of individuals and communities involved in a certain system design are indispensable to an increasingly robust and sustainable system (Laszlo and Krippner, 1998: 30). This conclusion is reached mainly from the perspective of the people involved in a certain system. For the designer of specific systems, the empowerment and participation of the people concerned are not unlimited. This is especially true when larger interests are involved, such as the delivery of public services and the use of farmland discussed in this research. More accurately, in the systems-design controlled by the state or issues concerning public administration, a right balance between the private rights and the public powers concerned is the most critical issue. This further leads to issues concerning the means of governing of public authorities, or the governance issues.

No matter what the governing pattern of a certain country is, planning characterized by a hierarchic bureaucracy was and still is an integral feature of government (Bevir, 2007: 376). In the case of a bureaucratic state whose public administration system is mostly occupied with plans, a proliferation of government regulation is normal. The empowerment and participation of individuals involved in such plans are usually sacrificed. With the emergence and growing popularity of governance research, a new perspective of governing is provided for public authorities firstly in developed countries. In particular, in a self-governance structure — one of the three structures proposed in the governance research (self-governance, co-governance and hierarchical governance) (Kooiman, 2003: 23), the active participation of individuals is strongly emphasized. It can be said that governance research has a close relationship with the systems approach.

The progress in governance research also goes hand in hand with the research on regulation. As a main approach to governing public issues, regulation characterized by administrative controls plays an important role in imposing state plans on specific societies. And indeed it helps to improve the overall efficiency of an organization, including the public administration of a state (Bevir, 2007: 376, 761). However, it is not conducive to the establishment of a sustainable society as the participation of the people involved is not sufficiently acknowledged. To some extent, governance means a further improvement in the regulatory system, especially in the public domain. In short, governance refers to better regulation — regulations aimed at better balancing the public power of the regulators and the private rights of the regulatees.

As the main instrument for both regulation and governance, the evolution of the legal system itself also contributes to the establishment of a balanced government regulation. Specifically, the evolution from repressive law and autonomous law to responsive law shows the importance of reflexivity to a certain legal system

(Teubner, 1983; Nonet and Selznick, 2001).⁴ Only with certain reflexivity may the legal system adapt to the changing needs of the society (Teubner, 1983). The emergence of the concept of reflexive law is a direct reflection of this development. Through a series of procedural requirements which can secure an equal bargaining process, certain social objectives can be achieved on the basis of a protected private autonomy (Teubner, 1983: 256). It is worth noting that this reflexive-law approach is closely connected with the systems approach, and further facilitates the research on governance in the legal field. The introduction of a governance perspective in the establishment of a balanced government regulation of land use in this research, which focuses on the making of procedural rules, is a good example.

It is obvious that the systems approach and especially the reflexive-law approach strongly emphasize the empowerment and participation of private parties. The final objective is to reduce the intervention of the state in private social activities. From the legal perspective, it reflects the crisis of the interventionist state secured by substantive law which directly regulates social behavior by defining substantive prescriptions. This need for less state regulation necessitates a transformation from the substantive rationality to a reflexive rationality, which aims for regulated autonomy and tries to create self-regulating social systems through norms of organization and procedure (Teubner, 1983: 253-254). Therefore, the governance perspective used in this research means the protection and reinforcement of private autonomy in the first place. Meanwhile, based on a holistic view derived from the systems approach, the legitimacy of the state regulation should also be considered, in order to introduce a balanced regulation in social systems. To some extent, this is consistent with the role of governance as a third way (besides market and government) to regulate the society in political research (Lobel, 2004: 363; Lobel, 2012: 68-69).

1.5 Research questions and the methodology

Based on the analysis above, the central question of this research is:

⁴ According to the legal evolution theory of Philippe Nonet and Philip Selznick (2001), three stages of law can be recognized in the development of human society — the repressive law, the autonomous law and the responsive law. In the repressive stage, law is associated with and subordinated to the needs of government. A close integration of law and politics and a rampant official discretion are two significant features of the repressive law (Nonet and Selznick, 2001: 51). The lack of legitimation due to the pliability of law in the repressive stage necessitates the emergence of autonomous law which emphasizes the primacy of the rule of law. At the autonomous law stage, law is separated from politics, and the judiciary especially becomes quite independent from the government. The primacy of rules also guarantees the legitimacy needed by a certain society. However, the focus on rules decreases its capacity for change. A long-term criticism about the authority upheld by the rule of law as the development of the institutions and procedures of autonomous law, in this case, requires a dynamic legal order which can respond flexibly to new circumstances (Nonet and Selznick, 2001: 71-72). In other words, a quest for responsive law is created.

How to balance the private land rights and the public powers involved in the farmland transfer (in China) from a newly-defined governance perspective?

To answer this central question, the following sub-questions will be addressed in turn:

1. *Why is a new governance perspective needed to establish a balanced regulation of farmland transfer? And how to apply this governance perspective to strike a balance between the private land rights and the public powers involved?*

From a historical point of view, public control over land use is common and the balance between private land rights and government regulation of land use is increasingly important in modern societies. More importantly, governance as a new development of government regulation provides a new perspective in a balanced structure for the regulation of land use. On the basis of a three-level understanding of governance and its development in legal research, four dimensions to the establishment of a balanced government regulation of land use from a newly-defined governance perspective will be proposed (see chapter 2).

2. *What is the impact of the collective land ownership in China on farmland transfer? Can individual farmers fully exercise their land use rights under the collective ownership?*

Through an analysis of the evolution of the collective land ownership and its serious consequences, the necessity of reforming China's collective land system becomes obvious. Although it is still problematic, collective land ownership is supported firmly by the central government and will continue to exist in Chinese law and land policies. In the meantime, the FUR of individual farmers is increasingly strengthened. The quasi-private nature of the FUR may not better secure individual farmers' rights though, if the definition of the collective land ownership remains vague. Redefinition of the collective ownership as divided co-ownership may help to clarify the relationship between the collective ownership and the individualized FUR. Based on this new definition, reorganization of the collective in accordance with a joint-stock cooperative system may better protect the land rights and interests of individual farmers. Before the collective ownership is clearly defined, the FUR needs to be further strengthened in law (see chapter 3).

3. *How is the transfer of farmland regulated under the strict land use control system? Is the government regulation of farmland transfer in China striking the biggest balance or not?*

Through summarizing the evolution of central land policies on farmland transfer and its relationship with the legislation, the indispensable role of land policies in guiding the transfer practice is notable. In comparison with land expropriation, the legalization of policies on market transfers of farmland is faster and an initial regulation system has been established. Despite doubts as to whether Chinese farmers should be empowered further in terms of farmland transfer still exist, the tendency is to give individual farmers a quasi-private right to use the farmland primarily in the central policies. Nevertheless, the excessive public powers secured mainly by public law still have a substantial impact on the exercise of private land rights. Usually these legal restrictions on the use and transfer of farmland are in the name of certain public interests. However, these public interests cannot be reasonable grounds for such a strict government control over farmland transfer. On the whole, government regulation of farmland transfer in China is not balanced. A new perspective — a governance perspective — is needed to improve this regulatory system (see chapter 4).

4. What can be done to improve government regulation of farmland transfer in China if it is not properly balanced?

The unbalanced regulation system is attributed in the first place to the insufficient empowerment of landholders. Thus, private land rights should be further strengthened in law. At the same time, the public interests involved should be secured. The key is how to strike a balance between private rights and the public interest. The governance perspective which is based on the systems approach and the reflexive-law approach provides a new way of thinking in this respect. More specifically, four dimensions to this newly-defined perspective will be used to establish a balanced regulation system. They are the strengthening of the empowerment and participation of private parties, the design of a series of procedural rules which may secure an equal bargaining status for both parties to transfer, the recognition and protection of the public interests involved, and the supervision over the public powers over land use (see chapter 2 and chapter 3-8 in general).

5. What are the barriers to the implementation of a balanced regulation in China?

A balanced regulation system established from a governance perspective is essentially built on the improvements in current legal rules, as law is the main tool of regulation. In addition to the improved rules and regulations, a more critical issue concerns the implementation of such rules. To some extent, the examination

of the possible barriers to the making and implementation of these rules reflects the possibility of establishing a balanced regulation of farmland use in China. In essence, as the core of introducing such a balanced regulation is the empowerment and participation of private parties, public powers over farmland use are diminished consequently. This certainly will be objected to and avoided by the public authority which benefits considerably from the current system. Therefore, the removal of those barriers necessitates a more strict supervision over the exercise of public powers (chapter 9).

Regarding the methodology of this research, the first one is a classic legal analysis. After the central question and the new governance perspective adopted in this research are proposed and discussed in chapter 1 and chapter 2 respectively, rules for regulating the farmland use in China are introduced and analyzed in the following chapter 3, 4 and 5. It includes the legal rules on the definition and exercise of the collective land ownership, rules on the regulation of farmland transfer from both private law and public law, and rules relating to the breadth, duration and assurance of Chinese farmers' land tenure security. Through a detailed analysis of these rules, the insufficient empowerment of individual households in the transfer of their contracted farmland and the lack of procedural rules which may secure an equal bargaining power for them, are the main causes for the poor enforcement of such rules and the resulting lack of participation in the transfer process. This necessitates a transformation of the law on farmland transfer in China from a new governance perspective. More accurately, it is a transformation from regulatory/autonomous law to reflexive/responsive law. In terms of the sources for desired procedural rules, in addition to relevant central policies, the pilot practice of improving the farmland transfer system in certain local areas is worth noting. Therefore, the second research method used here is case study, which includes five cases covering the local innovations in improving the participation of individual households in market transfers of farmland as well as compulsory transfer/expropriation of farmland. On the one hand, the general practice of farmland transfer is displayed based on these case studies. On the other hand, rules generated from those local practices provide more practical guidance for the participation of individual households, which should be well considered in order to improve related laws and regulations. As a matter of fact, government intervention in land use and the suppressed private land rights in specific countries are global phenomena, especially in developing countries. Thus, a global view is desirable for this on this increasingly internationalized topic. The introduction and analysis of related international documents and laws from other countries in chapter 7 and 8 reflect the importance of this international point of view. This is the third method I used in this research.

1.6 Why the principle of proportionality cannot be used in this research?

In terms of the balance between private rights and public powers, the principle of proportionality which originates from the German administrative law is usually applied in most European countries (Cohen-Eliya and Porat, 2013: 10-14). As a guarantee against the abuse of government regulatory power, three tests have to be taken concerning the legitimacy of the government act involved. They are suitability/appropriateness (the measure must be appropriate for achieving the objective), necessity (no less restrictive measures are available) and proportionality in the narrower sense (the benefit from realizing the objective exceeds the damage to the right) (Jacobs, 1999: 1; Harbo, 2010: 165; Cohen-Eliya and Porat, 2013: 17; Praduroux, 2014: 4). However, this principle cannot be used in this research mainly because of four reasons. First, as a principle of constitutional law and administrative law, it is primarily applied in judicial procedures (Harbo, 2010: 164). In other words, it is the court who makes the final decision concerning the legitimacy of the government act. This research, however, focuses on the law-making process. Second, even in Germany — the birthplace of this principle — and later the European Union countries, there are still no clear standards and rules for balancing private rights and public interests (van Gerven, 1999: 60-61). In particular, regarding the application of this principle in the EU, the judgement of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) depend heavily on the concrete situation of specific cases. There is no unified rules for the application of the principle of proportionality at the EU level (Harbo, 2010; Praduroux, 2014). Third, in accordance with the existing practice of applying this principle in the EU, the court, especially the ECtHR focuses on the burden imposed on individuals, instead of the justifications for the government regulation. That is, it does not pay due attention to the public interest side of the balancing test (Praduroux, 2014: 18). Fourth, as regards the application of this principle in legislation, due to its ambiguity, which may confuse elements of sound legislation reason, it is suggested that the principle should be set aside, for the legislature to act proportionately (Erkins, 2014).

In the meantime, as a counterpart of the principle of proportionality in the American constitutional law, balancing also serves as a tool to balance the private rights and public interests. Different from the principle of proportionality which concentrates on the restriction on the government action, balancing is aimed at guaranteeing that private rights are not protected unnecessarily by weighing them against public interests (Cohen-Eliya and Porat, 2013: 43). In other words, as two basic principles for striking a balance between conflicting interests in different

legal systems, neither the principle of proportionality nor balancing provides a holistic view, especially concerning the balance between private interests and public interests. This is one innovation of the governance perspective adopted in this research as mentioned above.

1.7 Structure of my research

On the basis of the four dimensions to the establishment of a balanced governance structure for land use proposed in chapter 2, the following chapters will analyze the four dimensions one by one. The necessity and viability of redefining the vague collective land ownership and its relationship with the farmland use right (FUR) of individual households (collective farmers) will be discussed in chapter 3. The main objective is to check whether the individual farmers can fully exercise their land use rights or not under the vague collective ownership. In chapter 4, rules, especially the legal restrictions on farmland transfer in China (including both market transfers of farmland and land expropriation) from both private law and public law, will be analyzed. More importantly, based on the four variables in balancing private rights and government regulation of farmland transfer proposed in chapter 2, the current regulation system of farmland transfer in China will be analyzed. As both chapter 3 and chapter 4 concern the delineation of private land use rights in law, the first dimension to the newly-defined governance perspective — sufficient empowerment and participation of private parties — is examined.

In chapter 5, through a systematic analysis of the tenure security of Chinese farmers from the *de jure*, the *de facto* and the perceived level, the direct consequence of the unbalanced regulation of farmland use is introduced. In short, although the FUR is being strengthened by both law and central policies, it is still not strong enough to resist the violations of public authorities. The most fundamental reason lies in the inadequate empowerment in law and the lack of an effective participation mechanism. More accurately, the individual household, as the real land user, does not have equal bargaining power in both market transfers of farmland and the land expropriation process. The practice develops much faster than the legal and policy design. In chapter 6, therefore, five cases concerning the innovations in the participation of affected farmers in farmland transfer processes are highlighted and analyzed in detail. The main purpose is to show the real problems occurring in local practice under the unbalanced regulation system and how these local experiments may help to improve the participation and thus the bargaining power of the farmers involved. This concerns the second dimension of the new governance perspective, that is, the design of a series of procedural rules which may secure an equal bargaining status for both parties to farmland transfer.

The absence of equal bargaining power in the transfer process caused by the lack of procedural rules makes chapter 7 and chapter 8 important. Both of them concern the establishment of a balanced governance structure through designing a series of procedural rules on market transfers of farmland and land expropriation respectively. In addition to the procedural rules from the local innovations in chapter 6, more relevant rules are introduced based on the international experience. Specifically, in chapter 7, based on a one-by-one analysis of the tricky issues about the conclusion of farmland transfer contracts, such as the formalization of spontaneous transfers, the entry of enterprises into the farming system, and the protection of farmers' land rights in large-scale transfers, a balanced governance structure for market transfers of farmland is expected to be established in China. In particular, in the increasing large-scale transfers of farmland involving commercial investments, the design of procedural rules which can secure a free, prior and informed consent (FPIC) of the affected farmers is crucial. In addition to such procedural rules, extra measures are needed to guarantee a substantive freedom of contract, especially for the farmer transferors. Chapter 8 relates to the adoption of an international model of a well-governed expropriation system in China, on the basis of the common practice and certain innovations in the current expropriation system introduced in chapter 6. Based on the very latest international documents on the governance of land expropriation, this model is composed of four-phase participation of the affected farmers in the expropriation process. An examination will be conducted regarding the compliance of the current expropriation system in China with this four-phase participation framework. Problems and feasible measures that can be adopted to improve the Chinese situation will be proposed at the same time. On the whole, the design and adoption of those procedural rules concern not only the second dimension of the new governance perspective, but also the third dimension — the empowerment and participation of private parties should not damage the public interests concerned.

The last chapter focuses on the barriers to make and implement rules on a balanced governance of farmland transfer. On the basis of the current central policies, the innovations in local practice and especially the international experience discussed in previous chapters, rules needed for establishing such a balanced governance structure are expected to be formulated in the near future. One more significant issue is about whether such procedural rules can truly secure equal bargaining power and effective participation of the affected farmers in real life. In other words, barriers that may affect the implementation of the procedural rules needed by the two balanced governance structures shall be examined and broken down in a timely manner. In essence, it relates to the restriction of the public powers involved in the farmland transfer process. Where the public

authority exists, an appropriate monitoring mechanism should be set. This is the requirement of the fourth dimension of the new governance perspective. In chapter 9, improvements in the decentralized management of land, reforms in the financial system of local governments, the establishment of a balanced benefit-sharing system in the land transfer process, and the reforms in the current judicial system will be discussed.

In addition to the establishment of balanced government regulation of farmland transfer on the basis of the four dimensions above, the governance perspective also provides a viable way of establishing the rules needed by the new governance structure. This will be discussed in both chapter 7 and chapter 8. From the legal perspective, it means a change in the content, the function, as well as the form of the law as a main instrument for both regulation and governance. This relates closely to the evolution and transformation of the legal system in China, which will be analyzed in the conclusion.

2 A governance perspective in the regulated farmland transfer system

The farmland transfer system in a certain country relates closely to its land ownership system. Most countries implement private ownership of farmland, while in countries like China and Mexico, or countries like Vietnam, collective land ownership or state land ownership is adopted. Nevertheless, all individual farmers can have certain rights to occupy and use the farmland, which are usually (real) property rights.⁵ Although there are different meanings of property rights in the common law system and the civil law system, exclusivity and transferability are common features of property rights admitted in both systems (Gensler, 1995; Posner, 2003: 75). A large number of works on property rights from an economic point of view further shows the important role of a stable property-rights regime in the economic development, such as Coase (1960), Alchian (1965), Demsetz (1967 b), Cheung (1970), and Alchian and Demsetz (1973). Transferability is also regarded as an essential part of property rights concerned from this economic perspective. However, with the emergence of restrictions imposed on private land ownership in law (Pipes, 1999: 50), the transferability of property rights in land is increasingly regulated by relevant public powers. Even if private ownership is given to landholders, specific restrictions on the exercise of such ownership may be imposed in order to realize certain social objectives (Deininger, 2005: 176-178). The key question is how to find a balance between private property rights and the regulatory power of the public authority.

In this chapter, the complexity of defining property rights and the restrictions on its exercise, especially the restrictions on its transferability will be analyzed first. Then, the delineation of property rights to the use of farmland, including the restrictions from both private law and public law is discussed in the second section. The third section further analyses the rationales for public control over farmland use and transfer. From a historical perspective, public control over land use is common and the balance between private land rights and government regulation of land use is increasingly important in modern societies. More importantly, governance as a new development of government regulation provides a new perspective in a balanced structure for the regulation of land use. This will be discussed in the fourth section. The fifth section then provides the four dimensions

⁵ It is noteworthy that in Vietnam, there is no clear distinction between property/real rights and personal rights, which is affected by the French Civil Code. However, the land use right enjoyed by individual farmers is relatively strong, which actually can be regarded as a (real) property right. Information on the land use rights of Vietnamese farmers is available at the USAID Country Profile, Property Rights and Resource Governance, Vietnam.

to the establishment of a balanced government regulation of land use from a governance perspective. The last section concludes.

2.1 Property rights and their transferability

2.1.1 What is a property right?

First, it should be remembered that property does not only mean the tangible things over which certain rights are exercised. Legally speaking, it first refers to the right to possess, use and enjoy a specific thing or the right of ownership (or bundle of rights in common law). Correspondingly, a property right means a right to a certain thing (tangible/intangible and movable/immovable) (Steiner, 2010: 377; Foster and Sule, 2010: 492-493). As regards the concept of property rights, nowadays it is mainly used in the fields of law and economics.⁶ From a legal perspective, the definition of property rights is very diverse, due to the existence of the common law system and the civil law system. In particular, in the civil law system, the property right is usually referred to as a ‘real (property) right’ or ‘right *in rem*’. Even inside the civil law system, the definition of real right is different. A typical case in point is the real right in the German Civil Code (Foster and Sule, 2010: 493) and the French Civil Code (Steiner, 2010: 379). In the economic field, property rights are always related to the use of property and its efficiency. The most prominent and remarkable study is made by Ronald Coase. The ‘Coase theorem’ he proposed is about the relationship between the initial allocation of property rights and transaction costs (Coase, 1960: 423-425). In the latest research on the economic analysis of property rights, Posner developed the economic theory of property rights in his book — *Economic Analysis of Law*. He puts forward that when the common law (in the sense of the fields of law that have been created largely by judges as the by-product of deciding cases, rather than by legislatures) is viewed economically, it includes three parts: (1) the law of property, concerned with creating and defining property rights, which are rights to use valuable resources exclusively; (2) the law of contracts, concerned with facilitating the voluntary movement of property rights into the hands of those who value them the most; and (3) the law of torts, concerned with protecting property rights, including the right to bodily integrity (Posner, 2003: 31). It can be said that the property right used today as a concept is from the common law system, in particular in the economic study. It is much related to the different definition of property rights/real rights in the common law and civil law system.

⁶ It includes the field of law, economics and the field of law and economics. According to Cooter and Ulen (2004), law and economics is the application of economic theory to predict how people respond to laws and the effects on economic efficiency and the distribution of income and wealth.

2.1.2 Property rights in common law and civil law system

Compared with contract law and tort law, property law is probably the best embodiment of the social, cultural, and national characteristics of a country. As the property-rights regime in a certain country relates closely to its history, a significant diversity of property laws or property-rights systems exist across the world (King, 1977: 7-11). This also affects the definition of property rights in specific countries. Furthermore, the definition of property in the civil law and the common law system is quite different. As is well known, common law and Roman law originated from different social backgrounds. The former, derived from an agricultural society, focuses on the use of the property. The latter, on the other hand, was derived from a more developed commercial society, in which the convenience and safety of the transaction were the main concern. Thus, the emphasis is put on the certainty and absolute nature of the property right (Watson, 1991: 139-146). In the common law system, property rights have long been described as ‘a bunch of rights/sticks’, as they are generated from the same basis — conferring, gifts, transfer, and so on (Chang and Smith, 2012: 5). The complicated estate system in the English law, in which the *fee simple* can be regarded as an equivalent of the ownership in the civil law system, serves as a good example (Sprankling, 2007: 79-85, 93-94; Humbach, 2013). It is mainly for protecting the holders’ rights and interests in the property, which is the same as the civil law system (Sprankling, 2007). The modern civil law system, originated from Roman law, still focuses on absolute ownership, especially ownership in the physical thing (Aynes, 2008: 147,151). Based on the ‘*dominium*’ in Roman law, which means that the owner has absolute control over his property (Diósdí, 1970: 133,135-136), property rights in civil law system are considered as the virtual links connecting the person and the object/the property. However, property rights in both common law and civil law system can be regarded as relationships between persons regarding resources, especially when the ‘propertized contract’ in civil law system is concerned (Chang and Smith, 2012: 32-33, 40). The bunch of rights is actually a bunch of relationships, which include four types of property relationships concerning rights-holders — the relation with the government, with the rights-holders of the other property, with some specific others, and with all others (Chang and Smith, 2012: 13). The nature of a property right rests with the *in rem* status, the right to exclude and running with assets. With a new conception of the property rights which can better describe the property rights in both the common law and the civil law system, a platform for a global comparative property law may be developed (Chang and Smith, 2012: 40).

2.1.3 Transferability of property rights

Historically, the legal evolution of the concept of property tells of a close relationship between changes in an economic system and shifts in the structure and content of property rights (Parisi, 2002: 596). Existing economic theories also state that property systems form the basis for all market exchanges and the delineation of property rights in a society affects the efficient use of the property (Tregarthen and Rittenberg, 2000). It can be concluded that a well-defined system of property rights is the basis for a functioning market, especially when the right is transferable (Deininger, 2005: 173). In the meantime, confusions and disputes about the definition of the transferability of property rights have existed for a long time. The dispute between Weisman and Tedeschi is one of them (Weisman, 1993). According to Weisman, property rights are by their nature transferable, and transferability is a central feature of a property right and of the nature of a thing as an ‘asset’ (Weisman, 1986: 551; Weisman, 1993: 652). While Tedeschi believes that transferability is not a condition of the proprietary nature of a thing, or of a thing constituting an ‘asset’ (Weisman, 1993: 654). In fact, the transferability that Tedeschi discussed only refers to the transfer of ownership (of the property). The truth is that there is a broader meaning of transferability. In addition to the transfer of the ownership of a certain property, rights to use the property can be transferred by means of leasing, mortgaging, or contributing as a share to the company. In this research, transferability is used in its broader sense.

According to Gensler (1995), there are three basic features which the system of property rights must have: universality, exclusivity, and transferability. With these three characteristics of ownership in property, an economy can reach a well-ordered, an efficient, and an optimal level of production. As to transferability, which is a vital feature of any property-rights system, without it, there can be no allocation from one use to another. From an economic point of view, goods must have property rights that are transferable before they can be exchanged in a market.⁷ From a legal perspective, it is related to the nature of a property right, especially the ownership — the most vital component of property rights. As the owner of a property, he has the right to possess, use, seek profits from and dispose of his property; and transferability is the most significant part of the owner’s disposition right. Meanwhile, in common law, as Posner (2003: 75) pointed out, the history of English land law is a history of efforts to make land more easily transferable and hence to make the land market more efficient. Therefore, regulations on the protection or the improvement of the transferability of the

⁷ It is also possible to exchange goods in the informal market, where property rights are not necessary. Nevertheless, the statement here is based on the formal land market.

property (right) are essential parts of property law/acts in both common law and civil law system.

2.2 Delineation of property rights in land

As shown above, the transferable nature of property rights is easily observable. Nevertheless, it does not mean that (a) property (right) can be transferred in a totally free manner. Property rights must sometimes be constrained or even breached in order to achieve an optimal level of production. By placing a restriction on the use of property, society is better off (Gensler, 1995: 51-53, 66). Thus, restrictions such as zoning, eminent domain, licenses, and supply restricting licenses are proposed to regulate the use of property rights (Gensler, 1995: 66-76). Those restrictions are primarily imposed on the exercise of ownership. The purpose of such restrictions is to address the conflict among personal interests, as well as the conflict between personal interests and the interests of society as a whole. This is the so-called delineation of property rights, which refers to the way the boundaries of the bundle of rights over certain property are determined (Buitelaar and Segeren, 2011). It usually involves rules on the use of the property in both private law and public law.

2.2.1 Long history of the ownership of private property

Emergence of private ownership (in Western Europe)

With regard to the restriction on the exercise of property rights, first and foremost, a long history of the establishment and protection of private property rights (in Europe) is relevant. At the times of Plato and Aristotle, based on his opposition to the ideal common ownership advocated by Plato, Aristotle supported the possession of property, which can enable men to have a higher ethical level by giving them the chance to be generous (Pipes, 1999: 7). Later, affected by the natural law and the pragmatism, the Roman jurist formulated the concept of absolute private ownership in law — the so-called ‘*dominium*’ — a great contribution to the idea of property and its four criteria (it had to be lawfully obtained, exclusive, absolute and permanent). Also, the ‘*dominium*’ was regarded as ‘the right to use and consume one’s thing as allowed by law’, and treated as one part of Natural Law (Pipes, 1999: 8-12). During the Middle Ages, the catholic view of property was summarized by Thomas Aquinas, who accepted the idea of common ownership on the one hand, while on the other he argued that the common ownership promoted neither efficiency nor harmony but discord. Protestantism, especially the Calvinists, held during the same period, a rather positive vision of private property, which shows the great influence of Roman law (Pipes, 1999:

16-17). The rise of individualism which encouraged the pursuit of private interests and the return of the idea of Natural Law which was abandoned partly in the Middle Ages, both promoted the prosperity of private property. In the 17th-century Western Europe, the inviolability of private property as one part of Natural Law was broadly recognized (Pipes, 1999: 19-22).

The sacredness of private property and its predating to sovereignty were challenged by an anti-proprietary sentiment during the 18th century (Pipes, 1999: 38). However, this did not affect the following formation of the Napoleonic Code in 1804, which upheld the sacred status of property rights (van Caenegem, 1992: 6). Meanwhile, the creation of the Civil Code means the establishment of a new legal system — the codification of law (mainly Roman law), which is different from the common law system. Since then, the codified law was spread all over the Europe, either through Napoleon's military conquest which forced the other countries to accept it passively (such as Germany, the Netherlands, Belgium and Switzerland), or the voluntary adoption of the others where it was suitable for their own situations (such as Italy, Spain and Portugal).

Although England was also affected by learned law, both through canon law and through Roman law, the most significant part of English law/common law is from the Germanic customary law and feudal law, which are quite different from Roman law (van Caenegem, 1992: 3). At the end of the 13th century, in order to meet the new social and economic needs, the English Lord Chancellor (judges) created Equity based on the learned canon law and Roman law, which enriched the common law. Unlike the civil law system in which the old (feudal) law was abolished and replaced by the modern codified law, there is no break in the development of common law (van Caenegem, 1992: 6). Even so, until the late 18th century, the advantages of private property were still justified in England, which was argued from a utilitarian perspective (Pipes, 1999: 38).

Emergence of restrictions on the private ownership

The 19th century marked the summit of ownership in Europe, since a great amount of capitals was mastered in a small number of private hands, whose property was protected from infringement by the state and their fellow countrymen through constitutional and civil laws. This inevitably brought about a public resentment to private ownership. Thus, the first half of the 19th century was filled with the call for restrictions on private property. Additionally, property at that time was not only land or real estate anymore; in fact, it was the capital that constituted the main property (Pipes, 1999: 44-46). With the emergence of socialism in the 1840s, the opposition to private property was connected with this change in the form of property (Pipes, 1999: 51). From the middle of the 19th century, the justification of

the unlimited private property right was questioned, due to the increasing disparities in the distribution of productive wealth. Even the liberals also admitted that the state may restrain its absolute nature in the interests of the common good (Pipes, 1999: 50). The making of the German Civil Code in 1900 reflects this change. In the prior French Civil Code, the ownership is an absolute and unlimited use of property, as long as it is not prohibited by law (Article 544). However, almost 100 years later, limitations on private ownership have increased dramatically in the German Civil Code (Article 903-906). The German Basic Law in 1949 further admits that property imposes duties, whose use should also serve the public good (Foster and Sule, 2010: 498).⁸

2.2.2 Restrictions on property rights and its transferability in private law

Since the formation of the German Civil Code, certain restrictions have been imposed on the exercise of property rights in law. Specifically, they are reflected mainly by the basic principles of property law, such as the *Numerus Clausus* and the principle of publicity and public trust (Akkermans, 2008: 5-7; Foster and Sule, 2010: 493-495).

The *Numerus Clausus* is the primary limitation on property rights, which refers to the type and content of property rights should be regulated only by law and the parties cannot create a new property right outside the law freely. In the German Civil Code, it is also known as the principle of the mandatory types of property rights.⁹ However, there is no clear provision on this principle either in the German Civil Code or in the French Civil Code.¹⁰ Laws that undoubtedly provide the *Numerus Clausus* are the Japanese Civil Code (Article 175), the Austrian Civil Code (Article 308), the Dutch Civil Code (Section 584, section 3: 81), the South Korean Civil Code (Article 185), and the Civil Code in Taiwan Area, China.¹¹ In

⁸ The full text of the French Civil Code (English version) is available at: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>; the full text of the German Civil Code (English version) is available at: http://www.gesetze-im-internet.de/englisch_bgb/; and the full text of the German Basic Law (English version) is available at: http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0079.

⁹ The emergence of *Numerus Clausus* is closely related to the codification process in the early 19th century. In order to discard all the remaining feudal rights in law, the legislator chose to adopt a limited and stable real property rights. This first happened in France and the most significant one is the *Typenzwang* and *Typenfixierung* in the German Civil Code. To some extent, the initial codification of civil law in such European countries stimulated the application of the *Numerus Clausus* principle (Mostert and Verstappen, 2014: 5).

¹⁰ In Germany, the statement of reasons for the draft of Civil Code clearly states that the civil law is based on the *Numerus Clausus*. Also, the academics accept and recognize this principle broadly. In France, there were many disputes regarding the existence of the *Numerus Clausus* in the French civil law, the mainstream opinion is a positive attitude to this principle. However, the French Cours de Cassation (the Supreme Court) recently decided that the French do not have a *Numerous Clausus*.

¹¹ Such as the Article 175 of the Japanese Civil Code stipulates that 'No real rights can be established other than those prescribed by laws including this Code'. The full text of this code (English version) is available at:

England, with the making of the Law of Property Act in 1925, a modern estate system was established. Even though this Act did not admit the *Numerus Clausus* clearly, a series of property rights were recognized in law. Based on an examination of English property law, which is composed of case law, statute and equity, Akkermans (2008: 387-396) argues that a *Numerus Clausus* may be held to exist in English law.¹²

The *principle of publicity and public trust* is the basic rule regarding the existence and changes of property rights. Usually, only real property that has been registered (based on the publicity and public trust principle) can be transferred, thereby a formal land market can be established (Akkermans, 2008: 5; Foster and Sule, 2010: 494). Therefore, although these principles constitute an overall restriction on the exercise of property rights, they can facilitate land transactions based on the legal certainty ensured by these principles (Akkermans, 2008: 437-442; Mostert and Verstappen, 2014: 1).

In addition to these overall restrictions on the exercise of property rights, specific restrictions on the transfer of property rights also exist in the private laws of a certain country. In particular, regarding the contract rules on the transfer of a certain property, special requirements on the capacity of the transferor or the means of transfer may be imposed (Deininger, 2005: 176-177). More importantly, as real property rights affect not only the parties to a contract, but also the third parties, even if the principle of freedom of contract should be upheld, specific restrictions on the transaction of real property are necessary. This shapes a basic framework of delineating property rights, especially property rights in land. Moreover, with the emergence of modern states, restrictions on the exercise of land property rights are also imposed by public law, which is mainly in the form of land administration law.

http://en.wikisource.org/wiki/Civil_Code_of_Japan. Besides, Article 757 of the Civil Code in Taiwan also provides that 'No rights *in rem* shall be created unless otherwise provided by the statutes or customs'. The full text of this code (English version) is available at: <http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp>.

¹² While the adoption and application of *Numerus Clausus* in individual countries, in countries where this principle is followed strictly in law like the Netherlands (Article 81, Book 3, the Dutch Civil Code), certain flexibility is also recognized in the new civil code. For instance, in addition to the limited real rights established on immovables, specific real rights like usufruct and pledge can also be created on movables, and even on the debt-claim rights. Meanwhile, in countries where there is no *Numerus Clausus* on real rights like South Africa, through a registration system (the real rights to land must be registered against the title deed of the land) which distinguish the real right and personal right and a supplementary mechanism developed by the courts to cope with disputes regarding the registrability of specific rights, the demarcation of real rights is increasingly improved in practice. In short, whether the *Numerus Clausus* is accepted or not, the idea that the number of real rights should be limited and steady is well recognized in most countries (Mostert and Verstappen, 2014).

2.2.3 Delineation of the property rights to the use of farmland

Delineation of property rights defines the boundaries of the bundle of rights over a certain property or an attribute from this bundle, and the conditions under which the right can be exercised (Havel, 2014: 617). This means a further development of the traditional property-rights regime, which provides a basic structure for the property-rights system of specific countries through private law. In modern societies, however, an increasing number of restraints are established to regulate land use primarily through public law. An integrated understanding of the property-rights regime is even proposed to combine all types of law that may affect the enjoyment and the use of specific property (Geuting, 2007: 26). Furthermore, the increasing importance of such public law relates closely to the development of land administration. Composed of land tenure, land use, and land valuation, land administration involves an extensive range of systems and processes to administer (Munro-Faure, 2002). The integrated perception of the property-rights regime or the delineation of property rights is more significant to the development of a modern society than the initial distribution of property rights merely through private law — either in the form of property law or in the form of a unified civil code.

2.3 Rationales for public control over farmland transfer

From a historical perspective, public control over private land use prevails in almost all human history. In particular, in the Feudal era, an absolute control of the King over land resources was imposed (Wickham, 2010: 27-43). However, due to the long-lasting influence of the Natural Law Thoughts on private rights, the control of the King over land in Europe at that time was not as absolute as the one in China where Legalism dominates the management of the country (Alsen, 1996: 5). With the flourishing of communes in the Medieval Age of the Europe in particular, the power of the King over private land use was restricted. However, the private use of land has to be subject to the control of the communes (Alfonso, 2007: 9; Provero, 2007: 143-157). With the end of the Feudal era and the emergence of modern states, private land rights were confirmed and better protected through legislation, such as the French Civil Code. In the meantime, with the growing national public authority, the control over the use of land resources was intensified.

2.3.1 Reasons for the intensification of public control over land use

Overall, there may be two main reasons that may explain the increased restraint on property rights:

First, it is attributed to the development of property-rights theory in modern times. Even though private ownership as a natural right has been strongly defended

since the time of Locke, with the codification of civil law and the emergence of modern welfare states, property rights are gradually considered as a creation of the state. It evolves into an ‘artificial’ right, rather than a pure ‘natural’ right (Pipes, 1999: 226-233). According to one survey of property rights in the 20th century, even in democratic societies the concept of property has been transformed from the absolute dominion into some kind of conditional possession/use (Pipes, 1999: 279). As Bromley (1998: 19-28) argued, it is the fact that something is protected (by the state) that makes it a right, rather than that something is protected because it is a right. That is, the design of property rights in law illustrates the private interests that the state recognizes and for which it tries to provide certain protections. Undoubtedly, different arrangements can be provided by different legal systems, depending on the specific situation. Meanwhile, due to the *Numerus Clausus* adopted in the property law of most European countries (especially the one that adopts the civil law system), only the rights recognized in law can be regarded as property rights and further protected by law. On the one hand, this proves that property rights are created or recognized by the state in modern societies; on the other hand, it signifies an enhancement of state control over land use.

The second reason concerns the realization of certain social objectives, or the public interests involved in the process of land transfer. This is another reflection of increased state power and weakened private rights to land. However, the definition of public interests is very abstract and vague. Even now, scholars have divergent views about it.¹³ Regarding the public interest involved in the process of land transfer, it is usually determined by public authorities through a hierarchical land use planning system. In most Western European countries such as the Netherlands, the land use planning is highly participatory and judicially protected. The public interest is secured by active and effective participation of affected people in the making and modification of zoning plans (Verstappen, 2014: 11). Unlike other European (continental) countries, private land rights in the UK (England) are subject to more public control, in particular with the nationalization of land development rights in 1947. The distinction between private and public interests in planning legislation is thus increasingly ambiguous (Booth, 2002: 168-169). In addition to the enhancement of the legal protection of private land rights, public control over land use in England shall be under more scrutiny. This is more important for countries where public ownership of land is adopted and the process of land use planning cannot truly reflect the public interest, such as China (8.3.1).

¹³ A recent research on the definition of public interest and public purpose is provided by Slade (2014).

2.3.2 Regulation of land use through land administration in modern states

The intensification of public control in modern times is mainly based on the establishment of a modern land administration system. In fact, the administration of land has existed from the beginning of the human history. Although the intensity of this public control is different in specific countries, a similar development path can be detected.

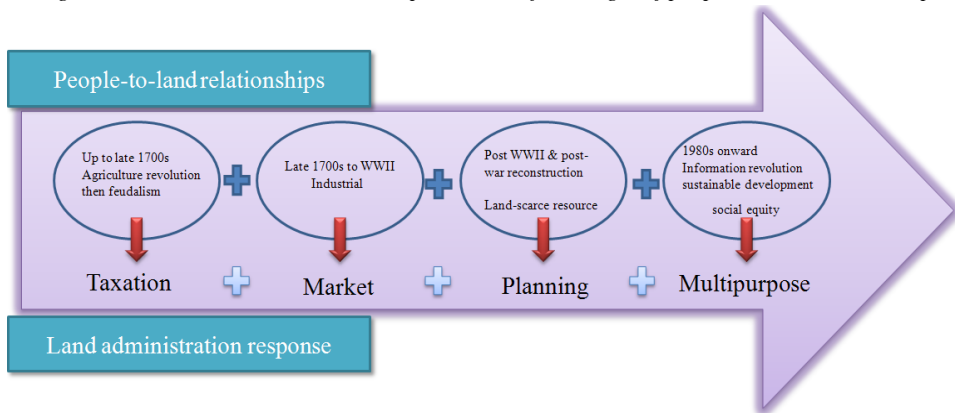
As the most essential part of land administration, cadaster has the longest history and plays a vital role in helping rulers maintain a control over the land resources under its dominion (Kain and Baigent, 1992). Moreover, the main purpose of this cadastral management is to collect taxes which contribute to the national revenues.¹⁴ This system existed in the Feudal era and the Agricultural Revolution up to the late 18th century. From the start of the Industrial Revolution to the World War II, the focus of land administration was on the establishment of the necessary institutions for land transactions. In addition to the clear definition of property rights in land through legislation, such as the French Civil Code and the German Civil Code, a systematic registration system for securing land tenure and the transfer of land is also created to facilitate such transactions (Zevenbergen, 2002: 35-38). The Deeds system in France, the Title system in Germany, and the Torrens system in the common law countries are typical examples. The rise of a land market is primarily attributed to the need of urbanization for land development which started from the late 19th century. With the enlargement of this land market, land valuation was gradually developed as a precondition for an effective transfer market. In the meantime, the land tax system was improved to better adjust the development of land through a market mechanism.¹⁵ After WW II, and due to the non-renewability or the limited amount of land resources, zoning

¹⁴ In Europe, the use of cadastre can be traced back to 170 B.C. when the Roman Empire was established. Through a systematic mapping of land ownership, the cadastral maps was used by Roman rulers as a tool of controlling the land that within its domain. Also, the mapping records helped the taxation on land (Kain and Baigent, 1992). Around the same time, with the establishment of the Qin Dynasty — the first dynasty of China, although the land was privatized, an absolute control of the state over every aspect of people's life was also created. Under the influence of Legalism, a disciplined bureaucracy, an obedient populace, and the unquestioned authority of a strong central government are main features of Qin Dynasty. In 216 B.C., the first emperor commanded that an overall registration of the private land nationwide be conducted. Landholders were asked to report the amount of their land to the government, who then collect taxes based on this information. Therefore, at that time, land registration and the use of cadastre are major component of land administration. For more information on the land registration in Qin Dynasty, please see Fan, 2007.

¹⁵ The main change of the land tax system is the introduction of Land Value Tax (LAT) at the end of 19th century. Although Adam Smith had proposed an initial form of the LAT, it was Henry George who gave a detailed analysis of the design and application of this tax (Smith, 1776: 426-441; Henry, 1879: 364-378). He argued that when the site or location value of land was improved by public works, its economic rent was the most logical source of public revenue. To some extent, a way of balancing the private interests and public interests in land has been developed.

including land use planning became the most important vehicle for land administration. More notably, ‘land administration’ was finally recognized as the official term for depicting all the government activities relating to the management of land in 1973, and further developed into a multi-purpose process as shown in Figure 2.1 (Williamson et al., 2010). In accordance with the Land Administration Guidelines of the UNECE (1996: 3), land administration is defined as the process whereby land and the information about land may be effectively managed. It includes the legal framework of land tenure and the related registration and cadastre management of land, land valuation and the taxation on land, the making of land use planning, and the management of land information. This comprehensive system, especially the making of land use planning, constitutes the basic framework of the government regulation of land use.

Figure 2.1 The land administration response to the four stages of people-to-land relationships



Sourced from: Williamson et al., 2010.

It is noteworthy that on the basis of different delineation of property rights in land in specific countries, the practice of land administration is different. Different practices of land administration also result in different processes of government regulation of land. As regards the regulation of property rights in land, specifically how the land should be used, most countries have an extensive legal system of property rights adjusting land use. Rules concerning land transfer are one of the most important. For most Western European countries, due to the adoption of private land ownership, the regulation of land transfer is mainly achieved through regulations of land use planning and land registration based on a market mechanism. In my view, according to the degree of restrictions imposed on private rights, there are two ways to regulate property rights in land. The one adopted in those Western European countries is an indirect mechanism. That is, it does not control farmland use through a direct restriction on the exercise of the landholders’

property rights. This is different from the countries where landholders cannot enjoy the ownership of land, and even if they have a right to use the land, it would still be a limited right, such as the farmland use right of Chinese farmers (section 3.3 of this book).¹⁶ Although certain regulations regarding land use planning, land registration, and land market (or sometimes just part of them) is available, they are too underdeveloped to have a big influence on the land transfer system. I regard this as a direct regulation of property rights in land. Among all types of restrictions on land transfer above, rules concerning the transfer contract and registration focus on a direct protection of private land rights, while rules regarding land use planning concentrate more on the intervention of public powers. This is a process of balancing private rights and public powers relating to farmland use, which directly affects the establishment of a land transfer market and thus the efficiency of this market. In addition to the regulation of market transfers of farmland, public control over the compulsory transfer of land, more precisely, land expropriation will also be discussed in this research. Although the transfer mechanism of these two types of transfer is different due to the different objectives, parties, and the interests involved, a proper balance between private land rights and the government regulation is the central question of both types.

2.3.3 Government vs. market in the regulation of farmland transfer

Regarding the meaning of regulation, a narrow or a traditional understanding concentrates on the predominant role of the state to deliberately ‘influence socially valuable behavior which may have adverse side-effects by establishing, monitoring and enforcing legal rules’. That is, government regulation is composed of state-enacted legal rules (Morgan and Yeung, 2007: 3,17). This is increasingly challenged by regulation scholarship. Based on an interdisciplinary observation, there are three categories of theories of regulation: public interest theories of regulation, private interest theories of regulation, and institutionalist theories of regulation (Morgan and Yeung, 2007: 17-76). On the one hand, the different category of theory shows the scholars’ pursuit of effective means of regulation. On the other hand, although the role of law differs in different theories, the law in the

¹⁶ This also happened in those transition countries in the Central and Eastern Europe (CEE) before the collapse of the Soviet Union in 1989. Under the state ownership of land, most agricultural land was managed by large-scale collective and state farms. After 1989, most of CEE countries began the privatization of agricultural land through a ‘land share’ system. Specifically, most of the private owners (former members of the state and collective farm) still hold their rights in common, and a right to partition the co-owned land in kind is given to individual farmers. Overall, some CEE countries completed the privatization of agricultural land in the mid-1990s, some are still in process, and a few have not yet made any substantive progress (Giovarelli and Bledsoe, 2001; Hartvigsen, 2013).

sense of the authoritative rules backed by the legitimate coercive power of the state is still a main tool of regulation (Morgan and Yeung, 2007: 342).

In terms of the regulation of farmland use and transfer, the public interest theory of regulation can give a better explanation of its rationality. Usually the regulation is in the name of public interests, such as higher land use efficiency and the preservation of land resources. Government as the representative of public interests is given the highest power to regulate the precious land resources. However, this does not deny the use of a market mechanism in the regulation on farmland transfer. In comparison with government regulation, the market mechanism is a system of society-wide coordination of human activities not by central command, but by mutual interactions in the form of transactions (Lindblom, 2002: 4). Based on the definition of markets proposed by Coase (1988: 7) who was a pioneer of the New Institutional Economics, markets are institutions for reducing the cost of carrying out exchange transactions, and thus facilitating the transactions. However, due to the appearance of (negative) externalities such as air pollution, government intervention in the form of regulation was justified since 1950s (Balleisen and Moss, 2012: 2; Stiglitz, 2012: 15-20). Although the rationality of government regulation was questioned soon after its emergence, government regulation has become an indisputable fact in our economic life. In most occasions, matters are better with regulation than without it (Stiglitz, 2012: 49; Posner, 2010: 249-266).¹⁷

This dispute clearly reflects the traditional way of dealing with social problems used in the regulation research — a puzzle about whether government or market should be used as the solution. Furthermore, this continuing confrontation promotes the development of a broader conception of regulation, which sees government regulation as including all forms of social control, whether it be mandatory state-rules or flexible rules from other social institutions (Morgan and Yeung, 2007: 4). It is in this sense that the research on regulation can be connected with the governance research I emphasized in section 4 (2.4).

From the perspective of government regulation, there are normally two ways of regulating a market. The first one is to strengthen the rights of private parties, while limiting the public authorities with a view to enhancing the vitality of the market. The second way is just the opposite, which aims at adjusting the market demands through delegating more powers to the public authority, together with or without a decrease in the private rights. These increases or decreases in rights and

¹⁷ The most famous example in recent years is the economic crisis started in 2008. In the *The Crisis of Capitalist Democracy* published in 2010, Posner clearly points out that in addition to the long-established FED's (Federal Reserve System) policy of low interest rate, the lack of a financial regulatory system in the US is another direct cause for this crisis. This poses a big challenge to the popular creed that markets can always correct itself in the American society.

powers are aimed at achieving specific policy objectives. The two means of regulating the property rights in land I proposed above are a direct reflection of this. Government regulation, the second type in particular, relies on a direct intervention in private autonomy and focuses on the final outcome, instead of the process. The result is usually an enormous public power and a suppressed private right, which is not a sustainable mechanism.

2.3.4 Variables in balancing private rights and government regulation in farmland transfer

In both market transfers of farmland and land expropriation, interests of four actors, including the government, the transferor, the transferee, and the general public may be directly or indirectly involved. The efficiency of land market or the expropriation process depends on how the rights of private parties and the powers of government are arranged. Based on the discussion above, two variables in balancing private rights and public powers (powers of governments over land management) involved in farmland transfer can be recognized: (1) delineation of property rights in land; and (2) the allocation of rights and powers in land use planning. Havel (2014: 618) further develops a third variable, which concerns the economic right in the land development process, on the basis of the three dimensions of institutional design proposed by Webster (2005). From my perspective, however, a fourth variable should be added, which concerns the legal remedy provided for the parties involved, namely the dispute resolution mechanism established for farmland transfer. As government intervention in the use of farmland is inevitable, a prompt and effective legal remedy is significant to the protection of private land rights. In particular, through an effective legal remedy, the land tenure security of (private) landholders can be better protected, which contributes to a balanced regulation of land use. This will be further discussed in chapter 5. These four variables (Table 2.1) constitute the basic framework for analyzing the balance of private rights and government regulation in farmland transfer in China in following chapters.

Table 2.1 An analysis framework for the balance of private rights and government regulation in land transfer

Variables in balancing private rights and government regulation in land transfer	Private rights and public powers involved
(1) The delineation of property rights in land	Private rights to occupy and use the land provided by property law or civil law; restrictions imposed on the exercise of this property right by related public law
(2) The allocation of rights and powers in land use planning	The rights of private parties in the making process of local land use planning; the allocation of planning powers among different levels of governments
(3) The economic right in land development process	A fair distribution of the economic rewards and the costs incurred by the transfer
(4) The legal remedy provided for the parties involved	The right to sue the responsible government (agency) and the independence of the judiciary system

As regards the balance of private rights and government regulation itself, a primary issue concerns the definition of public interests in the farmland transfer process. Only with a clearly defined public interest can restrictions on the exercise of private rights imposed by both private law and public law be justified. The second issue is about how to measure such a balance in farmland transfer. As argued by Webster (2005: 459), this is hard as the boundary between planned government regulation and spontaneous market forces is dynamic. Even if a balanced land development process can be achieved at a certain time, it does not mean that this balance will be sustainable in the future. Thus, a more significant issue is how to secure this balance through a sustainable legal-mechanism — a series of legal rules from both private law and public law. This is the main focus of this research.

2.3.5 The need for good governance in land administration

As mentioned, a modern land administration system is a multi-purpose process. In recent years, the pursuit of sustainability in economic, environmental, and social development promotes progressive reforms in land administration all over the world (Williamson et. al, 2010). In the meantime, (good) governance as a new way of achieving development goals has had a growing impact on land administration. As will be analyzed next, although governance has been explored and applied in almost every field of social sciences in the past few decades, its application in land administration is relatively new. According to the study of the FAO on good governance in land tenure and administration in 2007, a weak land administration characterized by a lack of transparency and accountability may appear, due to a

confusing regulatory framework and complex administrative processes (Grover et al., 2007: 1-2). The application of good governance, which is characterized by efficiency, responsiveness, legitimacy, transparency, and accountability, contributes to good land administration (Grover et al., 2007: 9). This well-governed land administration system can strengthen local institutions, thereby contributing to the overall governance of a whole country.

As shown in previous sections, the current regulation of land use, characterized by a strict government control, makes government intervention in the exercise of private land rights inevitable. Even in countries where a formal land market has been developed, a proper balance between public control and the private land rights involved is still hard to achieve. A new perspective for improving government regulation of land use, including land transfer, is needed. Below, through a detailed analysis of the current research on governance, a comprehensive understanding of governance will be proposed. In particular, this new understanding of governance in law provides a new way of creating a balanced regulation of land use.

2.4 Governance as a new development of government regulation

At first glance, governance is closely connected with the government. As it originates from the Greek word ‘*Kybernan*’ which means to pilot, steer or direct, accompanied by its Latin translation ‘*Gubernare*’ which specifies the action of steering from the perspective of the state, a process connecting the making, interpretation, application, enforcement of rules and sanctions for violations of rules provides an original understanding of this word (Kotzé, 2012: 54). However, the English use of ‘governance’ is a much later development than its Greek and Latin counterparts. In the 1950s, it was used originally as a critique of the hierarchical modes of control over universities and local governments, and had little influence on the social sciences (Levi-Faur, 2012: 5). Until the end of 1970s, topics on (corporate) governance are back in the spotlight, with the publishing of Williamson’s paper on the governance of contractual relations from the perspective of Transaction Cost Economics (Williamson, 1979). Discussions on governance at that time primarily concerned the field of economics (or economic organizations), followed by political science (Levi-Faur, 2012: 6; Williamson, 2005).¹⁸ This time

¹⁸ An analysis of 9,366 papers on the topic of governance that were published between 2006 and 2009 reveals that they came from economic journals (1,312), management (1,121), political science (1,086), business (1,061), environmental studies (993), public administration (911), planning and development (788), geography (758), business and finance (733), international relations (642), law (578), urban studies (436), sociology (383), and over fifty other fields. By comparison, the 158 papers that were published in the years 1981–1985 were published mainly in law journals (44 papers) followed by political science (22), economics (13) and public administration (10) (Levi-Faur, 2012; Williamson, 2005).

governance was used much more broadly among almost every single discipline of social science. It seems that a panacea or even the ‘silver bullet’ for resolving the tricky issues in social science has been found. In this sense, the broadest use of governance can be identified.

2.4.1 A three-level understanding of governance

From my perspective, a three-level understanding of governance can be developed based on the current research:

First, governance can be regarded as a strategy. Being discussed so extensively, four meanings of governance evolve in the literature — governance as a structure, a process, a mechanism and a strategy (Levi-Faur, 2012: 8). In this research, its use as a strategy — the design, creation and adaptation of governance systems — is adopted as the first-level — the broadest understanding of governance. With the rapid development of most societies all over the world, a variety of complicated problems such as climate change appear and plague mankind. Most of the traditional approaches to such problems, represented mainly by a strict control of the state through governmental regulation, can no longer meet practical needs. Meanwhile, most of these new problems can only be (better) addressed through an interdisciplinary approach. As a signifier of change (Levi-Faur, 2012: 7), a wide range of applications of governance — an interdisciplinary concept and a softer mechanism of solving problems — just make sense. In this respect, the active promotion of the World Bank concerning a better governance of development, fighting corruption, education, information disclosure, land tenure and other public management affairs plays a significant role.¹⁹ Essentially, a final objective of a good governance structure is to steer and shape people’s behavior through the design of a series of formal and an increasing number of informal institutions. Despite the difficulty of providing an overarching definition of such a vague concept, three core characteristics of governance can be recognized. Firstly, it is usually connected with the state, government, politics and rule-making. Through a

¹⁹ Starting from the 1989 World Bank Study on the development problems in Sub-Saharan Africa (‘Sub-Saharan Africa – from Crisis to Sustainable Growth’), (good) governance was firstly defined as the exercise of political power to manage a nation’s affairs. After several revisions, the World Bank — one primary promoter of the governance research, governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them. For more information, please see the website of World Bank, <http://info.worldbank.org/governance/wgi/index.aspx#home> (website for the Worldwide Governance Indicators (WGI) project), and <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,contentMDK:20689092~menuPK:1962419~pagePK:64168445~piPK:64168309~theSitePK:1740530,00.html> (the history of World Bank’s research on governance).

certain guiding process based on a series of institutions that affect people's behavior, governance aims for achieving some common/public goals. Secondly, regarding the process of governance and how it is implemented, the use of power and politics is always involved. It is through numerous forms of politics that these victorious powers can be used in a certain governance system. In addition to the use in the public context, now power and politics are gradually applied in the private context by non-state actors like NGOs. Thirdly, a principal goal of governance is to guide or influence various interactions. The interaction includes not only the one between individuals, but also those between non-human actors like organizations through which people act. The interactions between people and various organizations are also involved (Kotzé, 2012: 64-69). In short, governance is characterized by its steering function, involvement of powers and politics, as well as various interactions.

Second, a better balance between public good and private interests can be achieved through good governance. With the promotion of international organizations such as the World Bank, the OECD, the FAO, and even the UN, governance is primarily applied in public sectors.²⁰ Furthermore, it primarily concerns the degree of various governmental interventions. In most cases, the focus is on minimizing these outside interferences; while issues regarding the creation of certain (necessary) administrative intervention, such as how to integrate such new restrictions into traditional private relationships, can also be solved through a governance perspective (Cherednychenko, 2014). More notably, the requirement for a transparent, accountable, democratic, and decentralized structure is increasingly formed in the political research of governance. It seems that more effective governance may be attained, if the informal institutions together with private parties can be involved more in the specific process — a more interactive approach to governance. However, this enhancement of governance does not necessarily mean a dramatic reduction in the authority of the state in governing

²⁰ The most related research on governance of World Bank concerns land governance. Since the 2009 Conference on Land Governance in Support of the MDGs: Responding to New Challenges, land governance is the constant subject of its annual conference, especially the annual conference on land and poverty from 2011. In 2012, the Land Governance Assessment Framework was issued, accompanied by the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests of the FAO. Related research of FAO on governance clearly focuses on agriculture as well as land tenure. For OECD, in addition to corporate governance, public governance is also deeply studied through a sequence of working papers (<http://www.oecd.org/governance/workingpapersonpublicgovernance.htm>). Noticeably, its research on regulatory reform now gradually evolves into a new governance perspective — regulatory governance — characterized by the Recommendation of the OECD Council on Regulatory Policy and Governance in 2012 (<http://www.oecd.org/governance/regulatory-policy/>). With regard to UN, its research on governance, mainly public governance can be achieved through its website (http://www.un.org/en/globalissues/governance/link_s.shtml).

processes. Its central role in governance concerning public management is supposed to be maintained, as public powers are still needed to ensure compliance by the actors involved (Peters, 2014).

As regards the development of governance in economics, especially in the New Institutional Economics (NIE), the emphasis is put on the governance structure of specific transactions, namely the alternative institutional modes of organizing transactions. Moreover, as the introduction of the Transaction Cost Economics (TCE) to the governance research, a most economical governance structure may be identified for specific transactions (Williamson, 1979). Governance, in this case, can be regarded as a way of seeking for an optimization of the regulation on interactions between and among these public and private actors with the aim of maximizing benefits and minimizing costs (Kotzé, 2012: 56). Regarding the adoption of a specific governance structure, in addition to the market and hierarchies these two polar modes, a hybrid model has been created and promoted by the NIE. It is characterized by moderate incentives, a middle degree of administrative controls, a moderate adaptation in terms of both autonomy and cooperation and a semi-legalistic contract law regime (a moderate application of ‘excuse doctrine’) (Williamson, 1991: 281, 290). Like the governance research in political science, a hybrid model based on the right combination of private autonomy and administrative controls is also indispensable in terms of governing economic relations. To some extent, the ultimate goal of a governance perspective is to find a proper balance between private interests and the public control concerned.

Third, as in government regulation, law is also the main instrument of governance. As mentioned above, governance is essentially a steering mechanism, in which a series of formal and an increasing number of informal rules are adopted to affect the behavior of the actors involved. The formal rules here are primarily composed of state laws. Traditionally, law is an indispensable part of regulation. It provides the norms, authority and legitimacy needed by a regulatory system. To some extent, the broader notion of regulation mentioned above (2.3.3) is rather similar to our understanding of governance, as both of them are aimed at influencing people’s behavior for certain common goals and interests (Kotzé, 2012: 83). Nevertheless, in most cases, regulation is still used in its traditional meaning — predominance of the state in managing various social relationships, particularly those concerning public good (Levi-Faur, 2011). Although a growing number of informal institutions are included in government regulation, it is the regulators involved who can actually control the whole process. In a governance system, however, through various interactions and communications, it is the actors who will be affected work out or can actually shape the final governing norms. Under

the circumstances, governance can be regarded as a further development or improvement in theories concerning regulation. As the law was and now still is the main regulatory tool, it can also serve as the main instrument for governance.

The understanding of governance through the first two levels shows that governance as a strategy for resolving new problems or old problems that cannot be effectively solved by traditional ways has been widely recognized by social scientists. Meanwhile, with the aim of achieving certain common goals, appropriate (economical as much as possible) governance structures ought to be devised on the basis of a proper balance between the private rights and public powers involved. The third level of understanding further shows that as the major instrument for governing, law is the key to establishing balanced and effective governance structures. Besides, the evolution of the law itself also contributes to a full and deep understanding of governance in legal research.

2.4.2 Governance in legal research

The law itself as a discipline experiences a great change under the context of globalization. The new ‘legal pluralism approach of the law’ is the best example (Michaels, 2009). Also, a difference between repressive law, regulatory law and the newly appeared reflexive law (consistent with the repressive law, autonomous law and responsive law mentioned in chapter 1, section 1.4) is increasingly clear. The repressive law and regulatory law signify ‘earlier orthodox manifestations of law which focus on the rule-oriented resolution of disputes’ (Kotzé, 2012: 167); while reflexive law signifies a coordination of the goals and activities of various actors within a society (Stewart, 2001: 130).²¹ With the self-regulation as an ideal, a reflexive-law approach relies primarily on full participation of those who are to be affected by the regulatory norms. Moreover, it is only with such highly participatory rules that the regulatory goals involved can be realized to a maximum extent. This corresponds exactly with the systems theory I used in this research.²² This theory holds that significant social changes can be created only in the event that those who are most likely to be affected by it, participate in soliciting it and choose how it is to be implemented (Laszlo and Krippner, 1998: 20). Therefore, what the law should focus on, in accordance with the reflexive-law approach, is procedures that stimulate the interested participants to figure out the regulatory rules, thus readjust their behaviors, instead of influencing their behaviors through direct proscriptions (Gunningham, 2008: 113). As a result, government’s role in

²¹ As the third generation of the law paradigm, reflexive law is different from the formal law (the first generation paradigm of law) which centers on what roles to adopt and the substantive law (the second generation which is characterized by command-and-control regulation) which concentrates on what conduct to require.

²² This point is also mentioned in the research of Stijn Smismans (2005) on reflexive-deliberative polyarchy.

regulation will be reduced as these direct regulations would be excluded. This is, however, still unattainable at this time, especially for issues concerning the management of public sectors. In the case of the government as the main regulator, a direct regulation by governments is still necessary. Nevertheless, this reflexive-law approach does provide a more democratic basis for governance.

On the one hand, this new evolution of law — the emphasis on actors' participation and communications in establishing norms — satisfies the needs of governance for effective and flexible governing rules; on the other hand, informal rules like non-state law are increasingly popular and significant for achieving more desired goals. Although non-state law such as those international guidelines on governance²³ is complementary to the state law, with the aim of addressing regulatory problems, it shall be equally adopted by regulators as a means to guide human behaviors (Kotzé, 2012: 173). It can be said that law, including both state legal rules and informal law-like rules, provides a normative basis and the authority needed for compliance and legitimacy for governance. It constitutes the main instrument of governance. Meanwhile, the regulative objective of law as a traditional regulatory tool can be realized through a governance process. Although governance is still an evolving concept, as the content of law is also changing, the relation between them is progressively strengthened on a reciprocal basis. By and large, while law facilitates governance, through participating governance, public and private actors may create, interpret, apply and enforce the law with a view to adjusting individuals' behavior, thus resolving collective problems and safeguarding collective interests (Kotzé, 2012: 298). For lawyers, governance as an extra-legal concept may help to improve the adaptability of legal rules and thus their enforcement.

2.5 A balanced government regulation from a governance perspective

2.5.1 A viable way of realizing good/balanced governance

Regarding the governance research in specific legal disciplines, and following its development in economics and political science discussed above, at least two legal topics are distinguished among the six general discourses on governance concerning specific areas of law and policy (Ciacchi, 2011: 2). The first one is corporate governance, which has been studied extensively and thoroughly in company law. The second is the increasingly in-depth research on governance in European private law which is based on an emerging discourse on contract

²³ For example, the Recommendation of the Council on Regulatory Policy and Governance of OECD and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests of FAO.

governance. More importantly, on the basis of those discourses on governance, the essential feature that distinguishes governance from the traditional regulation lies in the balance between conflicting interests involved in specific issues (Ciacchi, 2011: 11). A sustainable legal mechanism is needed in order to strike a balance between differing interests, primarily the one between private interests and public interests. In this case, the emerging contract governance provides certain inspiration.

First of all, the contract governance originates from the Transaction Cost Economics (TCE) which focuses on the governance of contractual relationships. As mentioned, on the one hand, the research of the TCE on governance seeks a transaction cost economizing outcome based on certain adaptive structures — a variety of institutional framework. On the other hand, an economizing outcome can be achieved through modest incentive intensity, administrative controls, autonomy and cooperation of the participants, and interventions of courts in solving disputes (Williamson, 1991: 281). When it is discussed in the domain of contract law, four topics can be recognized — governance of contract law, governance of contracts, governance by means of contract law and governance through contract (Möslein and Riesenhuber, 2009; Riesenhuber, 2011).

From my perspective, a viable means of striking a balance between conflicting interests can be devised, primarily based on the governance of contract law (institutional framework of contract law rule-making) and the governance by means of contract law (contract law as an instrument for steering behavior and for achieving regulatory goals through procedural rules). To be specific, with the aim of introducing better regulation concerning contractual relations, private autonomy/freedom of contract has to be secured first; in the meantime, through structuring a fair bargaining process based on a series of procedural rules, the regulatory objective can be better achieved (Möslein and Riesenhuber, 2009: 274-281). That is to say, a shift from substance to procedure is desirable in a good governance system. With regard to the legalization of such procedural rules or the making of more practical (contract) rules, different levels and sources of rules need to be considered (Möslein and Riesenhuber, 2009: 260-268). This new way of balancing conflicting interests is mainly for parties involved in contractual relationships, that is, it mainly concerns contract rules. In the governance of other issues such as land use, rules on property rights are also involved. Based on this initial governance structure for contracts, a good/balanced governance structure for land use is proposed below.

2.5.2 A balanced governance structure for land use and transfer

Compared with the governance of contracts, the governance of land use typically involves more conflicts between private interests and public/regulatory powers. In particular, the protection of private land rights should be the first concern of public authorities. As a result, more dimensions are involved in a balanced governance structure for land use. Different from the traditional regulation system, a balanced regulation/governance of land use includes these four dimensions below:

First, it highlights the empowerment and participation of private parties, usually the regulatees, in the design of a specific system. Specifically, the individual is supposed to be endowed with enough rights and freedom to exercise his property right in accordance with the law, whether it is an ownership right or not.

Second, unlike traditional government regulation, the regulation from a governance perspective does not directly intervene in party autonomy. It mainly focuses on the design of a series of procedural rules which may secure an equal bargaining status for both parties. The final outcome still depends on the free agreement of the parties involved.

Third, although the substantive autonomy of the parties is not interfered, it has to be limited by the social values involved. In other words, the empowerment and participation of private parties should not damage the public interest concerned.

Fourth, it is noteworthy that the government regulation represented by certain public powers plays an important role in establishing and maintaining a basic market order. While strengthening private rights, a sustainable governance structure should also pay attention to the delegation of the public powers with a view to maintaining a basic market order. However, in practice, mostly it is the powerful public authority suppresses the private rights, not the other way around. Therefore, where the public authority exists, an appropriate monitoring mechanism should be set at the same time.

The adoption of a governance perspective is quite meaningful to the improvement in the current regulation system of farmland use, especially for countries like China where the power of government over the management of land is so strong that private land rights are deeply suppressed. Specifically, a primary value of this governance perspective lies in providing a better definition of the public interest involved in farmland transfer. The public interest can be better identified through establishing a detailed procedure for the participation of the affected parties in the transfer process. Furthermore, an easily identified public interest helps to limit the unnecessary public power which may be conferred under the guise of protecting the public interest. With the emphasis on the design of a series of procedural rules, this governance perspective also helps to improve the lawmaking process and the enforcement of related law, including property law,

contract law, land use planning law, land expropriation law, and sometimes the law concerning land administration. Regarding the basis for making such procedural rules, the diversification of the sources of rules is noteworthy. This will be further analyzed in following chapters.

Meanwhile, the participation mentioned above has different meanings in the two types of farmland transfer in this research. In the case of market transfers of farmland, it mainly refers to a full exercise of farmers' land use rights. Regarding the large-scale transfers, especially when industrial and commercial enterprises are involved, in most cases the individual households concerned cannot have a real say in the transfer process (see 6.6.2). The protection of individual households' use rights is even more significant and more complex than the small-scale transfers among households. In the case of the compulsory transfer/expropriation of farmland, the participation means the directly affected farmers whose land has been expropriated shall be involved in the whole process. The participation of other affected farmers and the general public should also be considered, in order to strike a right balance between the private interests and public interests concerned.

2.6 Concluding remarks

In accordance with the evolution of property rights in land, the public control over private land use is continuous. Moreover, the intensity of this control is different in specific countries. Even in the same country, it is different at different times. With the end of the Feudal era and the emergence of modern states, private land rights were confirmed and better protected through legislation. In the meantime, a land administration system was gradually established first in the Western countries, which included legislation on land tenure, a cadastral management of land, a formal land registration system, a strict zoning and land use planning, as well as a land tax and valuation system. On the one hand, private land rights, including private ownership, are better defined and protected by law; on the other hand, public power still exerts a great influence on the private use of land through zoning and land use planning. In modern times, due to the scarcity of land resources, especially farmland, an appropriate regulation or government control over land use including the transfer is necessary. The real problem is how to make sure that such a regulation system is balanced, and private land rights can be protected from any violations by public authorities.

As the basis for implementing the government regulation of land use, land administration has gradually improved with the emergence and development of modern states. Meanwhile, as the central issue of government control over land use, a proper balance between government regulation and the protection of private land rights should always be on the governments' agenda. To put it differently, a

sustainable development shall be the final objective of a land administration system. The rising interest in governance in other research fields in recent years contributes to a more effective, efficient, thus sustainable administration of land use.

On the basis of the three-level understanding of governance, a governance perspective in the government regulation of land use is introduced in this research. The design of a sustainable and balanced regulation of land primarily focuses on the legal aspect. Furthermore, the four dimensions involved in this new governance perspective — the empowerment and participation of private parties, the guarantee of an equal bargaining status for both parties through procedural rules, the recognition and protection of the public interest involved, and the limitation of the public powers, mainly concern the making of new rules or further improvements in current laws and regulations. With the emphasis on the design of procedural rules, the lawmaking process and the enforcement of related law are expected to be improved under this governance perspective. This is what should be strengthened in terms of the legal reform concerning the rules on farmland transfer in countries like China. According to the first dimension to the new governance perspective, private land rights enjoyed by individual landholders shall be sufficient and well-defined in law. However, the adoption and adherence to poorly defined collective ownership of rural land in China directly affect the definition and exercise of the land rights of individual households. The collective land ownership should be redefined to secure sufficient empowerment of individual households/farmers in the farmland transfer process. This is the topic of the next chapter.

3 Reform of collective land ownership and farmland transfer in China

According to the Constitution of the PRC, collective land ownership governs rural land in China, which means that rural collective land is common property. Regarding the management of common property, more precisely, common-pool resources (CPR), works of Elinor Ostrom are the most famous and important. It is worth noting that she did not advocate a single governance model of these CPR. Different means of managing resources, regardless of whether it is under private, common, or public ownership, may be appropriate depending on specific contexts. Meanwhile, under the common property regime, resources are exclusive to a specific community instead of dividing the resources into pieces (Ostrom et al., 2012: 29-30). In legal terms, it is undivided co-ownership. Due to the Communist Ideology, Chinese farmers cannot enjoy private land ownership. Although a collective land system has been adopted, because of the unclear nature of the collective and the lack of an effective management, it is ultimately controlled by the state. According to Ostrom's observation, the CPR can be managed by local communities successfully, provided that the resource can be clearly defined and the rules governing its use adapted to local situations (Ostrom et al., 2012: 15). However, this is not the case in China.

In this chapter, the necessity of reforming China's collective land system will be explained firstly through an analysis of the evolution of the collective land ownership and the serious consequences caused by its ambiguity. Then in the second section, the key factors affecting the redefinition of the collective land ownership, more precisely, the limitations of current collective land ownership will be analyzed. Although it is problematic, collective land ownership is supported firmly by the central government and will continue to exist in Chinese law and policies. In the meantime, the farmland use right (FUR) of individual households/farmers is increasingly strengthened. The quasi-private nature of the FUR may not better secure individual farmers' rights though, if the definition of the collective land ownership is still vague. Divided co-ownership of collective land, in this case, helps to clarify the relationship between collective ownership and individual land use rights. This quasi-private nature of the FUR and the divided co-ownership of collective land will be analyzed in section 3 and section 4 separately. A further clarification of the divided co-ownership of collective land and its relationship with the individualized FUR is also needed. As will be discussed in section 5, although the divided co-ownership of collective land helps to promote a joint-stock cooperative system reform of China's collective system, it should not affect the quasi-private nature of the FUR. Before clearly defined

collective ownership is established, the FUR needs to be further strengthened in law to protect individual farmers' land rights. Some concluding remarks will be given as the last section.

3.1 Evolution of the rural land ownership in China

Although there are many studies on the development of China's rural land reform, most of them focus on the political and economic aspects, for example, Bramall (2004), Guo (2004), Li (2003), Chen and Davis (1998) and Dong (1996). Also, researches such as Stanczyk (2007), Rosato-Stevens (2008), Korff (2007) and Alsen (1996) provide a general introduction to China's historical and current situation of the property-rights system of rural land. In particular, Rosato-Stevens (2008) gives a very deep and detailed analysis of the land tenure security of Chinese farmers, based on the analysis of the development of the legal system of rural land in China. Li and Prosterman (2009) also conducted a thorough research on the evolution of China's rural land reform as well as the corresponding legislation from the perspective of land tenure security, and proposed the possibilities for more far-reaching tenure reforms in the future. However, these researches do not specifically reveal the key factors affecting the formation of China's rural land tenure system, which will be discussed below in this research.

3.1.1 Pre-1949 rural land law reforms by the communists

Since its foundation in 1921, the Communist Party of China (CPC) has been deeply aware of the problem of landlessness facing Chinese farmers. Thus, it constantly placed land reforms as one of its top priorities in the fight against the Nationalists for the control over China (Li and Zhu, 2007). Nearly all the land reform before 1949 was mainly related to the confiscation of land from landlords and the allocation to poor farmers.²⁴ It is noteworthy that this distribution of farmland to

²⁴ The land tenure reforms that China has undergone under the rule of the CPC starts in the 1920s, when it established the first administrative region in Jiangxi province and promulgated the first land law—Jinggangshan Land Law in 1929. It set up the basic framework of communist land tenure reforms and endowed farmers who have little or no land with a land use right by confiscating land from landlords. The main characteristic of this law is that the land confiscated is owned by the past Soviet government and the land use rights are distributed to individual households (Mao Tse-Tung, 1995 a: 128; Li and Prosterman, 2009: 281). In 1929, the CPC promulgated the Xingguo Land Law, which adopted different basic principles. It stipulates that the government will only confiscate the land owned by landlords and allocate it to the farmers instead of confiscating all land. This actually recognizes farmers' private ownership to their own land (Mao Tse-Tung, 1995 b: 163). The enthusiasm for joining the army and protecting farmland were immediately improved. This was very favorable for the CPC to win the war. In 1931, the Land Law of the Soviet Republic of China was adopted as the first land law in the name of the country, and as 'the best protection for solving land problems'. Instead of attesting that land is owned by the Soviet government, it accentuated that the confiscated land should be allocated to the poor and middleclass farmers, and all temple land and other public land shall be granted to farmers without any conditions. It also allowed the lease and

individual farmers does not conform to the pursuit of public land ownership of the communist party. Yet, due to the tradition of private land ownership and the need to attract farmers to participate in the revolution, private land ownership was adopted (Li and Prosterman, 2009: 278). The most significant land law before the CPC came into power in 1949 was the Platform of Chinese Land Law (*zhongguo tudifa dagang* 中国土地法大纲), which was adopted at the CPC's national land conference in September 1947. It was the first time that the CPC had declared that China would accept the 'land to the tillers' agricultural system as a clear principle of Chinese land law (Article 1). In order to realize this principle, the Platform stipulated that except for some described kinds of non-arable land, all land confiscated from landlords and the land traditionally owned by communities was to be distributed among all rural residents and owned by individuals (Article 6). It also required that a land ownership certificate should be issued to all landowners and the landowners have the right to freely manage and sell the land, and lease the land under some conditions (Article 11) (Li and Prosterman, 2009: 281).²⁵

3.1.2 Changes of rural land ownership from 1949 to 1978

Private land ownership between 1949 and mid-1950s

From 1949 to 1978, the Chinese rural land system featured mainly collective ownership, while private land ownership was recognized upon the founding of the Peoples' Republic of China (PRC) in 1949. In June 1950, as the first land tenure reform law that was applicable to all parts of China (except for the Taiwan area), the Land Reform Law of the PRC was promulgated by the central government. It embodied the main provisions of the 1947 Platform on land allocation and land ownership, while stipulating that China would adopt a 'land ownership system of farmers' (Li and Prosterman, 2009: 282). The 1950 land reform ended in September 1952, which changed the social and political structure of China's rural areas completely. From an economic perspective, it established farmers' individual land ownership.²⁶

sale of land among farmers, though landlords were still prohibited from repurchasing land and rich farmers were prohibited from engaging in land speculation (Li and Prosterman, 2009: 281). This shows the lawmakers' intention to endow farmers with full land ownership.

²⁵ Besides, some local (communist) governments publicized specific rules to implement the Platform. For example, the Northeast Administrative Commission adopted the Supplemental Measures for Implementing the Land Law Platform in the Northeast Liberated Region, which required that a region-wide unified land ownership certificate should be designed by the Commission and issued to all landowners by governments at the county level.

²⁶ According to Article 8 of the 1954 Constitution — the first Constitution of the PRC, the state protects the land ownership and the ownership of other proprietary production of farmers in accordance with the law. Also, Article 13 provides that for public interests, the state can requisite, expropriate or nationalize the rural

Following the land reform in 1950 and the ‘land to the tiller’ program, there was an impressive economic growth in China, and the program proved to be a remarkable success in increasing agricultural productivity (Li and Prosterman, 2009: 283). However, private ownership and individual farming on rural land did not last for long. In the mid-1950s, China began to collectivize its agriculture under the influence of the Soviet system by forcing land owners to surrender their land to the newly formed collective organizations for collective farming. In 1955, the Central Committee of the CPC (CCCPC) issued the Decision on Agriculture Cooperation, which signified the launch of the collectivization movement.

The change of rural land ownership firstly can be attributed to the industrial development strategy of ‘giving priority to the development of heavy industry’ adopted after the foundation of the PRC (Lin, 1990: 1230; Zhou, 2009: 346). As the farmland and the grain produced on land are owned by individual households, it is hard for the government to acquire enough food, especially the grain production was low at that time. The best choice for Chinese leaders was to pool farmers together in cooperatives through the agricultural cooperative movement and acquire food from such cooperatives (Lin, 1990: 1231-1234). Another reason for the change of private land ownership is the land concentration and the rich-poor divide appeared in rural areas.²⁷ Although this change in land ownership is normal under the private ownership system, it is unacceptable under the communist ideology.

Farmers’ land ownership in the junior agricultural cooperatives

Collectivization through legislative measures began in 1956 when the Standing Committee of National People’s Congress (SCNPC) passed the Charter of Agricultural Production Cooperatives [Expired] (*nongye shengchan hezuoshe shifan zhangcheng* 农业生产合作社示范章程 [失效]) in March (Li and

and urban land and other means of production in accordance with the conditions prescribed by law. It can be said that both the rural land and the urban land can be privately owned by individuals at that time. Besides, in the PRC’s history, the 1954 Constitution used to give a clear regulation on the requirement for a public interest of the expropriation power. However, it was soon abandoned later, together with this Constitution. Even though the following 1975 and the 1978 Constitution also provide the right to expropriate land, they do not require a premise of public interests. Returning to the official text of the Constitution (the 2004 Amendment to the 1982 Constitution), it is already after half a century (Shen and Cheng, 2010).

²⁷ According to one research on 143 villages of the Land Committee of Xin County, Shanxi Province in 1953, after the land reform in 1950, 8,253 households had sold around 39,912 *mu* of land, which accounts for 5.5% of the total land. More notably, the number of the sold land increased year by year. In the 10,784 *mu* of land sold by the farmers of 49 villages, 3.95% was sold in 1949, 30.99% was sold in 1950, and 51.15% was sold in 1951. According to the statistics of 19 villages, in the 880 households who sold out their land, 167 former middleclass farmers became poor farmers as a result of the land sale. Besides, 471 new middleclass farmers who obtained new land from the land reform became poor farmers again after they sold their land (Shi, 1959).

Prosterman, 2009: 283). According to the Charter, the agricultural production cooperative is the working farmers' collective economic organization, which is organized by farmers in accordance with the principles of voluntariness and mutual reciprocity (first paragraph of Article 1).²⁸

It also provides that the purpose of the development of agricultural production cooperatives is to gradually eliminate the exploitation of the capitalist system in rural areas, overcome the backwardness of the farming economy, develop the socialist agricultural economy, and eventually meet the needs of socialist industrialization (second paragraph of Article 1). Although it did not change private ownership in law, it established public ownership of rural land as a goal for collectivization.²⁹ In addition to the land, farmers can also contribute their labor to cooperatives. Contributors of land were entitled to some compensation for their contribution, but such compensation could not exceed the compensation for the labor contribution (Article 18). With the development of production and the increase of members' socialist consciousness, the cooperative will gradually abolish the remuneration for members' land, and collectivize the other means of production steadily by paying a price or other mutually beneficial ways. That is, all the means of production in rural areas will be collectivized eventually. It is worth noting that according to this Charter, members have the freedom to quit the cooperative. When a member drops out, he can take away his privately owned means of production, and withdraw his fund shares and investments that he already paid (Article 15). Compared with the present Household Responsibility System (3.1.4), farmers had more freedom to manage the land at that time.

Joint ownership of collective land in senior agricultural cooperatives

At the stage of the junior agricultural cooperatives, farmers still had private land ownership. However, the Third Plenary Session of the NPC soon passed the Charter of Advanced Agricultural Production Cooperatives [Expired] (*gaoji nongye shengchan hezuoshe shifan zhangcheng* 高级农业生产合作社示范章程 [失效]) in June 1956. It transformed private ownership of farmland into formal collective land ownership, by stipulating that collective members must transform their own land, draft animals, large farm equipment, and other major means of production into collective ownership. However, individual households were allowed to keep

²⁸ The full text of this Charter (Chinese version) is available at: http://shlx.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=129486&EncodingName=.

²⁹ According to Article 3 of this Charter, the development of agricultural production cooperatives can be divided into two stages: the junior and the senior cooperative. The nature of the junior cooperative is a semi-socialist organization. At this stage, the cooperative has already possessed part of the public means of production, while retaining the ownership of members for a certain period, and giving them an appropriate compensation.

ownership of their residential land (Article 16). Besides, members of the cooperative could keep no more than 5% of the village's average landholdings as private plots to grow vegetables.³⁰ The start of the senior agricultural cooperative movement meant the inchoation of collective ownership of land.

Under the senior agricultural cooperative system, farmers' private land ownership was transformed into collective land ownership. Specifically, it was a joint-stock cooperative system based on joint ownership of contributed farmers. Individual farmers as the member of cooperatives could enjoy land ownership together with other contributed farmers on the basis of their shares. Moreover, under certain conditions, a farmer can request a partition of the ownership of land with the same quantity and quality as the contributed land. Land in different senior cooperatives could also be traded between each other. It can be said that farmers' land rights were highly protected in the form of shares, although they lost their private ownership.

Abstract collective land ownership under People's Commune system

The collectivization movement proceeded rapidly, even though there were many problems with the land management caused by the compulsive promotion of the government.³¹ In August 1958, the Resolution on the Establishment of People's Communes in Rural Areas (*guanyu zai nongcun jianli renmin gongshe de jueyi* 关于在农村建立人民公社的决议) was publicized by the CPC. Then, the agricultural collectives were merged into the People's Commune abruptly. At the end of this year, about 90% of the whole rural households joined the communes, which was the climax of the collectivization movement. Regarding the rural land ownership, the commune was the sole owner of all property, including the private plots which were used as the commonly worked land, private dwellings, livestock and certain consumer durables (Li and Prosterman, 2009: 284). Under this system, farmers worked together and got paid according to the time they spent on the land. They did not have any individual stake in the land, which successfully separated

³⁰ In the later Decision to Increase Private Plots of Agricultural Production Cooperative Members (*guanyu zengjia nongye shengchan hezuoshe sheyuan ziliudi de jueding* 关于增加农业生产合作社社员自留地的决定), which was passed by the SCNPC on 25 June, 1957, this ratio was increased to 10%.

³¹ According to Part 5 of the Directive of the CCCPC and the State Council on a Number of Specific Issues in the Harvest Allocation of Agricultural Production Cooperatives (*zhongguo gongchandang zhongyang weiyuanhui guowuyuan guanyu nongye shengchan hezuoshe qiushou fenpei zhong ruogan juti wenti de zhishi* 中国共产党中央委员会、国务院关于农业生产合作社秋收分配中若干具体问题的指示) in November 1956, there are many remaining issues in dealing with the means of production of cooperative members. For example, the price of the joined means of production, forest and fruit trees are unreasonable; scattered trees, fruit trees, and scattered livestock which do not need to join the cooperative in accordance with the Charter of Agriculture Production Cooperatives are also forced to join; for the members' investments, the cooperative neither returned the principal, nor paid the interest;....

farmers from their plots.

The total collectivization of agriculture marked the beginning of the ‘Great Leap Forward (*da yue jin* 大跃进)’, which is a movement aimed at transforming China into an industrial power, and lasted from 1958 to 1961 (Dean and Damm-Luhr, 2010: 121). This movement allowed the state to reach into farmers’ grain supplies, and the government imposed compulsory sales of grain at a low fixed price. This, coupled with a substantial decline in the grain production and natural disasters from 1959 to 1961, led to a widespread famine which may be the worst one during the 20th century (Lin, 1990: 1234). Most of the deaths are rural farmers.

After 1962, in order to overcome the serious difficulties caused by the commune movement, the CPC proposed a ‘three-level ownership of collective land on the basis of production teams (*sanji suoyou, duiwei jichu* 三级所有, 队为基础)’ land system. Under this system, the land ownership, land use rights and the rights to distribute products are decentralized from the commune to the production team level, which improved the enthusiasm of the production teams to produce.³² This land system composed of three levels of organizations was recognized in the 1975 and the 1978 Constitution and promoted in the whole country. To be specific, all the land within the production team belongs to the production team. The land of the production team includes members’ private plots of cropland and hilly land, and their homestead, which are not allowed to be rented or sold.³³ At that time, farmers only had the right to use the collective land, which was not permitted to be transferred. However, the house built on the homestead belonged to the member forever.³⁴ The implementation of this land system and the development of the household sideline did promote the development of collective economy (Ahn, 1975: 646). However, the recovery from the three years’ famine was slow and later was complicated by the ‘Cultural Revolution’ which lasted from 1966 to 1976 (Li and Prosterman, 2009: 284).

³² According to the Draft of Amendments to the Regulations of Rural People’s Communes (*nongcun renmin gongshe gongzuo tiaoli xiuzheng cao’an* 农村人民公社工作条例修正草案) issued in 1962, the production team is clearly regarded as the basic accounting unit of People’s Commune. A ‘three-level ownership of collective land on the basis of production teams’ system was adopted. Specifically, all the production materials within a certain scale is owned by the commune, the production brigade and the production team — three levels of collective economic organizations. Furthermore, the scope of a commune equivalents to a town; the size of a production brigade is the same as the former senior cooperatives or the current administrative villages; and the production team has a same size with the smaller natural villages or villagers’ groups inside an administrative village. Technically speaking, they are just representatives of the three-level of collective ownership. The true owner is all the members involved in a certain level of organizations. Through a three-level organ of authority, which are the Commune Members Congress, the Members Congress of Production Brigades and the General Assembly of Production Teams, the will of each collective member is supposed to be expressed. This three-level ownership and management system of collective land laid the foundation for the existing three-level ownership of collective land system.

³³ The Draft of Amendments to the Regulations of Rural People’s Communes, Article 21.

³⁴ *Ibid*, Article 45.

More notably, under the strict control of the central government, the commune actually became a part of the grassroots political power. The former cooperative system was transformed into a collective system. The so-called ‘integration of government administration and communal management (*zhengshe heyi* 政社合一)’ system was adopted to strengthen the management of collective land. The state had the highest power to dispose of collective land, through the party organizations at the three levels of the commune (commune, production brigade, and production team) (Ahn, 1975: 639-640). This system had an enormous influence on the exercise of collective land ownership, even after the commune system collapsed and the Household Responsibility System (HRS) was introduced.

3.1.3 Evolution of the collective land ownership under the HRS

Deng Xiaoping’s rise to power as China’s *de facto* leader in 1978 means the start of the ‘reform and opening up’ policy and the change of the nature of rural land ownership.³⁵ At that time, after the 10 years’ Cultural Revolution and more than 20 years’ collective farming, the Chinese rural economy came to the brink of collapse. Reportedly, the per capita grain production in 1977 was lower than that of 1956 (Yu, 2008). Meanwhile, the income of farmers also underwent an extremely slow growth. In 1978, the average annual rural income was 133 Yuan per capita, and more than 250 million rural people were in semi-starvation status (National Bureau of Statistics of China, 1978). The new leadership headed by Deng began to explore a way to alleviate the poverty and the persistent hunger in rural China from the late 1970s. The most imperative issue at that time was to decide whether to abandon the collective system and what kind of rural land system should be adopted if the collective system was abandoned (Yu, 2008). Almost at the same time, some poor farmers in Anhui Province, driven by the need for survival, invented a land contracting system. The collectively owned land was contracted to individual households for private farming who, in return, were committed to meeting collective demands for quota grain, taxes and fees assessed based on the quantity of the land allocated to each household (Li and Prosterman, 2009: 285). This is the origin of the later Household Responsibility System (HRS). By 1983, nearly all the farmland in rural areas was allocated to individual households, which means the 20 plus years’ collective farming finally ended (Bramall, 2004: 108). The initial results of the HRS were very outstanding as the productivity increased a lot and farmers’ incomes grew dramatically. It also narrowed the gap in consumption between the urban and the rural residents during the same time (National Bureau of Statistics of China, 1983).

³⁵ According to Zhou (2008), one of Deng’s biggest contributions is turning national policy to provide legal recognition and protection for spontaneous contracts that promotes productivity.

This new form of private farming aroused a fierce debate among the policy makers (Zweig, 1983). Some leaders were afraid of the risk that the collective ownership will be replaced by private ownership, which was deeply rooted in Chinese history (Zhou, 2009: 381-383). However, the pragmatic faction of the new leadership argued that the new model of farming is just an experimental way of organizing agricultural production. It is aimed at motivating farmers, instead of changing the rural land ownership. A new mechanism was created to separate land use rights from land ownership, and the land use right was allocated to the collective members for individual farming under the collective ownership. Furthermore, a two-tier management system characterized by the combination of a unified management of the collective and a dispersed management of individual households (*tongfen jiehe de shuangceng jingyig tizhi* 统分结合的双层经营体制) is implemented nationwide (Dong, 1996). According to the contract for contracting the allocated farmland, although individual households had to produce a certain output of grain for the state in order to exchange for the land use right, the enthusiasm for farming increased greatly as they can keep the grain left. The contracted farmland is still owned by the collective, in order to reduce the political risk of the HRS.

In the late 1970s and early 1980s, the HRS replaced the monolithic collective ownership of rural land in the wake of agricultural de-collectivization, and provided Chinese farmers³⁶ with more land use rights (Zhou, 2009: 387-389). As mentioned above, the HRS proved to be a great success in the first few years. There is no doubt that the system encouraged farmers' incentives for production by giving them freedom of land use rights and decision-making power, and connecting rewards closely with their performance. As a result, China's agricultural economy has dramatically recovered. After 30 years of stagnation, the growth in agricultural output in the first half of 1980s sped up to a rate several times the previous long-term average. The fundamental problem of feeding the giant population, which had been a great pressure in China for several centuries was essentially solved (Chen and Davis, 1998). Although the HRS achieved some measure of success, it did not guarantee land use rights for farmers in the long run. There is an unresolvable contradiction between the contractual system of individual households and the collective ownership inherited from the commune system. This will be analyzed in detail in section 3.2.1.

3.1.4 State-controlled collective land ownership

In accordance with the evolution of China's rural land system, all important changes of the production models of rural land after 1949 is consistent with the changes of rural land ownership. The following process of changes shows precisely how the private land ownership of Chinese farmers was transformed into collective

³⁶ As a matter of fact, farmers here refer to the individual households, which are composed of the head of the household who is usually the oldest male parent in a certain family, and the other family members. Accordingly, the farmers mentioned below primarily means the individual households, especially when it involves the FUR.

ownership: farmers' ownership and utilization in the time of the land reform movement; farmers' ownership and collective utilization during the junior agricultural cooperation movement; inchoation of collective land ownership during the senior agricultural cooperation movement; the stage of collective ownership and the utilization of land characterized by 'a three-level ownership of collective land on the basis of production teams'; and finally the collective land ownership and farmers' utilization of land under the HRS (Table 3.1).

Technically, it is hard to regard private land ownership of farmers as one phase of the land reform plan of the CPC. It is just a tool used by the CPC for obtaining farmers' support to stabilize its political power. The rapid collectivization movement since the early 1950s clearly shows this intention. State control over rural land is also expanding, especially in the Peoples' Commune period. Public land ownership has been deeply rooted in the minds of farmers. To some extent, the collective land system is under a state control from the outset. However, it is different from the state ownership. As Zhou (2009: 345) analyzed, the real difference between collective ownership and state ownership lies in that the state dominates and controls the collective, but does not assume financial responsibility for the consequences of such control. Under state ownership, the state is in charge of the employment, salary and other benefits with public finance. Under the controlled collective ownership, especially during the commune period, the state determined the amount, the form, and even the sales of collective production through various top-down commands. Yet, it is the collective who bears all the economic consequences.

The operation of this strictly controlled collective system was not as efficient as the Chinese leaders expected.³⁷ Apart from the loss of efficiency caused by a low motivation of collective members in co-production, the lack of incentives for the managers of individual collectives is also a critical reason. As Alchian and Demsetz (1972: 779-781) argued, effective supervision is the key to guaranteeing collective members making enough efforts. The effectiveness of such supervision depends on the supervisor's capability of enjoying the residual claim. Under China's commune system, however, through appointing officials to individual collectives, the state

³⁷ During the agricultural collectivization, especially the 20 years from 1958 to 1978, the agriculture provided the living necessities such as food and clothing for all the people. This promoted the development of the heavy industry greatly, which was very favorable for China to set up a relatively complete industry system. However, the agriculture underwent a very slow development during the same period. The average annual growth rate of agricultural production was only 1.48%, and the average annual growth rate of food production was 2.13%. The share of grain per capita increased only 10 plus kilograms during the 20 years. It can be said that farmers, the agriculture and the rural areas in China sacrificed a lot to support the development of the urban areas by providing cheap land resources and decreasing the development cost as much as possible (those numbers are from the website of the National Bureau of Statistics of China).

controlled the collective production and thus the surplus of agricultural production. The collective system at that time, therefore, was inefficient (Zhou, 2009: 353-354).

With the evolution of rural land ownership, farmers' rights to use and transfer collective land also changed. In particular, after the adoption of the HRS, farmers have an increasingly enhanced right to use their contracted farmland within a certain period. However, as the collective system was not abandoned together with the commune system, in addition to the intervention of the state, infringements on farmers' private land rights from the representatives of the vague collective ownership also exist. To some extent, the problematic farmland transfer system in China is primarily attributed to the vague collective land ownership.

Table 3.1 The evolution of China's property-rights system of rural land (1951-2011)

Period	Process	Political attributes	Legal nature	
			Ownership of land	Land users
1951-1958	Junior Cooperatives	Semi-socialism	Private ownership of individual farmers	Collective farmers in the junior cooperative
	Senior Cooperatives	Socialism	Divided co-ownership	Collective farmers in the senior cooperative
1958-1983	People's Commune	Communism	Undivided co-ownership (commune—brigades—production teams)	Collective farmers from the three levels of organizations
1983-2011	Post-People's Commune	Initial stage of socialism	Undivided co-ownership (town (ship) collective organizations—administrative villages—villagers' groups)	Individual households

Sourced from: X. Cheng, 2012, p. 26.

3.2 Limitations of the collective land ownership under the HRS

3.2.1 Contradiction between the collective system and the HRS

The most important purpose of the HRS is to improve the land use efficiency and provide a basic income for farmers, through endowing individual households with

an independent right to use the farmland. Certain transfer rights are also provided firstly by the central policy, namely the 1984 No. 1 Document, to promote scale farming and liberate the surplus rural labors. This is a big change of the long-term prohibition on farmland transfer in the commune era. However, the transfer of farmland did not happen a lot after this release of land policy (Q. Zhou, 2013: 220). In addition to the lack of non-farm jobs — an economic reason, the collective system which is inherited from the People's Commune is a more important cause.

The current collective system is learned from the former Soviet Union and inherited directly from the People's Commune. Regarding the collective land, it is owned by all the collective members together. As the death or marriage of certain members, the number of families in specific household changes over time. This means the composition of specific collectives is not constant. As the farmland was distributed to each household on an egalitarian basis, namely based on the number of family members and the quality of farmland, it is reasonable that the land of each household should be readjusted in accordance with the change of family members. The reallocation of the contracted farmland was one of the most important functions of the collective. This undoubtedly results in an unstable farmland use right, which contradicts with the central land policy and relevant legislation.

The land reallocation power of the collective is one way to guarantee a fair distribution of farmland among all members. It also embodies the land ownership of the collective. However, as one layer of the two-tier farmland management system, the unified management of the collective is becoming increasingly weak. The severely restricted ownership right of the collective in law is the best proof. First, the collective cannot decide the use of collective land, which is actually regulated by the government through local planning. If a certain piece of collective land is planned to be used as construction land (except for the homestead of households and the land used by the township and village enterprises — the TVEs), the government will expropriate it first and transform it into state-owned land.³⁸ This is the so-called 'truncation of ownership' proposed by Demsetz (1967 a). Because 'the position for controlling and abolishing the restraints of private rights has been granted to the state or already assumed by the state', a part of the complete ownership rights has been deleted (Demsetz, 1967 a: 18-19). Second, as another layer of the two-tier farmland management system, farmers are getting more autonomy to manage their contracted farmland. As the promulgation of the Rural Land Contracting Law (RLCL) in 2002 and the Property Law (PL) in 2007,

³⁸ The Law on the Administration of the Urban Real Estate (LAURE), Article 9 and the Land Administration Law (LAL), Article 43 and 63. The full text of the LAURE (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383755.htm; and the full text of the 1998 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7125&CGid=>.

the nature of the farmland use right (FUR)³⁹ of individual households as a private property right was confirmed and further strengthened by law. Legally speaking, the contract-issuing party/the collective, which is usually represented by the villagers' committee or villagers' groups should not intervene the independent management of individual households. It cannot change, take back or cancel the FUR for no reason. However, in practice, there is no clear boundary between the land rights of farmers and the one of the collective. As the collective is a collection of all its members, to some extent, the interests of individual members are included in the collective interest. Even if the land rights of a certain member are violated, it may be regarded as a safeguard of the overall collective interests. This unclear boundary above is the main reason why farmers' land rights are frequently violated (Zhou, 2009: 348-350).

With regard to the first aspect, state control over the collective land ownership, it is a malady left by the commune system. As the main leaders of the commune were controlled by the state, the state had the highest power to deal with the collective land (Ahn, 1975: 639). Today it is still the same (Oi and Rozelle, 2000: 527). Through the control over representatives of the collective — villagers' committee, (local) governments can grab most of the benefits generated by collective land. In most cases, village cadres or leaders of the villagers' committee are accomplice of these violations. This can be attributed to the confusing collective land ownership system. Although the FUR is separated from the collective ownership under the HRS, the vague collective still impedes the exercise of farmers' land rights greatly.

3.2.2 Who should be the legal representative of collective ownership?

The creation of the collective system was mainly affected by ideology, specifically the Communist Ideology. To some extent, the collective ownership assumed a political mission of national governance since the foundation of the PRC (Zhou, 2009: 344, 350). Through unifying dispersed farmers into the collective, a social control over farmers can be realized. Even after the implementation of the HRS, it is still adopted in order to maintain the collective management of land. Almost in every law concerning the use of collective land, a set of rules on the exercise of collective land ownership is provided.⁴⁰ It seems that the legislator tries to find an

³⁹ It is one type of the right to contract and manage land (RCML), which is used for depicting the use right of individual households to the contracted land including farmland from the collective.

⁴⁰ See Article 10 of the LAL, Article 12 of the RLCL and Article 60 of the PL. The full text of the RLCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm; and the full text of the PL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm.

eligible body to exercise the collective ownership on behalf of the real owner — all the members within a certain collective. However, whether these bodies can really represent the owner to exercise its rights deserves a more detailed observation.

According to Article 12 of the RLCL, 'where the land owned collectively by the farmers belongs, in accordance with law, to collective ownership by the farmers in a village, contracts shall be given out by the collective economic organization of the village or the villagers' committee; where the land is already owned collectively by the farmers of more than two rural collective economic organizations in a village, contracts shall be given out respectively by the said organizations or villagers' groups in the village'. That is, the village collective economic organization or the villagers' committee/villagers' groups can give out the contracted land to households on behalf of the collective. Besides, Article 10 of the LAL provides that for lands collectively owned by farmers that have been allocated to township collectives shall be operated and managed by the township collective economic organization, which is the current township government. Therefore, the legally-determined entity who can exercise the collective land ownership are the village collective economic organization or the villagers' committee/villagers' group (when they represent the collective to give out the agricultural land that can be contracted by individual households) and the township collective economic organization/the township government (in most cases, it is in charge of the application for the use of collective construction land).

Relationship between collective economic organizations and villagers' committees

According to Article 8 of the 1982 Constitution, the sector of socialist economy under collective ownership by the working people (*shehui zhuyi laodong qunzhong jiti suoyou zhi jingji* 社会主义劳动群众集体所有制经济), or the socialist collective economy includes two parts: the rural collective economic organizations and a variety of cooperative economy in rural and urban areas. That is, the collective economy in China covers both rural and urban areas. In addition to the rural collective economic organizations, certain urban collective economic organizations also exist. In this research, I only discuss the one in rural areas.

The rural collective economic organization initially appeared during the cooperative movement. Farmers had to surrender their means of production (including land, larger farm implements and farm animals) to the collective in order to establish the collective economic organizations which is based on the production team. As discussed above, it had mainly gone through three forms: junior agricultural cooperatives, senior agricultural cooperatives and the later People's Commune. According to the Resolution of the CCCPC on the Establishment of People's Commune in Rural Areas in 1958, the former senior cooperatives were merged and transformed into people's commune, and an 'integration of (township) government administration and commune management' system should be created within the commune. This means the commune not only replaced the township government and became the new grassroots political power,

it is also a production organization characterized by a collective management. This 'integration' system was the main feature of the rural political and economic system under the planned economy (Zhou, 2009: 374).

After the implementation of the HRS, the collectivized production materials, including land, were distributed to individual households. Thus, the three levels of collective economic organizations exist in name only. With the promulgation of the 1982 Constitution, there was a big change concerning the commune system. The originally integrated system was replaced by a 'separation of government administration with communal management' system (*zhengshe fenli* 政社分离) (Chen, 2010: 10; Zhou, 2014 a: 3). Accordingly, township governments and township (agricultural) cooperative economic organizations were set up to assume political functions and economic functions respectively. However, since the collective production no longer exists in a majority of rural areas, the township cooperative economic organization has never been established (Ho, 2001: 408; Chen, 2010: 12-13). Besides, the production brigade was substituted by administrative villages, and the production team was replaced by natural villages or villagers' groups (Ho, 2001: 414).⁴¹

With the aim of improving the management of rural areas, in addition to rebuilding the township government, an autonomous system of villagers was also established. The villagers' committee was created usually in the administrative villages to implement this autonomous system.⁴² Different villagers' groups were also set up in the covered natural villages, which are led by the villagers' committee. It can be said that the establishment of villagers' committees is in the need of the 'separation of government administration with communal management' system. It is not a national institution and does not belong to township governments. Meanwhile, according to the Opinions of the Rural Policy Research Office of the CCCPC on the Stability and Improvement of Land Contracting System (*zhonggong zhongyang shujichu nongcun zhengce yanjiushi guanyu wen'ding he wanshan tudi*

⁴¹ An administrative village can only be set up with the approval of provincial or municipal authorities. Sometimes it is composed of several natural villages, or in rare cases a big natural village can be divided into several administrative villages. Yet, usually the administrative villages and natural villages are overlapped. See Natural village, *baidubaik* 百度百科, <http://baike.baidu.com/view/374136.htm>.

⁴² According to Article 7 of the Organic Law of the Villagers' Committee of the PRC (For Trial Implementation) in 1998, villagers' committee shall generally be established in natural villages; several natural villages may jointly establish a villagers' committee; a large natural village may establish several villagers' committees. However, according to one survey, there were more than 900,000 villagers' committee at that time all over the country, in which more than 700,000 were set in the original production brigade — the administrative villages. Usually, varying amounts of natural villages are under the jurisdiction of the villagers' committee. See the Interpretation of the Organic Law of the Villagers' Committee of the PRC (2010 Revision), http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838870391.

chengbaozhi de yijian 中共中央书记处农村政策研究室关于稳定和完善的土地承包制的意见) in 1987, township and village economic organizations are contract-issuing parties of the land owned by township and village collectives and the state-owned land used by the collective. The General Assembly of all collective members is the highest authority of the organizations, whose executive body is a Management Committee elected by the General Assembly. However, the Management Committee can be separated from the Villagers' Committee (VC), or they can be composed of the same group of people, namely village cadres.⁴³ The fact is that there are no village-level cooperative economic organizations in most villages. Even for those who have one, it is controlled by the VC (Chen, 2010: 12-13). Through directly dominating the Villagers' Assembly who has the right to decide the use of collective land in specific villages, the VC becomes the actual owner of collective land.

Functions of the villagers' committee

Overall, there are three significant features of the VC: First, it is the most basic form of organization of rural society that exists at the grassroots. Second, it should be created by villagers — the collective members — under the instruction of local governments. Thus, it is not a governmental organization. Third, it should be created through the election of villagers, and all major issues should be decided by villagers themselves, instead of the local government. These were confirmed by the former Organic Law of the Villagers' Committee (For Trial Implementation) [Expired] in 1987 (the 1987 OLVC) and the Organic Law of the Villagers' Committees in 1998 (the 1998 OLVC) which was revised in 2010 (the 2010 OLVC). In addition to implementing villagers' autonomy in accordance with the Constitution, as a grassroots organization, it has to undertake certain tasks due to the relationship with township governments and collective economic organizations. For example, the VC has to assist the township governments in their work concerning rural areas. Also, it shall assist villagers in setting up various forms of economic undertakings and respect the decision-making power of the collective economic organizations in conducting their economic activities.⁴⁴ That is, in addition to political functions, the VC also has certain economic functions. As regards the former, although it is clear in law that the township government may only guide, support and help the VC in their work and shall not interfere with the

⁴³ As mentioned above, the township cooperative economic organizations were not established in a vast majority of local areas during the reconstruction of township governments. Thus, the corresponding Management Committee of township cooperative economic organizations never existed in most areas either.

⁴⁴ The 2010 OLVC, Article 5 and 8. The full text (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=8445&CGid=>.

affairs that lawfully fall within the scope of villagers' autonomy, most VCs have become a vassal of town(ship) governments (Oi and Rozelle, 2000: 523-524). This undoubtedly violates the 'separation of government administration with commune management' system.

During the making process of the 1987 OLVC and the 1998 OLVC, there was a dispute about the economic functions of the VC and its relationship with collective economic organizations. According to Article 4 of the 1987 OLVC and Article 5 of the 1998 OLVC, the VC may administer affairs concerning the land and other property owned collectively by the villagers. The 1998 OLVC further provides that when matters concerning the interests of villagers such as proposals for villagers' land contracts arise, the committee shall refer them to the villager's assembly for decision through discussion before dealing with them (Article 19).⁴⁵ In the 2010 OLVC, an updated and clearer list for such matters is provided.⁴⁶ It also provides that other regulations concerning the property of village collective economic organizations and the interests of collective members in other laws should also be followed. The law here mainly includes Property Law, Rural Land Contracting Law, Land Administration Law and Agricultural Law. By and large, the VC still has a legal power to manage the land and property owned by specific village collectives. Meanwhile, certain significant issues can only be decided by the villagers' assembly, namely the collective members themselves. This helps to reduce the encroachment of the VC upon the villagers' land rights. A following question is that whether a well-functioning representative mechanism for the collective land ownership has been established or not.

3.2.3 Interventions of collective ownership to farmers' land rights

Although there are three bodies in law to exercise the collective land ownership, the VC or the village collective economic organization is considered as the basic form. In terms of all the related legal regulations, the ones on the exercise and the management of the village collective land ownership are the most comprehensive

⁴⁵ The full text of the 1998 OLVC (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383542.htm.

⁴⁶ According to article 24 of the 2010 OLVC, matters that involve the interests of the villagers should be discussed and decided by the villagers assembly before they were dealt with: (1) persons who enjoy subsidies for work delayed and the rates for such subsidies; (2) use of the profits gained by the collective economic organizations of the village; (3) proposals managing public welfare undertakings in the village and the contracts proposed for the projects; (4) proposals for the management of land under contracts; (5) decision on projects to be launched by the collective economic organizations of the village and the contracts proposed for the projects; (6) proposals for the use of house sites; (7) proposals for the use and allocation of the compensation for land expropriation; (8) disposal of the village collective property by lending, lease or other means; and (9) other matters that involve the interests of the villagers and on which the villagers assembly considers it necessary to make decisions through discussion.

provisions. Rules on the collective land ownership of township governments and villagers' groups are very few.⁴⁷ Regarding the village collective economic organization, there are no special regulations for its establishment and the specific forms of organization after the farmland use right (FUR) was separated from the collective land ownership (Ho, 2001: 405-408). Even though there were certain forms of collective economic organizations in some local areas, most of them later became township and village enterprises (TVEs). With the transformation of these enterprises into companies, partnerships or sole proprietorship enterprises, they cannot be the representative of collective land ownership.⁴⁸ Under the new market economy system, the vague concept of collective economic organizations created under the planned economy shall be abandoned. However, even for the VC, which is regulated more comprehensively under the current law, cannot serve as an appropriate representative due to the lack of a good governance structure. Furthermore, although an independent right to use the contracted farmland has been separated from the collective ownership, the vague collective system is still a barrier to the further development of the FUR of individual farmers. This interference primarily lies in the power of the collective to reallocate land.

Land reallocation of the collective

As the adoption of the HRS in the 1980s, an equivalent distribution of farmland was implemented in rural areas. Since then, a significant obstacle to farmers' land tenure security is the frequent adjustment of the plot size. These reallocations were conducted by local cadres for reasons such as changes in household size or as the compensation for the affected farmers who lost their land because of expropriation (Rosato-Stevens, 2008: 113). This undoubtedly results in an instable FUR of individual farmers. As Kennedy and Stiglitz (2013) argued, it is simply meaningless to say that property rights in general are strong or clear without specifying who is supposed to have a strong entitlement against whom or for whom the application of the state's enforcement power ought to be clear and predictable in what circumstances. The reallocation of farmland directly hinders the establishment of a clear and stable FUR — a private property rights system.

⁴⁷ The General Principles of Civil Law (GPCL), Article 74 and the LAL, Article 10. The full text of the GPCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

⁴⁸ According to the Reply of Policy and Regulations Department of the State Land Administration to Relevant Issues on Land Administration Law (*guojia tudi guanliju zhengce faguisi guanyu dui tudi guanlifa youguan wenti qingshi de dafu* 国家土地管理局政策法规司关于对《土地管理法》有关问题请示的答复) in 1992, the collective economic organization must have a certain organization, management personnel and funding. Also, it should have a certain capacity for civil rights and capacity for civil conduct, and be able to bear civil liabilities independently in their own name.

In fact, since the implementation of the reform and opening-up policy, the stability of land contractual relations has always been stressed by relevant law and policies. In 1984, the CCCPC proposed the ‘small adjustments of land along with the stability as a whole (*da wen'ding, xiao tiaozheng* 大稳定, 小调整)’ policy in the No. 1 Document. After 1993, a policy of ‘the increase in population does not mean an increase in land, the decrease in population does not mean a decrease in land (*zengren bu zengdi, jianren bu jiandi* 增人不增地, 减人不减地)’ was executed. Later, in the Document No. 16 in 1997, guidelines for prohibitions on land reallocation were provided. However, they were not well implemented in reality and the village and local officials continued to reallocate land frequently (Li, 2003: 61). In the 2002 RLCL, Article 27 stipulates that during the term of contract, the contract-issuing party may not reallocate the contracted land, except in special circumstances, such as natural calamities that seriously damaged the contracted land which make it necessary to properly reallocate the farmland, and the approval from no less than two-thirds of the members of the villagers’ assembly or the villagers’ representatives is required. Meanwhile, according to its Article 64, the individual province can work out measures for implementing the RLCL, which may result in different interpretations of the meaning of ‘special circumstances’. The effect of prohibitions on land reallocation was compromised as a result. Instead of empowering the provincial government to draft implementing measures for the RLCL, the central government should issue a nationwide regulation which is consistent with its policies and legal objectives (Schwarzwalder et al., 2002: 175).

Even among the farmers, opinions for central government’s policies and regulations which attempt to stabilize farmland tenure are rather different. Households with higher land holdings are more reluctant to surrender their farmland and more supportive of the central government’s policy. Yet, farmers who had experienced a population growth in their families tend to support land reallocation (Dong, 1996: 917; Schwarzwalder et al., 2002: 190-193). This division between farmers is mainly caused by the substantial differences in the change of population and the extent of dependence on agricultural production of specific households (Wang et al., 2011: 813). According to the survey of Wang et al. (2011), over 60% of the interviewed farmers are not supportive of permanent land tenure and a large number of villages still continued to reallocate the contracted farmland.

In the meantime, the experiment of ‘no reallocation of land’ conducted at Meitan County (湄潭县), Guizhou Province since 1987 has proved that with a stable land use right, farmers chose to invest more in their contracted land. Until October 1993, 155,000 *mu* of barren mountains in this county has been developed, which resolved the employment of 24,000 people. 15,000 households began to engage in a variety of land management, which accounts for 16.8% of total households and increased 11.5% than 1987 (Q. Zhou, 2013: 233). Moreover, once the land use rights of individual households are stabilized, the surplus rural labors will be pushed to find other ways to make a living, instead of depending on land

reallocation. Nevertheless, even if the current ‘no reallocation of land’ policy can be well implemented in practice, it is just within the 30-year contract term. As the contract can be renewed, it is not clear whether all the contracted land within one collective will be reallocated again on an egalitarian basis or not. A more important question concerns the availability of the legal basis for land reallocation. To answer this question, an investigation of the existing system of villagers’ autonomy is necessary.

Village democracy suppressed by the villagers’ committee

As mentioned above, in principle, the reallocation of the contracted land is forbidden by the RLCL. However, there is another set of rules governing the decision on land reallocation, which is provided by the OLVC (Zhou, 2014 a: 3). According to Article 24 of the 2010 OLVC, plans for the contracting and management of farmland should be decided by the villagers’ assembly, which includes the period of contracts, reallocation or no-reallocation of land and the principles for the reallocation. This provides a legal basis for the reallocation of the contracted farmland in specific (village) collectives to a certain extent. The original purpose of this democratic decision-making system is to promote a grassroots democracy in rural China. The villagers’ committee (VC) generated through a direct election of eligible collective members is the most important reflection of this ‘direct democracy’. However, in most rural areas, the village democracy is not established successfully.

According to one study, the governance of village collectives by richer is quite common not only in rich villages located in developed areas, but also in ordinary villages in agricultural areas (OuYang, 2011). That is, the VC is usually directed by members with certain economic status in the collective. The motivation of most village cadres for running for the VC is to control the governing power and the resulted benefits. Besides, they have to assist the township government to complete certain top-down administrative tasks, such as investment-attracting, birth control and maintaining social stability. Thus, they rarely pay attention to the real needs of the collective itself. For (most) collective members, the realization of political rights such as the right to vote is not their main concern due to the disparity in their economic status.

Therefore, the legal rules for guaranteeing the exercise of collective farmers’ land rights did not work well in practice. An effective governance structure is desperately needed, to elect a manager who can truly represent the interests of (the majority of) collective members. My point is that due to the lack of a genuinely democratic mechanism in most collectives, such important decision-making powers like the right to reallocate land is easily controlled by a few people instead

of being exercised by farmers themselves. Besides, even if most farmers choose to reallocate the contracted land, it is not a wise decision from an economic point of view (Yao and Carter, 1999).

A through prohibition of land reallocation

As analyzed above, the land reallocation power of the collective hinders an efficient and stable use of the contracted farmland of individual households. This is especially obvious when it comes to farmland transfer. Although in principle the law prohibits the reallocation and promotes a stable land use right, under certain conditions it is still allowed. This undoubtedly provides opportunities for the VC, precisely, the village cadres, to abuse their power. Due to the lack of supervision and the increasing value of the collective land, especially in the suburban areas, it is quite hard to control the power of the VC as the executive body of collective decisions. As Zhou (2014a: 16) argued, although the administration of township governments has been separated from the management of collectives, in the village level the use of collective land is still affected by the administrative powers of the VC. A new ‘integration of administrative powers and land property rights’ system (*zhengchan heyi* 政产合一) was created, which seriously infringes the collective farmers’ land ownership as collective members and their land use rights as individual contractors of collective farmland.

This first led to the failure of village democracy. Due to the economic interests implicit in the administrative power over collective land, usually democracy is not the first concern of the VC. What is worse, the undefined or non-demarcated right to use the land caused by land reallocation directly delays land transfer and the migration of rural residents, as there is an invisible ‘debt’ of other collective members in each farmer’s land rights (Zhou, 2013: 222). In my opinion, the land reallocation power of the collective should be limited more strictly both in law and in practice. There should be a clear explanation of the ‘special circumstances’ in the later revision of related laws and regulations. This is the precondition for the implementation of a long-term and constant farmland use right of farmers. Currently, the great promotion of the central government to register collective land, including the contracted farmland, is aimed at stabilizing the FUR and gradually reducing land reallocation. With the stabilization of farmers’ land use rights, a related issue arises, which concerns the change of identification of the collective membership and thus the nature of the FUR.

Stabilization of the collective membership and its effect on farmland transfer

According to the 2014 No.1 Document — the latest central policy on farmland transfer, the right to contract and manage land (RCML) separated from the collective land ownership has two implicit rights: the right to contract collective

farmland (usually for free) and the right to manage or use the contracted land. At the beginning, the right to contract land applied to every member of a certain collective. In other words, a collective membership means a right to contract the collective land. This is a requirement for fairness under the collective system. However, with the implementation of no land reallocation and an unchanged land contractual relationship, certain collective members such as the newborn population and marrying women may not have the right to contract collective land. That is, the identity attribute of the RCML may disappear. The collective membership will not affect the land contractual relationship, which is a precondition for the marketization of the FUR. That is also why I use the term ‘farmland use right (FUR)’ in this research.

The identification of the collective membership relates closely to the definition of the collective system. In the commune system, the economic organization and the community are overlapped. Together with the reinforcement of China’s household registration management system (the HRMS, or *hukou* system in Chinese),⁴⁹ the relationship between the identity of collective members and the land is closer. Each member of the collective is equally entitled to the collective land. However, after the land was distributed to individual households, it is hard to define the ‘farmers’ collective’ in law. As analyzed above, although several levels

⁴⁹ In 1955, the agricultural and non-agricultural registered permanent residences were set up for the first time. Then in 1958, the SCNPC promulgated the Household Registration Ordinance of the PRC (*zhonghua renmin gongheguo hukou dengji tiaoli* 中华人民共和国户口登记条例), which means the formal establishment of an urban and rural (dual) household registration management system. After the implementation of the reform and opening up policy since the late 1970s, an increasing number of farmers went to cities to engage in business deals. A national labor market was gradually formed. In the meantime, some farmers looked forward to becoming urban residents. The need for a reform in the old household registration system was increasingly urgent. The central government also noted the contradiction between the household registration system and the requirement for labors in cities, and started allowing farmers to go to cities slowly. In 1984, the State Council issued the Notification on Farmers’ Access to and Settling down in the Town (*guowuyuan guanyu nongmin jinru jizhen luohu wenti de tongzhi* 国务院关于农民进入集镇落户问题的通知), which provides that as long as farmers can be self-reliant, they can settle down in the city. At that time, people had the right to move and settle down freely in cities. The number of former agricultural population who has been given a non-agricultural status had a rapid growth, which later was recognized as a burden to the food supply in the urban area. Thus, during the rectification in 1989-1991, these migrant workers were driven back to rural areas due to their former agricultural household registration. At the same time, local governments also started the exploration of household registration reform. In the late 1980s, some local governments stated that after paying a certain amount of town construction fees, workers who have skills and business in towns can acquire the qualification for settling down and living in cities. Starting from 1992, such trading of merchandising the non-agricultural household registration swept the whole country, which in part broke down the barriers of the sharply divided household registration system. At the end of 1992, the State Council set up a drafting group of the household registration reform program. The goal is to unify the national household registration within three years, to realize citizens’ freedom of movement and the equal identity, and at the end of the 20th century, the Household Registration Law should be introduced. Although these targets were not met, the household registration reform has been underway all the time.

of organizations have a right to exercise the collective land ownership on behalf of the farmers' collective, none of them can secure both the collective ownership and the individualized land use rights. In the meantime, although the so-called villagers' autonomy system characterized by the villagers' assembly can express the will of the farmers' collective through the principle of majority voting, the assembly cannot be the real owner of the collective land due to the actual control of the VC. Moreover, certain members' land rights may be infringed as the assembly has the power to decide the distribution and reallocation of the contracted farmland within the collective. The encroachment on the land rights of married women is the most typical example.⁵⁰

The current legal regulations concerning the acquisition and loss of collective membership still adhere to a strict correspondence between the collective membership and the right to contract the collective land. For example, Article 5 of the RLCL provides that members of the collective economic organizations in rural areas shall, according to law, have the right to undertake rural land contracts with their own collective economic organizations that give out the contracts. No organizations or individuals may deprive the members of the rural collective economic organizations of their rights to undertake contracts or illegally restrict such rights. That is, anyone who can be regarded as a member of the collective has a right to contract the land within the collective. This is inconsistent with the 'no reallocation of land' requirement within the contract period confirmed in the same law. As a matter of fact, most of the newborn population did not obtain a piece of collective land after the promulgation of the RLCL in 2002 (Zhu, 2015). Besides, according to Article 26 of the RLCL, if during the term of the contract, the whole household moves into a city divided into districts and their rural residence registration are changed to non-rural residence registration, the contracted farmland or grassland should be returned to the contract-issuing party. If the household fails to return the contracted land, the contract-issuing party may take back the land.⁵¹ Although this maintains the unity of collective members and contracted land, it hinders the migration of rural residents to cities and thus the transfer of farmland.

Under the collective system during the commune period, as the land was not allowed to be transferred, together with the relatively stable collective members controlled by the strict HRMS, the rural society was relatively closed. After the implementation of the HRS, the contracted land can be transferred and an

⁵⁰ According to Article 30 of the RLCL, during the term of contract, a woman gets married and undertakes no contract for land in the place of her new residence, the contract-issuing party may not take back her originally contracted land. Where a divorced woman or a woman bereaved of her husband still lives at her original residence or does not live at her original residence but undertakes no contract for land at her new residence, the contract-issuing party may not take back her originally contracted land. However, this is not the case in practice. In particular, when the land use right is contributed to cooperatives as shares, the loss of married women's land rights is more common (Gao, 2012: 327-339).

⁵¹ Meanwhile, if during the term of contract, the whole family of the contractor moves into a small town and settles down there, the right to contract and manage land of the contractor shall, in accordance with the contractor's wishes, be reserved, or the contractor shall be allowed to transfer the said right according to law.

increasing number of collective members migrated to the cities for non-farm jobs. Although the urban citizenship was open to farmers during 1984-1989, the restriction on urban household registration was quite strict as it links with a series of public services and social welfare policies. Usually these migrant farmers only work in the cities temporarily. Even though they may have a stable job and a stable urban life, they cannot enjoy the public services and welfare in urban areas. At the same time, there were also certain rights and interests attached to the rural household registration — the collective membership. For instance, generally only collective members have the right to contract the farmland within the collective. Only collective members are entitled to apply for a piece of collective land as homestead and it is free. In most cases, the release of restrictions on the household registration refers to the urban one. This is normal as China is in the transition from an agricultural society to an industrial society. It can be said that the current change of household registration is unidirectional.

In order to facilitate the farmland transfer as well as urbanization, in the Notice of the State Council to Actively and Steadily Promote the Reform of the Household Registration Management System (*guowuyuan bangongting guanyu jiji wentuo tuijin huji guanli zhidu gaige de tongzhi* 国务院办公厅关于积极稳妥推进户籍管理制度改革的通知) issued in 2011, migrant farmers can keep their land use rights if they chose to settle down in the cities, whether small towns or big cities. Based on my observation, if certain urban citizens intend to move to rural areas and engage in agriculture, it is also possible in law. According to Article 48 of the RLCL and Article 59 of the PL, the decision to give out a land contract to outsiders (an entity or an individual) shall be subject to the consent by no less than two-thirds of the members of the villagers' assembly, or of the villagers' representatives. The contract can only be concluded after an examination of the credit position and the management capability of the contractors. That is, urban citizens may obtain the FUR through land transfer, although the other collective members enjoy a priority under equal conditions (Article 33 of the RLCL). Also, there should be a scrutiny over the competence of such urban transferees.

With the migration of collective members and the transfer of the contracted farmland, the current separation of the urban and the rural household registration system will be abandoned. According to the Ministry of Public Security of the PRC, a new household registration system which is unified in both urban and rural areas will be established in China before 2020 (China Daily, 2015). As regards the standards for household registration, a legitimate and stable residence and a stable career will be considered. However, tricky problems concerning the change of public services, social welfare system attached to the urban citizenship and the collective land use rights attached to the rural collective membership will arise. At

this time, collective members can move to small towns and cities without giving up their farmland use rights.⁵² They can also enjoy the social security provided by the government. Although the level of public services and social welfare in small towns is limited, this undoubtedly will lead to a huge adjustment of the interests of certain stakeholders, especially the local governments. A more critical issue is how the land rights and interests attached to the collective membership should be defined to deal with the unified household registration system. If an urban citizen moves to a collective and rents a piece of farmland to carry out agricultural production, after a certain period can he obtain the collective membership and thus apply for a piece of the homestead? There is no answer in the current legislation or central policies. In practice, due to the priority of other collective members, most of the moved farmers transferred their land to their relatives who are also farmers or other collective members, which is encouraged by the laws and central policies.

In short, identification of the collective membership has a close relationship with the farmland transfer system. Only with a stabilized farmland land use right, the land can be transferred and used more efficiently. In order to promote farmland transfer, the most practical way is to solidify the right to contract land of the existing collective members. Furthermore, all the farmland of a certain household shall be confirmed as common property held by all family members within the household. This is supported by the current regulations and the ongoing practice of land registration. Besides, with a gradual disappear of land reallocation, the collective membership will not be connected with the right to contract land. In other words, the FUR is expected to be a pure property right, which can be more transferable after it is stabilized. In the next section, the long-term debate on the nature of the FUR and its latest definition provided by the central policy will be discussed.

⁵² Currently, the homestead distributed to individual households can only be used by the household itself or other members within the same collective if it is transferred. Although farmers have the ownership of their houses built on the homestead, individuals or other entities that are not from the same collective cannot occupy or use these houses as the houses are attached to the homestead when they are transferred. Although the new central policy, precisely the Decision of the CCCPC on a Number of Major Issues on Deepening the Overall Reform (*zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jue ding* 中共中央关于全面深化改革若干重大问题的决定) in 2013 (2013 Decision) allows certain pilots concerning the use of homestead and the transfer of houses attached to the land, it is just limited to certain local areas and only concerns farmers' right to the houses. Transfer of the homestead (use right) to the non-collective members is still forbidden in law.

3.3 A quasi-private land use right of individual farmers

3.3.1 Debate on the nature of the FUR

There were many disputes about the nature of the right to contract and manage land (RCML), including the FUR I analyzed in this research. In the 1986 General Principles of the Civil Law (GPCL), rules on the RCML have already been provided in Article 80, Section One (Property Ownership and Related Property Rights), Chapter Five (Civil Rights). Here it is treated as a property right. However, the ‘property right’ here is not the one used in the traditional continental law system, which has a clear distinction between the (real) property right and the personal right (except the French Civil Code). It is more like the patrimonial right in Anglo-American legal system, which does not have this differentiation (Akkermans, 2008: 331, 337). In addition, due to the lack of property-rights theory in China at that time, it was not regulated and protected as a property right. This gave it more characteristics of a personal right.⁵³ Even after the promulgation of the RLCL in 2002, which is especially made for the regulation of the RCML, it is still confusing that what has to be considered as the nature of the FUR. There are mainly two different theories about it. One is the ‘right *in personam*’ theory, which regards the FUR as a personal right. The other one is the ‘right *in rem*’ theory, which considers it as a real property right (Wang, 2005: 70-72).

The distinction between the real property right and the personal right is a basic issue in civil law system. In China, due to the significant effect of the German Civil Code, the distinction between these two rights has been implemented in the legal practice (Alsen, 1996). Generally speaking, the difference between a real property right and a personal right mainly includes: (1) In essence, the real right is a dominance right that the holder can directly control the use of a particular thing. Yet, as a right of claim, the holder of a personal right can only ask others for certain positive behaviors or certain negative behaviors. (2) The real right is a ‘*jura in rem*’, a right against the entire world. The personal right, however, is a ‘*jura in personam*’, a right against a particular person. When they coexist, the real right has a priority over the personal right. (3) The object of a real right should be specific and independent. The principle of ‘*Numerus Clausus*’ should be observed when a real right is set. It means that the type, the content, the effectiveness and the publicity method of the real right should be prescribed by law. Nobody can create a real right outside the law. (4) In general, a real right is a long-term and stable right, compared to most personal rights.

⁵³ Article 80 of the GPCL provides that ‘the right of citizens and collectives to contract for management of land under collective ownership or of state-owned land under collective use shall be protected by law. The rights and obligations of the two contracting parties shall be stipulated in the contract signed in accordance with the law.’ Based on the latter sentence, the RCML including the FUR is treated as a contractual relationship.

Although the nature of the FUR is not defined in the RLCL, it does have more features of a real property right.⁵⁴ Not until the issuance of the PL in 2007 that the FUR as a real right, more accurately, a usufruct, is finally identified in law. As the usufruct is a real right based on the purpose of using and bringing forth yields from the property owned by the other person, a legal relationship is established between the holder of the usufruct and the owner of the property. In essence, the basis of this relationship is a contractual relationship (except for the statutory easement, such as relationships of adjacency, Chapter Seven of the PL). In other words, the usufruct is created on the basis of obligatory rights and exists primarily as a contractual relationship.

3.3.2 Is the FUR a perpetual usufruct?

There are different definitions of the usufruct in different countries. Originally, it is from Roman law and it is a type of personal servitude (*servitutes personarum*) — a beneficial right to another person's property, including both movables and immovable (Mostert and Verstappen, 2014: 6). In the German Civil Code, the usufruct can be established in things (section 1030-1067), in rights (section 1068-1084) and in property (the assets of a person, section 1085-1089), and it can be transferred under certain conditions. In the Dutch Civil Code, usufruct is not recognized as a property right, but a personal right. It is endowed, however, with more features of a property right in the new Code.⁵⁵ In the French Civil Code, although it does not distinguish the property right from the personal right, based on the related regulations of the usufructuary's rights (Article 595 and 597), the usufruct is more like a property right stipulated in the German Civil Code. In China, the usufruct currently can only be established on land. Thus, the usufruct in Chinese law only refers to the real property right (the property right to

⁵⁴ In 1992, China announced the introduction of a socialist market economic system, which means the establishment of a standard property relationship and a legal system of regulating transactions. Then, a unified Contract Law was made in 1999 based on three former contract laws: the Economic Contract Law, the Technology Contract Law and the Foreign Economic Contract Law. Actually, the making of the Property Law was included in the legislative plan of the 8th Standing Committee of the National People's Committee (the SCNPC) in 1994. However, as the guarantee of market transactions, the making of contract law had the precedence over the property law. Starting from January 1998, the NPC began drafting the Property Law and a Chinese Civil Code. It is worth noting that both of the two leaders of the drafting group — Liang Huixing and Wang Liming — adopt the legislative structure of the civil law system in their drafts. Legal scholars at this time have more awareness of the difference between (real) property rights and personal rights, which directly affected the making of the RLCL.

⁵⁵ The right of usufruct used to come with the obligation to maintain the goods that are subject to the right of usufruct. This obligation, however, has been discarded in the 1992 Dutch Civil Code, which made it possible to transfer the goods conferred to the usufructuary by the establisher. The goods the usufructuary gets in return, automatically fall under the right of usufruct. In general, the new civil code brought more flexibility in terms of usufruct (Mostert and Verstappen, 2014: 13).

immovables). This is a big difference from the traditional usufruct in Roman law and the usufruct in other civil law countries.

Specific to the FUR, its main purpose is to realize a direct control of farmers over their contracted land. It is a right over the collective land or sometimes the state-owned land according to the law or the contract. Thus, it has all the properties of a usufruct. However, the FUR is different from the traditional usufruct, mainly because of the nature of its object — the contracted land — is very special. As the contracted land is owned by the collective, or owned by the state and managed by the collective, the FUR of individual households is a right over the property of another. However, individual households are the members of the collective and the collective land used to be farmers' private land, which was transferred to the collective during the agricultural cooperative movement from the 1950s to the 1960s. To some extent, farmers were using their own land — land collectively owned by themselves, rather than so-called another's property. This can only make sense if the collective land ownership is regarded as divided co-ownership. Besides, a precondition of acquiring the FUR is that farmers should have the membership of the collective and only with this membership, farmers can contract land from the collective. It can be said that the FUR is not a traditional usufruct, but a special one (J. Xu, 2007).

The nature of the FUR is being changed in the central policy. After it was recognized as a real property right, its economic nature becomes more important. As mentioned above, a new definition of the FUR has been proposed in the 2014 No.1 Document. A right to contract land and a right to manage the contracted land are further distinguished. This is mainly for encouraging farmers to transfer out their contracted land, while not being afraid of losing their control over the land. That is, the FUR will be stabilized and confirmed as a private property (right) of individual farmers. Even if the real land user may change with the transfer of the land management right, the right to contract land is still owned by the current household, unless it is assigned/transferred permanently to other entities. This land use right is rather similar to the freehold or *fee simple* in the common law system. Despite all the land being owned by the King or Queen, a freehold interest which equals to an ownership right is granted to the real landholders. However, as the design and the development of the legal system in China are largely dominated by the (German) civil law system, it is hard to introduce such a common law concept into the Chinese law. Under the circumstances, a perpetual usufruct may provide a better understanding of the nature of the FUR.

The concept of perpetual usufruct now is mainly used in Polish law. It originates from the historical reluctance of the state to transfer the control over land use to private parties through full private ownership. It is aimed at securing a full use of land by landholders, while keeping state land ownership. Among all the property rights in land,

it is the one which is closest to full ownership. This means the holder of a perpetual usufruct has relatively broad rights to use and seek profits from the land. Overall, there are two basic means to create a perpetual usufruct: by contract and by operation of law. Besides, two significant features of the perpetual usufruct in Polish law can be identified. First, the establishment of a perpetual usufruct through contracts is primarily for a defined purpose — the development of a project or the conduct of some sort of activity as set out in the contract. If the holder of the usufruct breaches the contract, certain punishments will be imposed, such as an increase in the annual fees, or even termination of the contract. Second, although conceptually the right is perpetual, it is usually created for a certain period of time in practice — 40 to 99 years — depending on the purpose of its creation. This period can be extended (Szafarz, 2004).

The perpetual usufruct in Polish law primarily refers to a right to use and manage the land owned by the state or local authorities. It is rather similar to the state-owned (construction) land use right in China (Ho and Lin, 2003: 687-689). However, it also shares certain similarities with the RCML including the FUR in Chinese law. First, the FUR is also created through a contract with the collective and the contracted land can only be used for agricultural purposes. Second, according to the PL, the duration of the FUR is 30 years, which can be extended when the 30-year contract expires (Article 126). It seems that the FUR can be ‘perpetual’ if the landholder is allowed to continue the contract. Nevertheless, this identification of the FUR as a perpetual usufruct requires a further observation on the current legislation on the renewability of the FUR.

3.3.3 A perpetual FUR in law

Due to the fundamental principle that land ownership in (the mainland) China is public land ownership, the individual cannot own a piece of land. This rule is applicable to all the land in cities which is owned by the state and the collective land. Individuals can only be entitled to a leasehold or a land use right. As to the farmland, through the adoption of the HRS in the late 1970s, a leasehold system was established in rural China. Individual households can utilize a certain amount of farmland⁵⁶ for a definite period of time by entering into a contract with the collective. This land contracting system provides Chinese farmers with opportunities to support themselves under the public land ownership. Moreover, a certain period of contract can guarantee an equal distribution among different households, as the collective can take back the contracted land when the contract is

⁵⁶ Here I do not use a piece of land because the land distributed to the individual households at the beginning of the HRS was rather fragmented. Based on the principle of equality and egalitarian, one household can be distributed at least two pieces of farmland which are located in different places due to the difference in the land quality and the convenience for farmers. Usually, the amount of farmland held by a certain household is quite small owing to the large population, let alone the amount held by individual family members (Dong, 1996: 916-917).

expired and then redistribute the collective land. To some extent, a fixed and definite term of the contract provides a possibility of reallocating land for the contract-issuing party — the collective. However, this is very dangerous for farmers' land tenure security and unfavorable to the long-term investment in farmland. Therefore, the central government has been trying to longer the contract period since the early 1980s.⁵⁷ A renewable contract for the FUR is finally recognized in the 2007 PL.

According to the land survey of the RDI (Rural Development Institute, now the Landesa) in 1999 and 2001, farmers' interpretation of the meaning of the '30-year period without change' policy depends on how the policy has been explained or implemented by local cadres. Some farmers think that it is the household contracting system that will be extended for 30 years, basically amounting to the extension of certain farmers' status quo in their own villages. Other farmers believe that it is their farmland use rights that will be prolonged for another 30 years and during this period their contracted land will not be subject to reallocation for demographic changes or other reasons (Schwarzwalder et al., 2002: 164-165). That is, even after the promulgation of the RLCL, farmers are still afraid of losing their land use rights. Although several central documents have demonstrated that the rural land contracting system will be kept for a long time and the land contract of individual farmers can be extended, the nature of farmers' land use rights is still unclear. They do not know what will happen after their land contracts expire by the late 2020s.⁵⁸

Article 126 of the 2007 PL provides that when the present 30-year contract term expires, holders of the FUR may continue to fulfill the contract according to the relevant provisions of the state. This identifies the FUR as a real right and it can be extended again after the current 30-year contract. However, compared with the provisions provided for the urban land use right, which is 70 years and can be renewed automatically (Article 149), no regulations are provided relating to the

⁵⁷ At first, a 15-year period of land contract was stipulated by the 1984 No. 1 Document. It was extended for another 30 years by the Policies and Measures on the Current Sustainable and Stable Development of the Agriculture and Rural Economy (*nongye he nongcun fazhan de ruogan zhengce cuoshi* 农业和农村发展的若干政策措施) issued by the CCCPC and the State Council in 1993, as the first round of land contract (1984-1998) was about to expire. However, it was not until the promulgation of the 1998 LAL that this 30-year land use right was legalized in law (Article 14), given that the implementation of these policies was not so effective to keep the land contractual relationship stable. This extension of contracts in law is upheld warmly by Chinese farmers. By the end of 2000, about 98% of the villages had basically completed the extension of the contract. However, due to the lack of legal protection of land contractual relations, some grassroots cadres and farmers still have misgivings about the policy of 'a constant period of contract during 30 years' (Liu, 2001). Following the regulation in the 1998 LAL, the 2002 RLCL (Article 20) and the 2007 PL (Article 126) repeated this 30-year lengthening of the FUR. Besides, in the 2002 RLCL, different length of periods is provided for different types of agricultural land based on their respective growth cycles, in order to encourage farmers investing in their land.

⁵⁸ The second round of rural land contracting started from the late 1990s, especially from 1997 to 1999 depending on local situations. After the extension for another 30 years, farmers' land contract and land use rights will be expired by the late 2020s.

length and the form of the next extension for the FUR. Moreover, as the basis of the extension, the ‘relevant provisions of the state’ is not a law, which means this extension has no legal basis yet. Although the Decision of the CCCPC on Several Major Issues about the Rural Reform and Development in 2008 (the 2008 Decision) emphasizes that ‘the existing land contractual relationship shall remain stable and permanently constant’, it does not specify the length of the FUR.⁵⁹ To some extent, the land tenure security of Chinese farmers can be strengthened in terms of duration, if the permanently constant land contractual relationship is clearly defined by law. I will discuss this further in chapter 5.

By and large, with the separation of the FUR into a right to contract land and a right to manage land, there will be three (main) property rights in the collective land — the collective land ownership and those two split rights. The specific rights enjoyed by individual households under the FUR are increasingly close to the rights that can be enjoyed by a landowner. With the renewability supported by the current laws and policies, the FUR can be regarded as a perpetual usufruct. This interpretation still has to rely on whether a more clear renewability of the FUR will be confirmed in the law or not. Meanwhile, with the increasingly apparent quasi-private nature of the FUR, the overall collective land ownership needs to be further defined. Otherwise, it will continue to be a potential threat to farmers’ land rights.

3.4 Redefined collective ownership based on divided co-ownership

3.4.1 Connection between the collective land ownership and divided co-ownership

Under the current collective system, land is owned by the ‘farmers’ collective’ — all collective members together. It is actually undivided co-ownership, and the use and distribution of collective land shall be decided by all collective members or their representatives (Alsen, 1996: 22-23). As discussed above, although the villagers’ assembly could be the representative, in most cases it is directly manipulated by the villagers’ committee whose power is usually controlled by village cadres. More importantly, as the assembly and the committee have certain economic rights concerning the land use and management, in the case of the lack of effective supervision, certain or even all collective members’ rights could be violated. Therefore, a clearer definition of the collective land system is needed to

⁵⁹ According to Chen (2009: 11), one main drafter of the 2008 Decision, an exact period for the prolonged FUR is supposed to be determined by the National People’s Congress (NPC) in future amendments to the Constitution. He can make sure that this ‘permanently constant’ period is longer than 30 years, and even longer than 70 years.

end the intervention of these administrative powers. Divided co-ownership of the collective land provides a feasible solution.

First, in accordance with Article 18, 27 and 48 of the RLCL and Article 59 of the PL, the land contracting plan and whether to give out a land contract to an entity or individual other than those of the collective, and the reallocation of the contracted land among the contractors shall be subject to the consent by no less than two-thirds of the members of the villagers' assembly or of the villagers' representatives. This conforms to the principle provided for the disposal of divided and co-owned property in the PL (Article 97).⁶⁰

Second, under the divided co-ownership of collective land, the individual members may enjoy a maximized freedom to exercise their own land use rights without transforming the collective ownership into private land ownership. To some extent, the divided co-ownership of farmland provides a legal basis for individual households to transfer their contracted farmland under the collective ownership. According to the PL, if there is no stipulation or the stipulation is not clear concerning the division of the property under divided co-ownership, a co-owner may petition for partitioning it at any time (Article 99). This endows the individual co-owners with a maximum autonomy to deal with their own (shares of) property. Nevertheless, this is different from the exercise of private land ownership.

Third, one of the basic rules of (market) farmland transfer is that under equal conditions, members of the collective concerned shall enjoy priority.⁶¹ This is consistent with the preemptive right enjoyed by the other co-owners of property under divided co-ownership, when one co-owner intends to transfer his share of the property.⁶² The main purpose is to better protect the other co-owners' interests, while maintaining the integrity of the group or the collective.

Last but not least, related experiments concerning the divided co-ownership of collective farmland have been conducted in some local areas. As shown below, the joint-stock cooperative reform of collectives implemented since the 1990s is the most significant experimentation.

3.4.2 Experiments of the joint-stock cooperative reform of collectives

The history of cooperatives in China dates back to the early 20th century, when some parts of China experienced grassroots-organized cooperatives (Sultan et al., 2011). During the 1950s, in order to help farmers who lack of machinery and

⁶⁰ It provides that as for the disposal or major repair of a commonly owned real property or movable property, the consent of the several co-owners possessing 2/3 of the shares or all joint owners shall be obtained, except it is stipulated otherwise by the co-owners.

⁶¹ The RLCL, Article 33.

⁶² The PL, Article 101.

techniques improve their land use efficiency, several kinds of cooperatives were motivated and established by the government. This means the taking place of the Cooperative Movement (as discussed in 3.1.2), which includes the mutual-aid groups, the junior cooperative, the senior cooperative and the final People's Commune phase that ended in the late 1970s. Although this more than 20 years' development of cooperatives in China is regarded as a failure, the development of the junior cooperative did become the earliest practice of joint-stock cooperatives in China. The junior cooperative resembles the joint-stock cooperative in several aspects, including a voluntary application to join the cooperative; contribution of farmers' land, farm tools and livestock as shares to the cooperative; a unified use of labors; and allocation of the surplus according to the used labor and shares. It can be said that the Chinese joint-stock cooperative system originates from rural areas.

In total, there are three kinds of joint-stock cooperatives in rural China since the economic reform in 1978. They are the enterprise-based joint-stock cooperatives, the community-based cooperatives, and the joint-stock cooperatives in the agricultural operation (Sun, 2001). Their first appearance was due to the need for reforming the property rights of township and village enterprises (TVEs). Almost at the same time, they emerged in some rich collectives as a way to restructure the collective system, in order to operate and distribute the collective assets equally to all members. Also, in the agricultural operation, as independent and relatively weak market players, individual farmers had to organize themselves together in order to participate in the market competition. Some took the form of joint-stock cooperatives (Sun, 2001: 5-7). In comparison with its Western counterparts, the joint-stock cooperative system in China is more complicated and has more types of arrangements of property rights.

Also, the assets contributed to the three types of joint-stock cooperatives are different. The first enterprise-based one focuses on the distribution of profits created through the use of collective construction land. The contracted farmland is still managed by individual households. Later, with the transformation of these enterprises and the decline of most collective economies, it can no longer be used as a way to reform the collective ownership. Meanwhile, although the joint-stock cooperative in the agricultural operation concerns the management of the contracted farmland, the farmland actually is not contributed to the cooperative. This kind of cooperation usually involves a bigger scope of households, rather than the households from a certain collective. It is the community-based cooperatives that relate to the reform of collective land ownership.

The community-based joint-stock cooperative originates from the developed rural areas, especially those rich villages owning a certain amount of collective capitals. The earliest and most representative one is the Nanhai Model in

Guangdong Province. In 1992, Nanhai started a pilot of land joint-stock cooperatives. Based on the specific administrative villages or villagers' groups, the collective property and collective land were quantified and converted into shares to establish a joint-stock cooperative organization. The organization then rents the contributed land out directly or rents it out after the construction of some plants. Farmers in the village contribute funds or their land to acquire certain shares, and share the value-added benefits of the non-agricultural use of the land (Research Center for China's Economy of Peking University, 2007; Lu and Zhu, 2014).⁶³

To some extent, the shares of individual households in the joint-stock cooperative organization are an extension of their rights to their contracted land. Only the contracting farmers of the former collective have rights to subscribe shares of the cooperative and share the annual dividends. However, the distribution of shares was very controversial, especially when it comes to the shares of marrying women and newborn population. Like the stabilization of the right to contract land through prohibitions on land reallocation in other local areas, the distribution of shares of the joint-stock cooperative also undergone a process of gradual stabilization. The latest reform in Nanhai City is to solidify the shares of individual households. The controversy over the distribution of shares caused by demographic changes has to be resolved within the household concerned (Lu and Zhu, 2014).

An indispensable prerequisite for the capitalization of specific assets is to ensure the liquidity or transferability of the assets, on the basis of a clear property-rights system (Upham, 2009: 612). In terms of guaranteeing the transferability of the contracted farmland, a stabilization of the FUR within each collective household is chosen as the final resolution, whether a joint-stock cooperative system reform is implemented or not (Lu and Zhu, 2014). It can be said that even in the comparatively advanced experimentation of the joint-stock cooperative system, the identification and stabilization of the collective membership are vital. It is a prerequisite to clarify the collective ownership and its relationship with the rights of the individual households to share the benefits from using collective land.

3.4.3 Lessons learned from this joint-stock cooperative system reform

Theoretically, the joint-stock cooperative reform of the collective can replace the obscure collective ownership with a clearly-defined joint-stock structure, thus

⁶³ In this experiment, collective land especially farmland can be directly converted into construction land without going through the expropriation procedure. Compared with the use of state-owned land, formalities for renting the collective land are simpler. Also, the rental period of the collective construction land can be long or short. Thus, enterprises are more willing to rent the collective land. This undoubtedly results in a rapid industrialization and urbanization of Nanhai City.

improve the management of collective assets. Based on this structure, farmers as the cooperative members have rights to enjoy the benefits from the contributed collective land including both farmland and construction land, which cannot be individualized under the former collective system.⁶⁴ However, problems concerning further development and promotion of this joint-stock cooperative system still exist. In addition to the stabilization of collective membership, more precisely, the identification and distribution of the initial shares of the cooperative, three more problems need to be resolved.

First, currently this reform only applies to a limited number of collectives, especially the ones in suburban areas who have certain collective assets. As a majority of collectives in China is still in poverty, most of them cannot implement a joint-stock cooperative system reform at the moment.⁶⁵ Moreover, in those collectives where a joint-stock cooperative structure has been adopted, illegal conversions of farmland into (collective) construction land frequently occur. This is why there is a greater need for a more clarified structure in such collectives, in order to better distribute the value-added benefits from the converted land (Research Center for China's Economy of Peking University, 2007).

Second, although the joint-stock cooperative system now is being promoted in an increasing number of local areas, it only involves the management and distribution of the collective assets created by using collective construction land, instead of farmland. On the one hand, not all the members within one collective are willing to transfer their farmland use rights to the cooperative; on the other hand, members who have transferred out their land use rights are reluctant to share the

⁶⁴ It is worth noting that the significance of collective land ownership varies greatly in different collectives because of the obvious disparities in the economic development of various regions (Chen et al., 2012). In regions where the collective economy is relatively developed such as the Nanhai City above, the strength of collective land ownership is significantly higher. In addition to a clear confirmation of farmers' individual farmland use rights, usually the land is re-concentrated and managed by the collective. Only the rights to earn rental income or share dividends are left to farmers. The ownership right of the collective owner — the whole collective farmers — is realized through the collectives' unified management. In this case, the effectiveness and efficiency of this unified management of farmland rest with a well-functioning governance institution which allows active participation of collective members. However, in most agricultural areas, especially in the Middle and Western China, collective ownership is not so significant due to the weak collective economy. The household management is also vulnerable owing to the lack of various agricultural infrastructures and services needed by a more efficient production.

⁶⁵ According to the survey of the Ministry of Agriculture (MOA) and Zhejiang Normal University concerning the income of 217 village collectives in 2007 and 2010, poverty of the village collective tends to expand. The research group considered the village collective whose annual income is less than 100,000 Yuan (around \$ 16,471) as poor villages. Among these, villages with less than 10,000 Yuan annual income are extremely poor villages, villages with 10,000-50,000 Yuan are absolutely poor villages, and the rest with 50,000-100,000 Yuan is relatively poor villages. The percentages in 2007 are 55.13%, 12.78%, 10.40% respectively. Poor villages in 2007, therefore, accounts for 78.31% in total. However, the percentages in 2010 are 49.5%, 27.0% and 8.8%. In total, 85.3% of the surveyed villages are poor villages (Wang, 2013).

rents with other collective members.⁶⁶ Therefore, even if the joint-stock cooperative system can be spread and applied to a wider range of local areas as a form of restructuring the collective system, it is not the best way to use and transfer the farmland efficiently. It may only work when all the contracted farmland in one collective can be contributed to the cooperative. Otherwise, it is better to maintain the management of farmland by individual households.

Last but not least, as shown in the Nanhai case, even if the collective can be transformed into a joint-stock cooperative, management of the cooperative is still controlled by the former VC (Lu and Zhu, 2014). Rights and interests of the collective or cooperative members were not better protected under this joint-stock cooperative structure. According to Zhao (2012: 106), local farmers did not see much difference between the joint-stock cooperative system and the former collective system, as their rights to dispose of the contributed land in both systems do not differ much.

It is evident that further reform of the current governance structure of the joint-stock cooperative is greatly needed. To be specific, the legal status of the joint-stock cooperative as a legal person should be confirmed first by legislation. The economic power of the VC is supposed to be separated from its political function, and exercised by particular subjects who are able to manage the collective land and supervise the distribution of the revenue of cooperatives.⁶⁷ In my opinion, a corporate governance structure which includes a Board of Shareholders, a Board of Directors and a Board of Supervisors may be adopted to manage the contributed land. Only with an appropriate governance structure can the share of the cooperative members be better protected. Although the current conditions for a unified transformation of rural collectives to a joint-stock cooperative system are not enough, the design of a proper governance structure of this cooperative system is relatively urgent.

⁶⁶ This information is based on my interview with a local official who is responsible for local agricultural affairs in November 2014.

⁶⁷ In practice, in order to improve the governance in rural areas, a system of 'little village official' (*daxuesheng cun guan* 大学生村官) has been established nationwide. According to the latest edition of the 'Workbook for the Construction of the Communist Party of China (*dangjian cihui shouce* 党建词汇手册)', the 'little village official' is a nickname for the college graduates who take up the job of running a village. With the aim of addressing certain issues in rural areas, Jiangsu Province started recruiting college students as rural grassroots cadres in 1995. By the end of 2004, 10 provinces and municipalities have started the 'little village official' program, which mainly locate in the eastern and central China. In 2005, the General Office of the CCCPC and the General Office of the State Council issued the Opinions on the Guidance and Encouragement of College Graduates to Work at the Grassroots in February 2006. Since then, there is a wide range of trials concerning the 'little village official' program. As of the end of February 2008, 28 provinces and municipalities have launched the program, 17 of which endeavor to achieve a goal of having a little village official in each village. These little village officials may help to improve the governance of collective land use.

3.5 A further clarification of the collective ownership and the FUR

With the new definition of collective land as divided co-ownership, the joint-stock cooperative system reform that has been implemented in certain local areas may be further promoted. The governance structure of this joint-stock cooperative can also be improved in accordance with the structure adopted in joint-stock companies. However, the establishment of such a cooperative system is more significant to the use and transfer of the collective construction land, if later it can be transferred freely on land market like the state-owned construction land (use rights).⁶⁸ With regard to the FUR of individual households, usually the motivation for contributing the contracted farmland into the cooperative is much lower as the benefits of such land are limited compared to the construction land. With a stabilized FUR through the ongoing registration of rural land (section 5.3 in chapter 5), collective members may also choose to contribute their farmland use rights to the cooperative with a view to conducting scale farming. The distribution of shares depends on the quantity and the quality of the contributed land of individual households. However, this kind of joint-stock cooperatives may be only suitable for certain collectives, in which most of the farmland is not efficiently used as the collective members can easily get access to off-farm jobs, or most of them already have a stable off-farm job. For most rural collectives, especially those located in the central and western China, this is still unattainable. Under the circumstances, for collectives that cannot conduct a joint-stock cooperative system reform at the moment and the collective farmers decide to keep the current household management of farmland even if the collective concerned has been transformed into a joint-stock cooperative, the relationship between the divided co-ownership of collective farmland and the individualized FUR needs a further clarification.

⁶⁸ Currently, collective construction land can only be used for TVEs, public infrastructure and the homestead of collective members. This construction land use right cannot be transferred, unless the TVE is bankrupt or merged with other enterprises. In the 2013 Decision of the CCCPC, the collectively owned and profit-oriented construction land is allowed to be sold, leased and appraised as shares, on the premise that this conforms to local planning. This will be further discussed in chapter 4 and chapter 8. In this case, the transformation of the current collective system into a joint-stock cooperative system is more significant to the use of collective construction land. Unlike the collective farmland that has been managed by individual households, the collective construction land is not physically divided and allocated to each household. The redefined collective ownership and a reorganization of the collective in accordance with a joint-stock cooperative system can better clarify the rights and interests involved in the co-owned construction land. This is conducive to the protection of individual farmers' rights and interests in collective construction land. Therefore, for collectives which have certain amount of construction land and such land can bring considerable benefits to the collective, the creation of a joint-stock cooperative system may provide better protections to both the collective interests and the interests of individual farmers.

3.5.1 Conflicts between the divided co-ownership of collective land and the FUR

Certain correspondence between the newly defined collective land ownership and the general rules on divided co-ownership in Chinese law has been discussed above (3.4.1). Specifically, the collective ownership of farmland can be regarded as divided co-ownership, as it conforms to the general rules for the disposal of commonly owned real property and the request for partitioning the co-owned property if there is no stipulation as to this partitioning or the stipulation is not clear. In addition to these aspects, more rules have been provided for property under divided co-ownership by the Property Law, which mainly include: (1) A specific co-owner of property under divided co-ownership shall exercise the ownership of the property according to his shares (Article 94). (2) Regarding the management expenses or any other liabilities of property under divided co-ownership, if there is any stipulation on it, such stipulation shall apply; if there isn't any stipulation on it or the stipulation is not clear, the expenses shall be borne by all co-owners on the basis of their respective shares (Article 98). (3) Usually the co-owner of property under divided co-ownership shall enjoy joint and several creditor's right or assume joint and several debts in terms of the external relationship; in terms of the internal relationship among the co-owners, a co-owner shall enjoy the creditor's right or assume the debt on the basis of his own share, except it is otherwise stipulated by the co-owners. Any co-owner who overpays his share of the debt is entitled to recover the overpaid amount from the other co-owners (Article 102). It is worth noting that the divided co-ownership of collective farmland which has been individually managed by specific farmers/households does not totally comply with such general rules above. At least three issues have to be considered and addressed in terms of the relationship between the newly defined collective ownership and the individualized FUR.

First, for property under divided co-ownership in general, the right enjoyed by each co-owner is not confined to one part of the property, or each one has individual ownership of a specific part. On the contrary, the right of each co-owner involves the whole property. In the case of the collectively owned and individually managed farmland, it is obvious that each household already holds a definite part of the co-owned property. In particular, with the nationwide registration of collective land, including the contracted farmland, the share of the co-owned collective farmland held by each household becomes even clearer. Meanwhile, according to Article 18, 27, and 48 of the RLCL and Article 59 of the PL, certain disposal of the contracted farmland in the collective has to be approved by no less than two-thirds of the members of the villagers' assembly or of the villagers'

representatives. This means the right of each holder of the contracted farmland may involve the use and disposal of the whole collective farmland.

Second, compared with the rules for sharing rights and assuming obligations provided for the co-owners of property in general, the allocation of rights and obligations of each household under the HRS is much simpler. As the land is individually managed, the household concerned has a relatively independent right to use its contracted land and it only assumes obligations arising from the contract with the collective. As discussed above, with the increasing protection for the FUR in law and central policies, its quasi-private nature is increasingly obvious. This is quite different from the right to other property under divided co-ownership that a co-owner can have.

Third, although the co-owners do not have individual ownership of a specific part of the property based on their share, under certain circumstances, this share may produce the same effect as an ownership right. For example, each co-owner may request a transfer of his share, which needs no pre-consent of the other co-owners, and regardless of how this share will be transferred and to whom it will be transferred. However, in the case of the co-owned farmland, the transfer of each household's contracted land (the permanent transfer in particular) has to be approved by the collective first. With the aim of maintaining an integrated collective, more restrictions are imposed on the transfer of the contracted farmland.

According to the analysis above, the redefinition of the collective land ownership as divided co-ownership may conflict with the quasi-private nature of the FUR in legal theory. However, the reorganization of the collective based on divided co-ownership, especially in accordance with a joint-stock cooperative system, does not necessarily require the contribution of the FUR into the cooperative in practice. Farmers should have a right to decide whether to contribute their farmland use rights to the cooperative or not. In other words, the cooperative assets that can be distributed to its members periodically may only include the benefits from renting collective construction land and the buildings attached and other collective assets. In my opinion, the redefinition of the collective land ownership as divided co-ownership and thus the adoption of a joint-stock cooperative system do help to improve the governance structure of the vague collective. However, the quasi-private nature of the FUR of individual households should not be affected. This is especially important before a clearly defined collective system can be established to protect individual farmers' land rights and interests, instead of violating them. The nature of the FUR as a perpetual usufruct should be further confirmed by law. The efforts to stabilize the right to contract land of individual households (as discussed in 3.3.3) provide the prerequisite needed for realizing a permanent farmland use right.

3.5.2 Embodiment of the collective ownership under the new definition

In order to achieve a better balance between the individualized use and the collective ownership of the contracted farmland, rights enjoyed by the collective should be clarified on the basis of an increasingly independent land use right. Overall, this can be analyzed from two aspects: its relationship with the state — the external relationship, and its relationship with the collective members — the internal relationship. With the joint-stock cooperative system reform, together with a proper governance structure, it can be expected that the collective will become a farmers' organization that can truly represent the main interests of its members. In particular, it may get rid of the excessive administrative control from local governments over the management of collective land. When the collective land right is violated by public powers, it can protect its own interests and the interests of individual members. In short, the collective ownership shall become a defense for farmers to against the violations from public authorities.

Regarding the adjustment of the internal relationship between the collective and its members, several basic rules of the common property regime proposed by Elinor Ostrom can be adopted. According to the study of Ostrom (1990), in terms of the management of common property, collective ownership can be more effective than private or state ownership, provided that the community can create collective rules independently for penalizing free-riders on common property.⁶⁹ For instance, a clearly defined boundary which can be achieved through a land registration system; a governance structure allowing for the participation of most collective members in the decision-making process and an effective monitoring system; a sanction system which can punish violations inside the collective; and a conflict-resolution mechanism which are cheap and easy access.⁷⁰ As discussed above, even though there are still problems with the experiment of the joint-stock cooperative system in China, as a feasible way of clarifying the collective ownership and protecting the land rights and interests vested in collective members, it should be improved further in practice. More precisely, through the adoption of a corporate governance structure, individual farmers can make better decisions on

⁶⁹ Although the common property she studied is not exactly the same as the new definition of the collective land ownership in China, certain principles such as an effective monitoring and a graduated sanction system can still be adopted under the Chinese situation.

⁷⁰ In detail, principles which are preconditions for a long-enduring common property regime she proposed includes: clearly defined boundaries; congruence between appropriation and provision rules and local conditions; collective-choice arrangements allowing for the participation of most of the appropriators in the decision making process; effective monitoring by monitors who are part of or accountable to the appropriators; graduated sanctions for appropriators who do not respect community rules; conflict-resolution mechanisms which are cheap and easy of access; minimal recognition of rights to organize (e.g., by the government); in case of larger CPRs: Organization in the form of multiple layers of nested enterprises, with small, local CPRs at their bases (Ostrom, 1990).

the management of all collective property. Compared with other collective property, farmers have more autonomy to use their contracted farmland. Moreover, farmers should not be forced to contribute their contracted land to the joint-stock cooperative.

3.6 Concluding remarks

There has been a remarkable growth in China's economy in recent decades, and the living standards of rural people have also risen considerably with this progressive trend. However, problems concerning rural poverty and the gap between China's rural and urban population continue to plague China's existence (Rosato-Stevens, 2008). One cannot understand why the prosperity and wealth created in China's 30 plus years' reform has not spread proportionately to the countryside without appreciating both the role of land and the farmers' relationship to land (Prosterman et al., 2009: 5). As discussed above, due to the adoption of a 'give priority to the development of heavy industry' strategy in 1950s and the pursuit of a Communist society, a commune system was established to control the use of collective land. Although farmers as members of the commune were endowed with a right to use the land, this right could not be transferred. This, together with the strict household registration management system which forbids a free flow of rural population since 1950s, resulted in the long-lasting poverty of rural China. The collective land ownership under the planned economy was one way of controlling rural farmers by the state to a certain extent. In terms of the legal regulations, this political control directly led to an unknown subject of collective ownership. The state actually controlled every aspect of the collective economy including the use of collective land, especially during the commune period.

After the implementation of the HRS, a two-tier management system of the contracted farmland was adopted. Although farmers have an individualized right to use the contracted farmland, the abstract owner of collective land still exists in law. Due to the lack of an effective monitoring, the villagers' committee as a legal representative of the collective land owner cannot manage the land for the benefit of collective members. In future reforms, the committee should focus on its social and political functions, while the economic function — the management of collective land — shall be assumed by a specialized person or agency who can truly represent the interests of farmers. Moreover, the previous vague or undivided co-ownership of collective land shall be redefined as divided co-ownership. Under this new definition, theoretically if one member requests for a division of the collective land, he can enjoy private ownership of his own contracted farmland. This is, however, not allowed under the current political system of China. As argued in this chapter, the adoption of divided co-ownership in redefining the

collective land ownership is primarily for restructuring the collective in accordance with a joint-stock cooperative system that has been implemented in certain local areas. More notably, with a gradual release of the transfer of collective construction land and thus the increment in collective assets, the reorganization of collective as a joint-stock cooperative may better protect the interests of collective farmers.

Nevertheless, even if the vague collective can be transformed into a joint-stock cooperative on the basis of divided co-ownership, it does not mean that the individualized FUR should be contributed into the cooperative and transformed into a certain amount of shares. From my perspective, the reorganization of collective based on divided co-ownership and the strengthening of the FUR are two independent reforms. Although there are certain conflicts over this co-existence in legal theory, in practice these two reforms can be carried out simultaneously. The transfer right of individual households to their contracted farmland should be respected and protected in both reforms. Whether in the overall transfer of farmland needed by the reorganization of the collective or large-scale transfers involving the whole farmland in a collective, or in the separate transfers of individual households, the individual household concerned should be entitled to make independent decisions. This is inherent in the quasi-private nature of the FUR. More importantly, a more effective representative mechanism can be established as a result of the joint-stock cooperative reform of the collective. In the large-scale transfers of farmland, including expropriation in particular, individual farmers' land rights and interests may be better secured on the basis of greater participation brought by the effective representative mechanism. This concerns the first dimension to a balanced government regulation from a governance perspective which I introduced in the last chapter.

To sum up, the redefinition of the collective land ownership and the reorganization of the collective in accordance with a joint-stock cooperative system contribute to the protection of individual households' land use rights and interests and their participation in the farmland transfer process. It is a necessary prerequisite for the establishment of a balanced government regulation of farmland use and transfer.

4 Unbalanced regulation of farmland transfer in China

The nature of the farmland use right (FUR) as a perpetual usufruct secures a stabilized use and management of the contracted farmland. It also provides the legal basis for individual households to transfer their individualized land use rights. As discussed in chapter 2 (2.2), regulations from both private law and public law may impose certain restrictions on the use of farmland, especially on farmland transfer. According to the Institutional Resource Regime, in order to achieve a sustainable use of natural resources, an analysis of private law only is not enough. An examination of relevant public policies and public law is also significant and necessary (Gerber et al., 2009). Moreover, only with a right balance between the private rights and the public powers involved in private law, public law and policies may a well-functioning transfer mechanism be established. Thus, farmland can be used in a more sustainable and more efficient way. Needless to say, an indispensable precondition for such a mechanism is that private parties can be endowed with enough and secured rights to use and dispose of their land.

In this chapter, first through summarizing the evolution of central land policies on farmland transfer and its relationship with the legislation, the indispensable role of such policies in guiding the development of relevant laws is discussed. In comparison with the compulsory transfer/expropriation of farmland, the legalization of policies on market farmland transfer is faster once an initial regulation system has been established. This will be analyzed in the second section. An analysis of the restrictions on farmland transfer from both private law and public law will follow. As mentioned in chapter 1 (the Introduction), although doubts as to whether Chinese farmers should be empowered further in terms of farmland transfer still exist, the tendency is to give them a quasi-private right to use the farmland, primarily through central policies. Nevertheless, constraints or interventions by public powers still have a big impact on these private land rights. Such restrictive rules in both private law and public law will be introduced in the third and fourth section respectively. Usually these legal restrictions on the use and the transfer of farmland are in the name of certain public interests. However, these public interests cannot be sufficient grounds for such strict government control over farmland transfer. Meanwhile, although policies play a bigger role than legislation in the land management of China, a sound legal system for farmland transfer should be in place if further progress in rural land reform is attainable. These constitute the main particularities of the farmland transfer system in China, which will be discussed in the fifth section. On the whole, government regulation of farmland transfer in China is not balanced and a new perspective — a

governance perspective — is needed to improve this regulatory system. Certain concluding remarks will be provided in the last section.

4.1 Central policies on the transfer of farmland in China

After the implementation of the ‘reform and opening up’ policy in 1978, China has witnessed a great success in economic development. The average GDP increase per year is 9.6% from 1979 to 2004, which increased to 10.7% between 2002 and 2011 (Xu, 2012). During this development process, land has been attached to a crucial significance. The establishment of a land use rights system, the tenure security provided for land users and the formation of proper rules for land transactions are critical for developing a vibrant land market and promoting the whole economy. Historically, land has always been considered as a basic means of survival and a driving force of the prosperity of the whole country. In the future, land will continue to be central to China’s chase for a sustainable economic growth, social stability, and political integrity (Lin, 2009: xiv). With regard to farmland transfer, as the collapse of the commune system and re-emergence of farmers’ individual land use rights, a series of regulations were provided, in which land policies instead of legal rules play a more vital role. Below, through an analysis of the relationship between China’s legislation and policies, the special role played by (central) policies in farmland transfer is explained.

4.1.1 Relationship between land legislation and central land policies

Research on the legislative system in China requires an insight in the legislative policy. For that purpose, one needs to analyze the land policy of the ruling party in depth. It can be even said that to study the state’s legislation policies on land, in fact, is to study the ruling party’s land policies. This is not only true for China, but also for other countries, including both socialist countries and capitalist countries. Specifically, policy is contained in the principles and codes established by certain social groups in order to achieve certain benefits or to complete certain tasks. As Dworkin (1978: 22) pointed out, policy is that ‘kind of standard which sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)’. Meanwhile, as one means of social control, law contains the generally binding social norms established or approved by the state and implemented by the state’s authority. Its main content is to define the parties’ rights and obligations. From a historical perspective, policy has always had an important influence on the formation and the

development of law, especially in mainland China.⁷¹ Comparatively speaking, policies of the ruling party have a closer relationship with the law. Ruling parties implement their own policies through the organs of the state power, and use legal means to implement policy. Moreover, all laws are created against a certain policy background, and will be subject to the implications of the ruling party's policies. It can be said that the ruling party's policy is the core content of national laws and regulations (Jiang and Zhou, 2014). This has not only occurred in socialist countries. Even in capitalist countries, every law has its explicit or implicit policy background. Otherwise, it will be hard to understand how the law is generated and applied in practice.

In China, the essence of the party's policies and laws is the same. Both of them originate from the economic basis of a socialist society and serve for it. Their basic guiding ideology and value orientation, as well as the fundamental social purpose which they pursue are also the same. To some extent, maintaining the authority of the law is to safeguard the authority of the party's policies. The party's policies were and still are in an important position in the national governance. As the ruling party, from the perspective of the origins of law, it must learn how to make full use of the law to implement and achieve the party's policies under the background of 'building a socialist country with the rule of law' (Decision of the CCCPC on Number of Major Issues on Deepening the Overall Reform in 2013). In the case of China, the policy of the ruling party is the premise and the basis for the relevant legal system. Meanwhile, legislation is a necessary tool to achieve goals involved

⁷¹ From the perspective of historical development, China has always put the policy on an irreplaceable status, which can be seen from the development course of the relationship between China's policies and laws. In the first phase, which starts from the early establishment of base areas (*gen ju di*) in the late 1920s, the Communist Party repealed a series of laws promulgated by the Nationalist Party (or Kuomintang), and governed the base area through the making of policies. In the second phase, which starts from the early 1949, according to the Instructions of the Central Committee of the CPC (CCCPC) on the Abolition of the Statute-book and Determination of Principles of Justice in Liberated Areas (*zhonggong zhongyang guanyu feichu guomindang liufaquanshu he queding jiefangqu sifa yuanze de zhishi* 中共中央关于废除国民党《六法全书》和确定解放区司法原则的指示), in the case that people's laws are incomplete, the principle of the judiciary's work is: if there are programs, laws, orders or regulations, we should abide by the programs, laws, orders or regulations; if there are no programs, laws, orders or regulations, we should abide by the new democratic policy, which was believed to establish the principle of supremacy of law by most scholars. However, this principle of supremacy of law was determined by the Party's policy, which shows that in the relationship between policy and law, the later cannot really play a leading role. In the third phase, which is from late 1950s to the late 1970s, due to the impact of left thinking, the legal nihilism of the country as a whole began to take shape and flooded. Meanwhile, the public security organs where the law itself has a less effect have been seriously damaged during the Cultural Revolution (1966-1976). In the fourth phase, which is after 1978, although the policy is still the soul of national governance, the sound law as the human civilization and social progress have been paid more and more attention. Since the 1980s, the legislature drafted and issued a large number of laws. The Chinese legal system was established initially in a hurry. Policy still plays an irreplaceable role (Xu, 2005).

in specific policies. As the interaction between policy and law directly affects the level of the rule of law in a certain country, the guidance of policy should be well considered in China. Relevant policies shall be transformed into law in a timely manner, in order to better guide the development of the national legal system (Ma et al., 2015: 295).

The agricultural land policy is the related policy designed for the land management system and the ways and measures to realize the rights concerning agricultural land. In accordance with the formulation of the main body, China's agricultural land policy can be divided into the ruling party's policy and the governments' policy.⁷² The former mainly refers to the policy made and implemented by the ruling party in order to achieve specific political and economic objectives. These policies are more involved in the establishment of land management systems, which generally are the basic policies stipulating the concept and development direction for constructing the state's agricultural land system over a considerable period of time. As examples, the collectivization policy of agricultural land formulated in the mid-1950s, and the Household Responsibility System (HRS) established and implemented in the late 1970s. These policies were mainly enacted during the reform period of the agricultural management system. The government land policy is the policy made by the central or the local government and its specific authorities, which primarily provides specific measures for realizing the established land rights. According to the hierarchical relationship of its formulation and implementation power, it can be divided into the central government's agricultural land policy and the local one. The local governments' agricultural policies are essentially the specification of the policies of the central government (Huang, 2009: 33). Regarding the relationship between land law and land policies, the agricultural land policy is also the prerequisite for the construction of the agricultural land law system. On the one hand, the policy, especially the ruling party's policies on the use and the management of agricultural land provides the guiding principles for specific legislation; on the other hand, usually the legislation on agricultural land use is composed of the policies that have been experimented in practice. As will be analyzed below, a specific feature of the

⁷² According to the status and its contents, the agricultural land policy in China can also be divided into the agricultural land policy included in the comprehensive agricultural policy and the special agricultural land policy under the current policy system. The former is an integral part of the comprehensive agricultural industry policy, whose content is very principle and abstract. It shows the attitude and value orientation of the state to the agricultural land system during specific times. Although it is not operational in reality, it does have great guiding significance for the macroscopic agricultural land institutional arrangements, such as the No. 1 Document made by the CCCPC and the State Council over the years. The latter stipulates the provisions for the realization of various elements of agricultural land rights. Compared with the former one, this kind of policy provides more specific and clear instructions on the practices of realizing the agricultural land rights and the design of specific systems (Huang, 2009: 33).

(rural) land law in China is that the law-making process is to some extent the legalization of relevant land policies. With the legalization of the land policy that has been practically experimented, the interests and rights that are recognized in the policy can be better protected through legislation.

4.1.2 Development of policies about farmland transfer

From 1950 to the present, China has carried out four large-scale land reforms. Hence, the policies on rural land transfer have gone through four periods (Tan and Chen, 2005: 21). It should be noted that farmers' rights to transfer their land relates closely to the evolution of the collective system, especially during the period before and after the establishment of the People's Commune. However, the greatest impact on the current farmland transfer system is from the land policies that were issued after the adoption of the HRS.⁷³

Policies on (market) farmland transfer from 1984 to the early 2000s

In 1975, 15 farmers in Xiaogang Village (小岗村) of Fengyang County (凤阳县) initiated the 'all-round contract' (*da bao gan* 大包干) practice — an allocation of collective farmland to individual households through contracts, which laid the foundation for the implementation of the HRS in rural China. This opened a new era of China's rural land reform — a transformation from the vague collective ownership to a separation of a management right of individual households from the collective ownership (Dong, 1996: 916). It was in the Notice of the Central Committee of the CPC (CCCPC) on the Issuance of 'the Current Issues about the Rural Economic Policy' (*zhonggong zhongyang guanyu yinfa dangqian nongcun jingji zhengce de ruogan wenti de tongzhi* 中共中央关于印发《当前农村经济政策的若干问题》的通知) in 1983 that the HRS was confirmed at the central level and promoted nationally. At the end of 1983, villages that had adopted the HRS account for about 94.2% of the total villages in China (National Statistics Bureau of China, 1983; Bramall, 2004: 108). This means that the management right of individual households to their contracted land is successfully separated from the

⁷³ These four periods of the development of policies on farmland transfer are: (1) the early 1950s; (2) from mid-1950s to the late 1970s; (3) from the late 1970s to the early 2000s; and (4) from 2008 to the present. In the first period, the promulgation of the Land Reform Law in 1950 abolished the feudal landlords' private ownership of land and established farmers' private land ownership. According to this law, farmers not only can receive the land, but also have the right to operate, sell and lease the land (owned by them) freely. It means that farmers actually were given a right to transfer their land under the private ownership. Since 1955, the private land ownership of individual farmers was gradually transformed into land ownership of cooperatives, the People's Commune and finally a vague collective. In particular, in the People's Commune period, individual farmers had no legal relationship or property rights to the land. At that time, it was impossible to exercise the right to operate, sell and lease the collective land freely. Therefore, the policies on farmland transfer here mainly refer to the policy issued after the adoption of the HRS in the late 1970s.

collective ownership. Overall, land policies from the 1984 No. 1 Document to the early 2000s mainly concern the confirmation of farmers' rights to transfer their contracted farmland and the establishment of an initial regulatory system for the transfer of the farmland use right (FUR).

The main focus of the 1984 No. 1 Document⁷⁴ is on the extension of the period of this new land use right enjoyed by individual households. It states that the contract term of farmland shall be more than 15 years, and before the extension, individual households may ask for a reallocation of the contracted farmland which should be approved by the collective. Moreover, the contracted farmland can be subcontracted to other collective farmers under certain circumstances.⁷⁵ This is the first time that the concept of 'subcontract' appeared in the central document. Then, in the No. 5 Document of the Central Politburo of the CPC (中共中央政治局)⁷⁶ — 'Deepening the Rural Reform' (*ba nongcun gaige yinxiang shenru* 把农村改革引向深入) in 1987, a right to receive certain compensation for investments in the contracted farmland is given to the household who intends to or has to subcontract the land to other farmers or return the land to the collective.⁷⁷ It is actually a

⁷⁴ As a matter of fact, from 1982 to 1986, every year there is a No.1 Document issued by the CCCPC alone or sometimes together with the State Council to deal with rural issues. It reflects the important achievements of the rural reform, such as the application of the HRS, the abolition of People's Commune, and the initial construction of a new rural economic system to adapt to the development of a socialist market economy. The first round of five No. 1 Documents played a great role in promoting the rural economic development (Si and Nie, 2014).

⁷⁵ It clearly provides that 'To encourage concentrating land to farming experts gradually. During the contracted period, collective members who do not want to contract or contract less land due to their inability to farming or transfer to the other industries, can return their land to the collectives to arrange uniformly, or the members can find objects themselves to subcontract their land with the consent of the collective'. The full text of this document (Chinese version) is available at: http://www.china.com.cn/aboutchina/data/zgncgk30n/2008-04/09/content_14685167.htm.

⁷⁶ The Central Politburo of the CPC or the Political Bureau of the CCCPC, formerly called Central Bureau (*zhong yang ju* 中央局) before 1927, is a group of 25 people who oversee the Communist Party of China. Unlike the politburos (political bureaus) of other Communist parties, power within this politburo is centralized in the Politburo Standing Committee. According to the Party Constitution, the Central Politburo of the CPC and its Standing Committee exercise the authority of the CCCPC during the adjournment of the plenary session of the Central Committee. After the closing of the National Congress of the Communist Party of China (NCCPC), its power will be transferred to the Central Committee, and then transferred to the Politburo, and finally transferred to the Standing Committee of the Politburo. That is, the power of the NCCPC has to be transferred three times, as the first three agencies do not have a standing body to perform its functions. After the founding of the PRC in 1949, members of the Politburo generally hold the main position in national institutions such as the National People's Congress, the State Council, Chinese People's Political Consultative Conference, Central Military Commission, and departments of the CCCPC or provincial party and government organs. They are usually called 'Party and state leaders'. It can be said that the idea in this 1987 document has a national strategic significance as a part of the highest level of central policies.

⁷⁷ It provides that 'If the contractor who managed the contracted land increases investments in land and improves land productivity during the contracted period, when the land is subcontracted, the collective or the

stimulation provided by the central leaders for farmers to invest in the land that they cultivate. More importantly, the contractual relationship between the collective and individual households is further stabilized, as the household is allowed to continue to contract the same piece of land after the 15-year contract expires. Apart from the further stabilization of the household management of the contracted farmland, experiments in moderate-scale farming developed in certain coastal provinces and cities were approved by the State Council. To some extent, the transfer, more precisely, the subcontract of farmland to other collective farmers was also regarded as a way to promote scale farming by Chinese leaders.

A big step forward concerning the transfer of the contracted farmland is provided by the Numbers of Policies and Measures of the CCCPC and the State Council on the Current Development of Agriculture and Rural Economy (*zhonggong zhongyang guowuyuan guanyu dangqian nongye he nongcun jingji fazhan de ruogan zhengce cuoshi* 中共中央、国务院关于当前农业和农村经济发展的若干政策措施) which was issued in 1993. The farmer contractor is allowed to assign/transfer (permanently) his contracted farmland with compensation after acquiring the permission of the contract-issuing party (the collective), under the premise of adhering to collective land ownership and no change of land use purpose. Moreover, the land contract can be extended for another 30 years when the first 15-year period has expired. This enlargement in farmers' rights to transfer their land use rights relates closely to the rise and development of township and village enterprises (TVEs) and the migration of agricultural labors since 1980s.⁷⁸ Meanwhile, moderate-scale farming is still encouraged in areas where most of agricultural labors can get access to off-farm jobs. In the Notice of the Ministry of Agriculture (MOA) on Advices to Stabilize and Improve Land Contract Relations (*guanyu wen'ding he wanshan tudi chengbao guanxi yijian de tongzhi* 关于稳定和完善的土地承包关系意见的通知) in 1995, the 30-year contract term was further confirmed. A new policy called 'the increase in population does not mean an increase in the land area (that a household can hold), and the decrease in population does not mean a decrease in the land area (that a household can hold)' (增人不增地, 减人不减地) was proposed, with a view to stabilizing the contractual relations of farmers to the contracted farmland. Accordingly, the land reallocation within the collective is limited to certain situations, such as the distribution of the contracted land is severely uneven due to the increase or decrease in population. More

new contracting household should give appropriate compensation to the contractor'. The full text of this document (Chinese version) is available at: <http://www.51wf.com/print-law?id=1164257>.

⁷⁸ For the rise and development of the TVEs in China, see Zuo (Township and Village Enterprises in China's Sustainable Development).

importantly, the term of ‘Right to Contract and Manage Land (RCML)’ is used for the first time in central policies, which replaced the ‘land use right’ used before.⁷⁹ The establishment of a sound transfer mechanism for the RCML is also emphasized in this notice.

In total, at least four aspects concerning the establishment of a sound transfer mechanism for the RCML, including the FUR in this research, are mentioned in this notice. First, as the transfer of the RCML is a continuation and a further development of the HRS, it should be included in the contract management system of farmland. Second, with the consent of the contract-issuing party and without the change of land ownership and land use purposes, the contracted land can be subcontracted, assigned, exchanged or contributed as a share during the contract period. Moreover, it clearly provides that the legal rights and interests of the contractors’ heirs should be protected.⁸⁰ However, combined with the following regulations in the Rural Land Contracting Law (RLCL) in 2002, the contracted land here only refers to the land obtained through bid invitation, auction or public consultation, which can be inherited as these contracted land (use rights) are obtained based on market transactions (Article 31 and 50). The contractor has to invest more during the longer contract period to acquire the return. In order to activate the enthusiasm of the contractor, the heirs should be allowed to continue the contract.⁸¹ Third, a written contract shall be concluded regarding the form of the transfer and the transfer fee. It is based on the negotiation of both parties, who should report the contract to the contract-issuing party and the local management department of agricultural contracts for a record. Last but not least, a ceiling of transfer fee is required to be set in local areas when the RCML is transferred. The contractor — the individual households — cannot use the contracted land to repay their debts. That is, the contracted land cannot be sold for repaying the debts of the contractors.

Based on this initial mechanism, two more notices from the CCCPC and the MOA further enrich this transfer mechanism. The Notice of the CCCPC about Bettering the Work of Transferring the Farmers’ Contracted Land Use Right

⁷⁹ It is worth noting that in the General Principles of the Civil Law (GPCL) promulgated in 1986, the term of ‘the Right to Contract and Manage Land’ has been used in Article 80 for depicting the right of citizens and collectives to use the land under collective ownership or the state-owned land used by the collective. The full text of this law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

⁸⁰ For the land (including farmland, wasteland, orchards, tea plantations, mulberry fields, and so on), mountains, grasslands, tidal flats, the water and the collective-owned livestock, irrigation facilities and farm machinery contracted by the contractor individually, in case the contractor died within the contract period, the heirs may continue to perform the contract until the contract expires.

⁸¹ The RLCL provides different provisions for the inheritance of the land contracted by households and land contracted through the other means. The contractor of the household contract is the household within the collective and it will contract with the collective as a unit. So each family member can be considered as the contractor and the death of the head of the household or the other family members does not affect the transfer of the contracted land use right. The contract by the other means is usually based on an individual contract. Thus, different rules will be applied to the inheritance under these two circumstances. The household contract adopts Article 31 and the contract by the other means will be applicable to Article 50. This will be further analyzed below in this chapter (4.3.6).

(*zhonggong zhongyang guanyu zuohao nonghu chengbaodi shiyongquan liuzhuan gongzuo de tongzhi* 中共中央关于做好农户承包地使用权流转工作的通知) issued in 2001 clearly proposes the basic principle of farmland transfer — the transfer must be conducted according to law and on a voluntary and compensatory basis, in addition to the adherence to the HRS. It explicitly shows that the ‘law’ that should be observed includes not only relevant laws and regulations, but also the central policies. This reflects the dual regulation by the central policies and the national law concerning the transfer of the contracted farmland. As regards the willingness of farmers to transfer, it officially declares that only the farmer contractors are entitled to transfer their contracted land. That is, the transfer must be based on farmers’ own will. In the contract period, farmers have independent rights to use, seek profits, and decide whether to transfer and the form of transferring the land. This is a concrete manifestation that farmers have a long-term and secured land use right. No organizations or individuals can force them to transfer their land. The land revenue of farmers includes the benefits from the direct management of the contracted land and the proceeds from the land transfer. The transfer of land use rights should be paid, and the transfer fee should be determined by free negotiations of the parties to the contract. Farmers as the actual transferor of farmland are entitled to receive all the profits from the transfer. The collective leaders or local officials should not intervene in the transfer and subtract the transfer income. In order to put these policies into practice, the leadership of local party committees and local governments in the transfer of farmers’ contracted land is strengthened in this notice. Under this leadership, a general administration system is established for farmland transfer.

First, in order to further stabilize the household management of farmland, a certificate of the RCML is required to be issued by relevant departments of local governments. Second, the transfer must be based on the willingness of individual households. The village collective or the township government cannot take back farmers’ contracted land illegally and transfer out the land for its own profits. Third, local governments should not encourage and organize enterprises or urban residents to lease farmers’ contracted land in rural areas. In particular, the long-term and large-scale lease and management of the contracted land by industrial and commercial enterprises are not encouraged by the central government. Fourth, a division of responsibilities among different departments of local governments concerning the regulation of farmland transfer is provided: (1) The township party committees and governments are responsible for implementing the central land policies, securing a rational use of rural land and providing legal and policy services for the transfer. (2) The agricultural administration departments of local governments at all levels should provide guidance on the conclusion of transfer contracts; deal with the alteration, the dissolution and the authentication of contracts; establish archives of the transfer contracts; and mediate and handle transfer disputes properly. (3) The land management departments should strengthen the management of rural land expropriation and requisition, with a view to preventing the unauthorized

changes in the land used for agricultural purposes under the pretext of land transfer. It is obvious that an initial regulation system has been created for farmland transfer, based on a division of responsibilities among local departments.

The Notification of the MOA about the Implementation of the 2001 Notice of the CCCPC about Bettering the Work of Transferring the Farmers' Contracted Land Use Rights issued in 2002 is a further explanation as to the regulatory system provided in the 2001 Notice of the CCCPC. It provides a more detailed guidance on the conclusion of transfer contracts, especially in terms of the essential content and form of the contract. For instance, a unified form of transfer contracts provided by the agricultural administration department of the provincial governments is promoted. Besides, in addition to the requirement for the certification of the RCML, a registration of the lease of the contracted farmland by local governments is encouraged, rather than an archive system established for the transfer contracts.⁸²

Based on the analysis above, an initial regulation system has been established by the series of central policies. It has two distinctive features: first, the willingness of individual households to transfer farmland is particularly emphasized and their transfer rights are gradually enlarged. Second, the transfer process is increasingly regulated with the intervention of local governments through land administration. More importantly, most of these policies are adopted by the RLCL promulgated in 2002. Later, two more regulations were issued by the MOA — Measures of the PRC for the Administration of the Certificates of the Right to Contract and Manage Rural Land in 2003 and Measures for the Administration of Transfer of the Right to Contract and Manage Rural Land in 2005 — to better guide the transfer of the contracted farmland in practice.⁸³ Therefore, the right of individual households to

⁸² Concerning the contracted farmland, as it is primarily allocated and managed through contracts, an archive system is required to be created. Also, according to the 2001 Notice of the CCCPC, the management of farmland transfer contracts should also be based on archives. That is, the management of contracted farmland in rural China relies on the contract between the collective/the contract-issuing party and individual households/the contractor, instead of a cadastre management based on the registration of land. Therefore, the registration of farmland lease highlighted in the 2002 Notification of the MOA cannot be regarded as a modification registration, as there is no initial registration. The registration of the contracted farmland in rural China will be further discussed in chapter 5.

⁸³ The RLCL focuses more on the household management of contracted farmland, more accurately, the contractual relationship between the contract-issuing party (the collective) and the contractor of farmland (individual households). Specifically, after the General Provisions for the household management of farmland and the protection and use of farmland in Chapter I, Chapter II provides detailed rules on the household contract. Section 1 is about the rights and obligations of the contract-issuing party and the contractor; Section 2 is the principles and procedures for contracting; Section 3 relates to the term and the conclusion of the contract; Section 4 concerns the protection of the right to contract and manage land; Section 5 provides certain regulations on the transfer of the right to contract and manage land. Then, in Chapter III, contracts by other means are regulated, such as bid invitation, auction and public consultation. Chapter IV focuses on the settlement of disputes and legal responsibility involved in the management and use of the contracted farmland. Chapter V provides some supplementary provisions. The 2003 Measures of the

contract and manage the contracted farmland/the FUR, which was confirmed and protected by central policies, is now legalized and better regulated by law. However, as argued in chapter 3 (3.3), even with those protective policies and their legalization by the RLCL, the nature of the FUR is still not clearly defined. Besides, the transfer process is mainly regulated through a land administration system. Although the issuance of the Property Law (PL) in 2007 finally recognized the FUR of Chinese farmers as a usufruct — a real property right, no more rules is provided in terms of its transfer.

Policies on (market) farmland transfer from the 2008 Decision of the CCCPC

Based on the initial regulation system established in the previous central policies and the legal rules and regulations mentioned above, policies on farmland transfer from 2008 primarily focus on the implementation of this regulation system. This is directly reflected in five aspects:

First, the perpetual nature of the contractual relationship between the collective and individual households is especially emphasized. Moreover, the registration of the FUR promoted by the central government further stabilizes the land use rights of Chinese farmers. The Decision of the CCCPC on Several Major Issues of Rural Reform and Development (*zhonggong zhongyang guanyu tuijin nongcun gaige fazhan ruogan zhongda wenti de jue ding* 中共中央关于推进农村改革发展若干重大问题的决定) issued in 2008 (2008 Decision) clearly states that, ‘giving farmers more full and secure rights to contract and manage land, and the existing land contractual relationship should keep stable and permanently constant.’⁸⁴ This reveals the intention of the central government to perpetuate farmers’ land use rights. It also mentions land titling and land registration in rural areas, although there are no detailed rules. In the 2009 No. 1 Document⁸⁵ and the 2010 No.1

MOA provides a further guarantee for a stabilized use of the contracted farmland by individual households. The certification of the RCML also contributes to the transfer of farmers’ land use rights. Meanwhile, the 2005 Measures of the MOA provides a relatively comprehensive regulation on the transfer of the RCML, on the basis of the previous central policies and the law and regulations above.

⁸⁴ This Decision together with the following 2009 No. 1 Document are arguably a part of the contemporary Chinese law regarding rural land use rights, as the Chinese government officials always consider similar documents as having the force of law. However, it is not technically binding as the issuing body — the Party (CPC) — is not empowered by the Constitution or the Legislation Law to make laws. As for the State Council who jointly issued the 2009 No. 1 Document, according to Article 89 of the Constitution, it is authorized to adopt administrative measures, enact administrative rules, and regulations and issue decisions and orders in accordance with the Constitution and the law. And such documents have the force of law. Even so, the 2009 No. 1 Document cannot be recognized as a legal document, because it was not issued as a regulation or the other types of legally binding document (Dean and Damm-Luhr, 2010: 121).

⁸⁵ The Certain Opinions of the State Council and the CCCPC on Promoting the Stable Development of Agriculture and Continuing to Increase Farmers’ Incomes in 2009 (*zhonggong zhongyang guowuyuan guanyu 2009 nian cujin nongye wen ding fazhan nongmin chixu zengshou de ruogan yijian* 中共中央、国务

Document,⁸⁶ pilots on the registration of the FUR in local areas were proposed.⁸⁷ With the aim of implementing the requirements for this registration pilot, Views of the MOA about Carrying out the Registration Pilot Project of the Right to Contract and Manage Rural Land (*nongyebu guanyu kaizhan nongcun tudi chengbao jingyingquan dengji shidian gongzuo de yijian* 农业部关于开展农村土地承包经营权登记试点工作的意见) was issued in 2011, to provide advice for relevant issues on the registration of the FUR.⁸⁸ According to the recent 2013 No.1 Document,⁸⁹ the whole registration of the RCML has to be finished within 5 years. It can be expected that this registration process will be implemented across China gradually and experiences from the pilot areas may accelerate this process. Here the first indispensable supporting institution for transfers of farmland — land

院关于 2009 年促进农业稳定发展农民持续增收的若干意见, 2009 No. 1 Document) was promulgated on 31 December, 2008 and made public on 2 February, 2009. Compared to the 2008 Decision, the 2009 No. 1 Document covers a narrower range of issues, but provides greater details for these issues. It mainly focuses on the support and protection of agriculture, the increase of agricultural production, the material support and service systems for agriculture, the basic rural management systems and unifying social and economic development of rural and urban areas (Damm-Luhr, 2009).

⁸⁶ The Certain Opinions of the State Council and the CCCPC on Balancing Urban and Rural Development and Further Consolidate the Foundation of Agriculture and Rural Development (*zhonggong zhongyang guowuyuan guanyu jiada tongchou chengxiang fazhan lidu jinyibu hangshi nongye nongcun fazhan jichu de ruogan yijian* 中共中央、国务院关于加大统筹城乡发展力度 进一步夯实农业农村发展基础的若干意见, 2010 No. 1 Document) was promulgated on 31 December, 2009.

⁸⁷ The registration of collective land ownership is also strengthened in these two No. 1 Documents. In fact, the registration of collective land ownership and the registration of collective construction land use rights have been regulated by the 1986 LAL (Article 9 and 10) and the 1998 LAL (Article 11-13) respectively. In November 2001, the Ministry of Land and Resources (MLR) issued the Notification on Speeding up the Registration and Certification of the Collective Land Ownership in Accordance with Law (*guanyu yifa jiakuai jiti tudi suoyouquan dengji fazheng gongzuo de tongzhi* 关于依法加快集体土地所有权登记发证工作的通知). This means the starting of the registration and certification of collective land ownership. However, in terms of the registration of the FUR, it only began in 2009. In addition to the requirement for the certification of the FUR as provided by the 2002 Notification of the MOA, the pilots on the registration of the FUR actually refers to the registration of the contracted farmland through land survey. According to the 2010 No.1 Document, the contracted plot, area, contracts and certificates of the FUR should be identified and issued to individual households. Here the identification of the contracted plot and contracted area obviously requires a land survey.

⁸⁸ The main content of the registration experiments includes: carrying out the clean-up of land contract files; identifying the area and spatial location of contracted land; establishing and improving the register of the RCML; completing the alteration registration and cancellation registration of the RCML; accomplishing the titling, registration and present certification for the land contracted through bid invitation, auction and public consultation; and bettering the filing of the registration information of the RCML.

⁸⁹ The Certain Opinions of the State Council and the CCCPC on Accelerating the Development of Modern Agriculture and Further Enhancing the Vitality of Rural Development (*zhonggong zhongyang guowuyuan guanyu jiakuai fazhan xiandai nongye jinyibu zengqiang nongcun fazhan huoli de ruogan yijian* 中共中央、国务院关于加快发展现代农业,进一步增强农村发展活力的若干意见, 2013 No. 1 Document) was promulgated on 31 January, 2013.

titling and registration in rural China — is emphasized. Only with a definite titling and certification can land be transferred more fluently and successfully. Undoubtedly, this contributes to the construction of a sound transfer mechanism for the FUR.

Second, in addition to the subcontract, lease, exchange, assignment and contribution as a share of the FUR that have been gradually allowed by the central policy and confirmed by the RLCL,⁹⁰ farmers are further allowed to mortgage and use their land rights as collateral. In the Decision of the CCCPC on Number of Major Issues on Deepening the Overall Reform in 2013 (*zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jue ding* 中共中央关于全面深化改革若干重大问题的决定) (2013 Decision of the CCCPC), the prohibition on the mortgage and other security rights of the FUR was abandoned. Besides, farmers may also contribute the FUR to various agricultural enterprises to promote the industrialization of agriculture.⁹¹ As mentioned in chapter 3 (3.2.3), in order to guarantee the landholding of individual farmers, the right to contract and manage land (RCML, including the FUR) is separated into the right to contract land and the right to manage the contracted land in the 2014 No.1 Document.⁹² Specifically, the initial contractor — the collective household — can keep its right to contract land and transfer its right to manage land to other farmers or

⁹⁰ It is worth noting that in the 2007 PL, only the subcontract, the assignment and the exchange of the FUR are provided. The lease and contribution of the FUR as a share are not mentioned. The full text of the RLCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm; and the full text of the PL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm.

⁹¹ In the earlier 2013 No.1 Document, large professional households and farmers' organizations are encouraged to be established to conduct agricultural production. In particular, the construction of farmers' professional cooperatives is underscored. Furthermore, the contracted farmland of individual households is supported to be transferred to these large agricultural business entities, to promote scale farming in China. Besides, land exchange (technically the swapping of farmers' different plots) between households/contractors (as the key step of a land consolidation process) is proposed and accentuated for the first time in central policies. In my opinion, it is the first issue that should be dealt with by the government for a further development of farmland transfer.

⁹² As a matter of fact, the division of the FUR into a right to contact land and a right to manage land first appeared in the written statement on the implementation of the SCNPC inspection team's report on the inspection of the enforcement of the Land Administration Law (LAL), which was published on 19 December, 2000 by the MLR. The sixth part of this statement involves the issues on strengthening of the collective land tenure system in the mainland China. It states that to strengthen the study of the collective land tenure system is one of the major tasks of the MLR after the implementation of the new LAL. The Ministry was trying to carry out the research and pilot projects of joint-stock cooperative systems of collective land in rural areas in consultation with relevant departments, in order to establish China's collective land ownership system and further improve the management of rural collective land. The basic idea is to explore the establishment of a land rights system (based on the separation of three rights: the collective land ownership, the land use rights and the right to manage land) linked to the two-level management system — a centralized management by the collective and a decentralized management by individual households.

agricultural enterprises. When the FUR is mortgaged in financial institutions for financing, only the land management right is mortgaged. Even if the mortgagor cannot repay the loans within the prescribed period, the mortgagee may only obtain the profits from operating the land within a certain period of time without involving the right to contract land. This obviously can protect individual farmers from losing their land use rights forever in the transfer process, except in the case of permanent transfers like the exchange and the assignment of the FUR. However, currently there are barely any financial institutions that are willing to accept this kind of mortgage, unless it is supported by governments. This will be further discussed in the third section (4.3).

Third, in addition to emphasizing the importance of rural stability and providing a constant term of farmers' land use contracts, the 2008 Decision of the CCCPC also stressed the establishment and the improvements in the transfer market for the contracted farmland. In addition, the management and services for transferring farmland by means of subcontract, lease, exchange, assignment or joint-stock cooperatives were also underscored. The 2009 No. 1 Document provides more details for the creation of a transfer market for the FUR, especially the development of service organizations of transfer, which aimed at providing services for the transferring party, such as information sharing, consultancy on rules and regulations, valuation, contract signing, and dispute resolution (Damm-Luhr, 2009). To some extent, this requires the introduction of a market-oriented mechanism and the establishment of a trading platform for farmland transfer (Fang, 2010). A final purpose of the market-oriented mechanism is to realize the market value of farmland resources. In addition, it is aimed at improving the land productivity and the labor productivity by taking the market as the basis for the allocation of land resources; safeguarding the status of individual households as the main body of farmland transfer through protecting the legitimate rights and interests of farmers and reducing the intervention from governments; and constructing an open, fair and impartial trading system by creating a comprehensive system for evaluating the price of farmland. As another indispensable supportive institution for land transfer, the importance of establishing a rural land transfer market is highlighted here.

With the aim of establishing a sound transfer market for the FUR, in addition to the titling and registration of the FUR, the status of farmers as the main subject of transfer should be secured firstly. Second, more capable transferees who can add the land value, such as the professional and large growers, the cooperative economic organizations and leading enterprises, can be trained or created in order to develop highly efficient agriculture. Third, with the increase in the transfer scale, regional intermediary organizations are needed to connect the participants in the transfer process. The intermediary service organizations should first choose a relatively stable market place,

and release the land market information on a regular basis in order to increase the transparency of land transactions. Moreover, it should develop trading rules to clarify the transaction procedures, which include the establishment of relevant institutions such as consulting, agency, arbitration and premium assessment system. Fourth, the core of this market-oriented transfer mechanism lies in a reasonable pricing mechanism. A farmland evaluation system should be established to determine the market price of farmland based on scientific methods, which can improve the transparency and operability of the rural land market. Last but not least, the government should strengthen the management of this transfer market due to the drawbacks of market economy. It may provide guidance about the formalities for land transfer, supervise the change of farmland use purpose and improve the arbitration system for farmland transfer disputes, in order to protect the legitimate rights and interests of both parties (Fang, 2010; Zhang, 2012: 41).

Fourth, the government administration of farmland transfer is further expanded. In the Notification of the MOA on Bettering the Management and Services of Transferring the Right to Contract and Manage Land (*nongye bu guanyu zuohao dangqian nongcun tudi chengbao jingyingquan liuzhuan guanli he fuwu gongzuo de tongzhi* 农业部关于做好当前农村土地承包经营权流转管理和服务工作的通知) released in 2008, a more detailed regulation on farmland transfer is provided. In particular, the focus on establishing a transfer contract system and a recordkeeping system, the creation of a sound and standardized procedure for transfer and the improvements in the dispute resolution mechanism are noteworthy. Meanwhile, the agricultural sector at all levels, especially the rural management department, should strengthen the leadership in promoting the management and services for farmland transfer. To some extent, this notification is a further explanation of relevant rules provided in the Measures of the MOA for the Administration of Transfer of the Right to Contract and Manage Rural Land in 2005 (2005 Measures of the MOA). Specifically, five aspects are highlighted in terms of establishing a standardized procedure for the government management of farmland transfer: (1) A unified form or a model text of transfer contracts shall be promoted by the agriculture department of provincial governments. (2) The guidance on the conclusion of transfer contracts shall be connected with the services concerning information sharing, consultancy on rules and regulations, and valuation; and the contract shall be concluded on the basis of independent negotiations of the parties to transfer. (3) In the process of concluding a farmland transfer contract, a verification of the contract may be provided by the department of rural land contracting management of governments at the county or township level, and specified staff should be in charge of handling the applications. During the verification, advices shall be provided timely in the case of violations. (4) The examination of the use of the transferred land shall be highlighted in order to prevent the change of agricultural use of land. (5) The department of rural land

contracting management of county or township governments shall put the transfer contracts and relevant materials in archives, and establish a register for all transfers. If the transfer is made by means of subcontracting, leasing or other ways, the department shall record that in the archives in time. If the transfer is made by means of exchanging or assignment, the department shall handle the change of original contracts (between the contractor and the contract-issuing party) and the certificate of the FUR in time. In the meantime, a multi-channel resolution mechanism dominated by arbitration shall be created or improved to deal with the various disputes in farmland transfer. It can be said that this management system of local departments covers almost every aspect of the farmland transfer process.

Fifth, with the development of farmland transfer, a reform in the property-rights system of collective land has been promoted since the 2010 No. 1 Document. Local pilots are also encouraged in areas with proper conditions. According to the latter 2013 No. 1 Document,⁹³ here it means a joint-stock cooperative system reform of the collective system. As I argued in chapter 3 (3.5), reform of the collective in accordance with a joint-stock cooperative system is mainly aimed at improving the governance structure of individual collectives. It also facilitates the contribution of the FUR as a share in the cooperative if the collective farmers decide to contribute their contracted farmland. In the 2013 No. 1 Document, three rights of farmers are recognized, including the RCML (including the FUR), the homestead use right and the right to distribute collective profits.⁹⁴ In order to identify and protect farmers' rights to collective profits, a collective land registration and certification system, including the registration of collective land ownership, the registration of the RCML and the collective construction land use right (including the homestead), is supported and sponsored by the central and local governments. More notably, in order to implement this joint-stock cooperative system, a management system of rural collective funds, collective assets and collective resources (the so-called 'three assets [*san zi* 三资])⁹⁵ is refined. It focuses on the verification of collective

⁹³ There is no related regulation regarding farmland transfer in the 2011 No.1 Document and 2012 No. 1 Document, which focus on the reform and development of water conservancy and the innovation of agricultural science and technology respectively.

⁹⁴ The right to distribute collective profits was first proposed on the Central Conference on Rural Issues (*zhongyang nongcun gongzuo huiyi* 中央农村工作会议) in December 2011 by the former Premier Wen Jiabao. It mainly originates from the collective land ownership, which is still an unclear concept under the current law. According to Article 59, 62 and 63 of the Property Law, although farmers have the right to make decisions on collective significant matters, the membership rights, the nature and content of the membership right, the qualification of collective members, and the legal remedies to this right are still blurred. Apart from the FUR and the right to use homestead, farmers' rights to distribute collective profits as the member of collectives should also be identified and protected (Chen, 2013).

⁹⁵ In detail, the rural collective fund refers to the entire monetary fund owned by the collective, which consists of cash and bank deposits. The collective assets include the fixed assets invested by the collective

property, the quantification of collective assets and the management of stock rights. To some extent, these improvements in the overall governance structure of collectives contribute to the establishment of a sound transfer mechanism for the contracted farmland, as the illegal interference by local cadres in the transfer process can be prevented.

By and large, the central policies since the 2008 Decision of the CCCPC are aimed at better implementing the relevant legal rules, including the 2002 RLCL, the 2003 Measures and the 2005 Measures of the MOA, and the 2007 PL, in practice. In addition to the legal recognition of the nature of the FUR as a real property right and the transfer rights of individual households attached to their FURs in the PL, most of the legal rules are provided by administrative laws and regulations. In other words, the regulation system on market farmland transfer in China features a strict government administration, which may infringe farmers' land rights if it is not well implemented. I will discuss this further in chapter 5. More notably, with the issuance of the Opinions about Guiding an Orderly Transfer of Rural Land Management Rights and the Development of an Appropriate-Scale Management of Agriculture (*guanyu yindao nongcun tudi jingyingquan youxu liuzhuan fazhan nongye shidu guimo jingying de yijian* 关于引导农村土地经营权有序流转发展农业适度规模经营的意见) in November 2014, a more comprehensive system for regulating the transfer of the FUR is created.

The latest regulation system for farmland transfer

This Opinion on guiding the transfer of the land management right (the 2014 Opinion) is issued by the General Office of the CCCPC together with the General Office of the State Council. It is the latest and currently the most comprehensive central policy concerning the transfer of farmers' contracted farmland. With the division of the FUR into a right to contract land and a right to manage land in the 2014 No.1 Document, this Opinion exclusively focuses on the transfer of the land management right, on the basis of a stabilized right to contract land. In the first part — the General Requirements, four principles behind this guidance are laid down:

such as village houses, buildings, machinery and equipment; other basic public facilities like water conservancy, transportation, culture and education; and other assets like agricultural assets. The collective resources are the land, forest, mountains, grassland, wasteland, beach, water and other natural resources owned by the collective according to laws and regulations. Actually, in 1995, the State Council had issued the Notice on Strengthening the Management of Rural Collective Assets (*guowuyuan guanyu jiaqiang nongcun jiti zichan guanli gongzuo de tongzhi* 国务院关于加强农村集体资产管理工作的通知), which is aimed at preventing the serious loss of collective assets. Then, the MOA issued the Views on Further Strengthening the Guidance on the Management of Rural Collective Funds, Assets and Resources (*nongyebu guanyu jinyibu jiaqiang nongcun jiti zijin zichan ziyuan guanli zhidao de yijian* 农业部关于进一步加强农村集体资金资产管理指导的意见) in 2009, which provides a detailed instruction on the rural collective property.

(1) the adherence to the collective land ownership, the stabilization of the right to contract land and the flexibility of the right to manage land; (2) encouraging the initiative of farmers in farmland transfer and supporting grassroots pilots; (3) the transfer shall be voluntary, compensatory and in accordance with law, and under the government guidance, land shall be allocated through markets; (4) an appropriate-scale management of farmland should be upheld. This reflects China's long-lasting pursuit of scale farming. In the second part — stabilization of the land contractual relationship, the registration and certification of the FUR are emphasized with more detailed guidance. The third part — guidance on an orderly transfer of the right to manage land — is the first key part of this Opinion. In addition to the encouragement in innovating the transfer means, the regulative rules on the transfer process with the aim of protecting farmers' independent decisions, the strengthening of local administration and services for farmland transfer, and the intensification of the control over the change of land use purpose, a reasonable scale of farming in the Chinese context is defined for the first time.⁹⁶ The fourth part concerns the nurturing of new agricultural business entities, such as the family farm, joint-stock cooperatives based on a quantification of all the contracted farmland in a collective, farmers' professional cooperatives, and the cooperation between farmers and leading enterprises in agriculture. More importantly, regarding the lease of the contracted farmland by industrial and commercial enterprises (ICEs), certain supervisory and risk-preventive measures are proposed to protect the rights and interests of individual households.⁹⁷ As the last part of this guidance, the establishment and improvement in a social service system for the agriculture are highlighted. It can be said that a relatively complete regulation of market farmland transfer is provided by the central agency, based on this latest policy.

Central policies on compulsory transfer/expropriation of farmland in China

Based on the analysis above, the use of collective land including the contracted farmland is overall managed by local governments through a strict land administration system. The making of the Land Administration Law (LAL) in 1986 and its revision in 1998 — the 1998 LAL — provide an overall structure for this

⁹⁶ Due to the local differences in the natural, social and economic conditions, it is impossible to develop a unified standard all over the country. According to the 2014 Opinion, local governments may determine the standard for an appropriate scale of farming in local areas. At this moment, the key support should be given for the farming scale that equivalent to 10 to 15 times of the local average contracted area per household and the income from farming that equivalent to the local income from the second and tertiary industry.

⁹⁷ Article 16 of the 2014 Opinion requires that the supervision over the long-term and large-scale transfer of farmland by ICEs shall be strengthened. In terms of the specific measures it proposed for reducing the risk involved in such transfers, most of them are from the trading rules of local Agriculture Equity Exchange such as the Wuhan Comprehensive Agriculture Equity Exchange. This will be further discussed in chapter 6.

administration system. In particular, the establishment of a land use control system has a direct impact on the transfer of the contracted farmland.⁹⁸ More interference from governments in farmland transfer is the land expropriation power given to the state (represented by governments) in the Constitution. In other words, policies and legal rules for the compulsory transfer of farmland also have an important impact on the exercise of farmers' land rights. Compared to the regulation of market farmland transfer, more strict rules and restrictions are imposed on the exercise of farmers' land rights in the process of land expropriation.

As will be discussed in section 4 (4.4), after the emergence of the expropriation power in the 1982 Constitution, it was further regulated by the 1986 LAL and the current 1998 LAL. A basic framework was established for land expropriation in the 1998 LAL. It is characterized by an absolute state monopoly over the transfer of collective land including the farmland, a relatively low compensation (standard) and underdeveloped resettlement mechanisms (Zhang, 2013). Before the promulgation of the Property Law (PL) in 2007, a series of central policies developed mainly by the State Council and the Ministry of Land and Resources (MLR) were introduced to improve the basic structure of land expropriation. For instance, the Decision of the State Council on Deepening Reform and Strengthening Land Administration (*guanyu shenhua gaige yan'ge tudi guanli de jue ding* 关于深化改革严格土地管理的决定) and the Guidelines of the MLR on Improving the System of Land Compensation and Resettlement (*guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian* 关于完善征地补偿安置制度的指导意见) in 2004; the Notice of the State Council on Strengthening the Regulation of Land Related Issues (*guowuyuan guanyu jiaqiang tudi tiaokong youguan wenti de tongzhi* 国务院关于加强土地调控有关问题的通知) and the Notice of the General Office of the State Council on Specifications for the Management of the Income and Expenditure from the Transfer of State-owned Land Use Right (*guowuyuan bangongting guanyu guifan guoyou tudi shiyongquan churang*

⁹⁸ In order to protect the dwindling amount of farmland and further improve the land quality, the Notice of the CCCPC and the State Council on Further Strengthening the Land Management and Farmland Protection (*zhonggong zhongyang guowuyuan guanyu jinyibu jiaqiang tudi guanli qieshi bao hu gengdi de tongzhi* 中共中央国务院关于进一步加强土地管理切实保护耕地的通知) was published in May 1997. In terms of land management, the making of an overall land use planning is emphasized, in which the supplement of occupied farmland through land development and reclamation, the protection of basic farmland and land consolidation are adopted to guarantee the overall quantity and quality of farmland in China. Moreover, in order to limit the expansion of construction land (both in the urban and the rural areas), a strict land use control system was proposed. As a supplement, the making and implementation of both the urban construction planning and the rural construction planning are also strengthened. These regulations are further adopted by the 1998 LAL (Article 4), which is still the main legal basis for restricting the change of land use purpose during the farmland transfer process. The full text of the 1998 LAL (English version) is available at: <http://www.lawinfchina.com/display.aspx?lib=law&id=7125&CGid=>

shouzhi guanli de tongzhi 国务院办公厅关于规范国有土地使用权出让收支管理的通知) in 2006.⁹⁹ In the 2007 PL, a full compensation for the expropriated land, subsidies for resettlement, compensations for the above-ground fixtures of the lands and seedlings, and the arrangement for social security fees for the affected farmers were proposed. This primarily concerns the expropriation of collectively-owned land.¹⁰⁰ This can also be regarded as a legal recognition of the earlier central policies concerning land expropriation and compensation.

In the 2008 Decision of the CCCPC, the focus of land expropriation reform was on the narrowing of the expropriation scale. That is, only collective land that was planned to be used for a public purpose could be expropriated. Meanwhile, for the development and the management of those non-public welfare projects which are approved to use the collective land in rural areas (beyond the scope of the land used for urban construction as determined in local land use planning), farmers involved are allowed to participate through various means. In other words, certain collective construction land use right later can be transferred freely on a unified urban and rural land market.¹⁰¹ In the 2013 No.1 Document, the reform of land expropriation system is regarded as one part of the reform of the collective property rights system. More accurately, as an important embodiment of farmers' rights to distribute the collective profits, the share of individual farmers in the distribution of compensation for land expropriation is required to be improved. In the 2014 No.1 Document, however, a more objective expression is proposed concerning farmers' distribution ratio in the appreciation of land caused by expropriation. Specifically, the relevant law and regulations shall be revised with a view to securing a fair distribution of the added value of the expropriated land for

⁹⁹ Besides, right after the Promulgation of the PL in March 2007 (it is effective from 1 October, 2007), the Notice on Better Addressing Related Issues about the Social Security of Landless Farmers (*guanyu qieshi zuohao beizhengdi nongmin shehui baozhang gongzuo youguan wenti de tongzhi* 关于切实做好被征地农民社会保障工作有关问题的通知) was issued by the Ministry of Human Resources and Social Security of the PRC (MOHRSS) and the MLR in April 2007. For more information, please visit the website of the MOHRSS, http://www.mohrss.gov.cn/gkml/xxgk/201407/t20140717_136100.htm.

¹⁰⁰ See Article 42 of the PL. In addition to the expropriation of collectively-owned land, it also mentions the expropriation of the premises owned by entities and individuals or other real property. Regarding the expropriation of the premises owned by entities and individuals or other real property, it is necessary to make compensation for demolition and relocation according to law, and safeguard the legitimate rights and interests of the owners of the real property expropriated. As for the expropriation of the individuals' residential houses, it is necessary to safeguard the housing conditions of the house owners involved. Besides, a special regulation on the expropriation and compensation for houses on the state-owned land was issued by the State Council in 2011. Although it is an administrative regulation instead of a national law, it provides a strong legal protection for the urban residents whose houses on the state-owned land have to be expropriated for public purposes. This will be further discussed in chapter 8.

¹⁰¹ The full text of this decision (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7542&CGid=>.

collective farmers.¹⁰² More notably, since the 2012 No. 1 Document, the revision of the LAL, especially the modification of the articles concerning the expropriation of collective land was emphasized in the annual No. 1 Document. In the 2013 No. 1 Document in particular, a special regulation on the expropriation and compensation of collective land which is similar to the Regulation on the Expropriation and Compensation for Houses on the State-owned Land is required to be made.¹⁰³ However, to date there has still been no progress in making a special regulation or the revision of the LAL.

Indeed, these central documents above provide more detailed rules for the protection of the affected farmers in the expropriation process, the determination of compensation standards and the resettlement mechanisms. Nevertheless, these improvements are not legalized promptly, especially in terms of the expropriation of collective land. Government control over the expropriation process is still obvious. I will analyze such central policies further in chapter 8 (8.3).

4.1.3 Why land policies in China are more efficient than land legislation?

Land policies regarding farmland transfer above are introduced in a chronological order. It is evident that a more complete farmland transfer system has been created in the policy instead of the legislation. Aspects including the qualification and the competence of the transfer subject, different means of transferring the contracted farmland and its basic principles have been defined in the central policies. The transfer should be in accordance with the law, based on farmers' actual willingness and the resulting profits should be paid to the farmers concerned. The 'law' mentioned here includes not only the formal legal rules and regulations, relevant central policies discussed above should also be observed. Due to the special political system, policies, whether the policy of governments or the communist party's policy, usually play a bigger role than legislation in China. Sometimes the distinction between law and policy is not that clear, as the policies issued by governments and/or the CPC are frequently in the form of government mandates. They are abided by lower governments, even though they are not exactly binding. In particular, the treatment of the CCCPC's decisions reveals that the policy document has tangible and quasi-legal effects to some extent (Dean and Damm-Luhr, 2010: 136-137). It is also the same in terms of the policies on farmland transfer.¹⁰⁴

¹⁰² Article 20 of the 2014 No. 1 Document.

¹⁰³ Article 5 of the 2012 No. 1 Document and Item 2 of the fifth part of the 2013 No.1 Document.

¹⁰⁴ On 11 May, 2006, an international seminar about the land policy reform was held in Beijing, which was sponsored by the State Council Development Research Center and the World Bank. The purpose of this meeting was to report their findings on cooperative projects about China's land policy reform. It illustrates the important role of land policy to the formulation of China's land legal system, and provides the basic

Overall, there are mainly two reasons that may explain the relatively updated land policies in China. First, it relates closely to the political regime of China. More precisely, the decision-making process concerning central policies under the one-party system is more efficient than the one under a multi-party regime. Furthermore, a complete mechanism for the decision making and the implementation of central policies has been created in China.¹⁰⁵ Second, policy can provide more prompt guidance on new situations in practice, compared to the legislation. Usually, only the policies that have been proved to be effective can be transformed into law to better regulate the practice. This is obvious in the formulation process of the legal rules on both market farmland transfer and land expropriation, as shown above.

All in all, the process of market transfers of farmland in China relies heavily on the management of local governments, instead of a market-based transaction mechanism. This firstly can be attributed to the vague collective land ownership and the actual state-control over the use of collective land. Due to the poorly defined collective land ownership and the lack of effective governance structure, most collectives in practice hardly can be an independent legal entity which can represent the rights and interests of collective farmers. On the contrary, this collective ownership may constitute a big threat to the private land rights and interests, as will be discussed in the next chapter (5.6.2). Meanwhile, the deficiency or absence of related legal regulations is also a significant reason. For instance, due to the lack of a formal registration system for the use and transfer of the contracted farmland, a recordkeeping system has to be created by local agriculture departments, on the basis of the archives of the initial contracts and the transfer contracts. According to one report of the World Bank, with the development of the rule of law in China, most of these land policies have been transformed into law, to better protect farmers' legal rights and interests and stimulate the development of agriculture and rural economy (World Bank and Development Research Center of the State Council of the PRC, 2013: 137-138). The question here is whether and to

direction for future land reforms. It also states that the legal framework of land has been improved and strengthened to promote the governments' ability to better the regulation of land use, which was regulated mainly by land policies before (Wang, 2006: 72-73).

¹⁰⁵ Take the making of agricultural policies in China as an example. There are at least 4 layers of institutions are involved in the decision making and the implementation of central agricultural policies. First, the central leaders determine broad government policies and directions, which are informed and advised in their decisions by the CPC 'leading groups'. Second, groups such as 'Office of Central Financial and Economic Leading Group' ensure that the activities of commissions and ministries within the formal state apparatus consist with the direction proposed by central leaders. Third, the State Council commissions and key ministries are in charge of coordinating the activities of line ministries and provinces through all-encompassing mandates. And last, the other ministries and provincial governments are responsible for the implementation of the central policy.

want extent these policies on farmland transfer have been legalized. Below, the legalization of central policies on market farmland transfer will be analyzed first. The discussion on legalization of central policies on land expropriation will be followed (4.4).

4.2 Legalization of policies on market farmland transfer

Although the land policy in China plays a significant role in facilitating the transfer process, it cannot really protect the legal rights and interests of individual farmers if it is not transformed into law in a timely manner. At present, the legalized policy is mainly included in national laws like the 2002 Rural Land Contracting Law (RLCL) and the 2007 Property Law (PL), and two ministerial rules of the MOA — the 2003 Measures for the administration of the certificates of the RCML and the 2005 Measures for the administration of the transfer of the RCML (including the FUR). Furthermore, the embodiment of the policies above, more accurately, the embodiment of policies before 2008 in legislation confirms farmers' land use rights and interests in law. A series of protective regulations based on the instruction of the policies have also been provided through legislation.

4.2.1 Stabilization of farmers' land use rights

Due to the adoption of public land ownership in China, the right to use land is a very important part of China's land law system.¹⁰⁶ Since the late 1970s, the HRS has been adopted to manage the rural farmland. Under the HRS, farmers cannot enjoy the farmland ownership and generally all the land in rural areas is owned by the collective. Because of the significance of the farmland to the livelihood of farmers, most of the farmland is contracted to farmers to cultivate, which is the so-called 'right to contract and manage land (RCML)'. There are actually two kinds of RCML: one is the contract of farmland by individual households; the other is the contract of barren mountains, gullies, hills and beaches by other means, such as bid invitation, auction and public consultation. And there are different provisions provided for the use of these two land use rights.¹⁰⁷ In this research, I only focus on the transferability of the former one — the farmland use right (FUR).

As analyzed in chapter 3 (3.3), through the confirmation of the extended contract term and the nature of the FUR as a usufruct — a real property right in the

¹⁰⁶ According to Article 6 and Article 10 of the Constitution, the basis of the socialist economic system of the PRC is socialist public ownership of the means of production, namely ownership by the whole people and collective ownership by the working people. Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those belonging to the state. The full text of the Constitution (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm.

¹⁰⁷ The RLCL, Chapter Two and Chapter Three.

PL, a quasi-private nature of farmers' land use rights can be distinguished. If the renewability of the FUR can be clearly defined in law, it will be a perpetual usufruct. In addition to these protective rules on the enjoyment and the exercise of the FUR, the issuance of a certificate further strengthens its legal protection. According to the 2003 Measures of the MOA, a certificate of the FUR is a legal document for the contractor to enjoy the right to contract and manage land after the contract for the management of farmland becomes effective, and upon lawful ratification of the state. The certificate can only be used by the contractor (Article 2).¹⁰⁸ On the basis of a confirmation of the issuing authority and the content of the certificate, a procedure for issuing this certificate is provided (Article 7). More notably, a registration book on the certificate of the FUR has to be set up by the administrative department of agriculture of local governments at the county level or above, which shall record the basic contents of the FUR. The details in this registration book shall be in accord with the content recorded in the certificate and the content of the original contract between the collective and the individual households (Article 9). In the event that there is an error in the certificate or in the registration book, the contractor can apply for correction (Article 11).

In addition to the issuance of the certificate, the modification of the certificate in the case of the transfer of the FUR and the formalities required are also provided in the 2003 Measures of the MOA. Specifically, only when the FUR is transferred by means of assignment or exchange, the transfer party concerned may request a modification registration of the certificate, but not in the case of sub-contract, lease or contribution as shares (Article 14). As the issuance, the modification and the withdrawal of the certificate are overall managed by the administrative departments of agriculture of local governments at the county or township level, a local administration system is expected to be established to deal with this issue. Also, the responsibilities and administrative liabilities of those departments and their staff should be clearly defined. It is obvious that the issuance of a certificate of the FUR contributes to the protection of farmers' land use rights and facilitates the transfer of the FUR. This, however, primarily depends on whether an effective administration system can be created in local areas to handle this issue or not.

4.2.2 Means to transfer the FUR

As the concept of 'subcontract' firstly appeared in the 1984 No. 1 Document of the CCCPC, the transfer of the FUR is officially confirmed by the central policies. Prior to this, both land ownership and land use rights were not allowed to be transferred according to the 1982 Constitution. In 1988, the first amendment to the

¹⁰⁸ The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3277&CGid=>.

Constitution provides that the rights to the use of land may be transferred according to law, which defined the legal status of the rural land transfer for the first time.¹⁰⁹ Conform to the 1988 amendment to the Constitution, Article 2 of the amended Land Administration Law (LAL)¹¹⁰ also in 1988 added that ‘the land use rights can be transferred according to law’.¹¹¹ From 1993, the central government issued a series of documents about the improvement in the FUR, and a sound farmland transfer mechanism was established at least on paper. The development of the policies on farmland transfer stimulates the progress of legislation. With the promulgation of the RLCL in 2002, the transferability of the FUR and different means of farmland transfer are identified in law.¹¹² That is, farmers can legally transfer their land use rights since 2003. The 2007 PL as the most significant legal protection for individuals’ property (rights) in China further confirms this transfer right. Pursuant to Article 32 and Article 42 of the RLCL, the FUR may be transferred by subcontracting, leasing, exchanging, assigning or contributing as a share. As illustrated in Table 4.1, all these transfer means are gradually confirmed by the central policy, prior to the final legalization in the RLCL. Besides, with the legal protection of the RLCL, individual households have more autonomy to transfer their contracted farmland in accordance with the latest central policies.

¹⁰⁹ The full text of the 1988 Amendment to the 1982 Constitution (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2008-01/24/content_1381975.htm.

¹¹⁰ The Land Administration Law was adopted at the 16th Meeting of the Standing Committee of the 6th NPC on 25 June, 1986, amended in pursuance of the Decision on the Amendment of the LAL on 29 December, 1988 and revised at the 4th Meeting of the Standing Committee of the 9th NPC on 29 August, 1998. The latest amendment to the new 1998 LAL was on 28 August, 2004. It is the most comprehensive law on land administration in China, which legally implements many of the constitutional provisions that related to rural land use rights.

¹¹¹ In the 1998 LAL, Article 63 further provides that the right to use the collective land shall not be granted, transferred, or rented out for non-agricultural construction. This means that the FUR can only be transferred for agricultural purposes.

¹¹² As a matter of fact, in the RLCL, ‘circulation’ is adopted to describe different means of transferring the right to contract and manage land (RCML, including the FUR), although it is not a legal term. As ‘transfer’ means the change over the possession or control and to sell or give in a narrow meaning, it would be confusing if it is also used in its broad meaning — all the means of disposing of or parting with an asset or an interest in an asset — in one research. Therefore, the Chinese legislature chose ‘circulation’ rather than ‘transfer’ to define the various means of transferring the FUR. In this paper, however, I still use ‘transfer’ in its broad meaning to describe the transferability of the FUR. As to the concrete transfer (the transfer in a narrow meaning) of the FUR, I will use ‘assign’ to replace it. Therefore, ‘transfer’ in this research equals to the ‘circulation’ used in the Chinese law context.

Table 4.1 Means of farmland transfer allowed by the central policy gradually

The central document concerned	The transfer means that is allowed	Explanation
1984 No. 1 Document	The contractor can subcontract their contracted farmland with the consent of the collective and the contract term is extended to 15 years	The subcontract here is actually one form of lease, in which the lessee is limited to other farmers in the same collective
Numbers of Policies and Measures of the CCCPC and the State Council on the Current Development of Agriculture and Rural Economy in 1993	The contractor is allowed to assign/transfer (permanently) his contracted farmland with compensation after getting the permission of the contract-issuing party — the collective, and the contract term is extended to 30 years	The assignment of the land use right should not change the collective land ownership and the land use purpose
Notice of the MOA on Advices to Stabilize and Improve Land Contract Relations in 1995	In addition to the subcontract and assignment, the contractor can also exchange and contribute their Rights to Contract and Manage Land (RCML)	The term of RCML is used for the first time in central documents, which replaced the ‘land use right’ used before. Besides, for contractors who obtained their land through bid invitation, auction or public negotiation, the legal rights and interests of the heirs concerned should be protected.
Notice of the CCCPC about Bettering the Work of Transferring the Farmers’ Contracted Land Use Right in 2001 and the following Notification of the MOA on implementing this Notice in 2002	The rent from the contracted farmland shall be decided through free negotiations of parties to transfer; the lease of contracted farmland (and its contribution as a share) shall be dealt with cautiously; the long-term lease that involves a large amount of farmland by urban citizens and enterprises is not encouraged	In the 2002 Notification of the MOA, lease of the contracted farmland is finally proposed as an independent way to transfer farmland. Different from the subcontract, the lessee involved in this land lease does not include other collective farmers
New central policies on the transfer means after the promulgation of the RLCL in 2002		

Decision of the CCCPC on Number of Major Issues on Deepening the Overall Reform in November 2013	On the premise of upholding and improving the system for providing the strictest protection for farmland, farmers are entitled to occupy, use, seek profits, transfer, mortgage and guarantee their contracted farmland (use rights) as collateral	
Opinions on Guiding an Orderly Transfer of Rural Land Management Rights and the Development of an Appropriate-Scale Management of Agriculture in November 2014	Innovations in the means of farmland transfer are promoted. Local areas with appropriate conditions shall develop supportive policies for households who transferred out their farmland for a long term. Pilots on the mortgage and guarantee of the RCML are promoted in local areas. Meanwhile, rules on the disposition of the mortgaged land are supposed to be made accordingly.	An official confirmation of all the allowed transfer means above

4.2.3 Basic principles of transferring the FUR

According to Article 33 of the RLCL, the transfer contract shall be concluded through an equal consultation, and on a voluntary and compensatory basis. This is the first principle of transferring the FUR. No organizations or individuals may compel the contractor to transfer his land use right or prevent him from doing so. Obviously, this principle is aimed at securing the party autonomy of the parties to transfer in the transfer process. In addition to this first paragraph of Article 33, the protection of party autonomy in the process of market transfer of farmland is also provided in other related articles.¹¹³

In the meantime, the transfer of the FUR has to adhere to the following

¹¹³ For instance, Article 10 of the RLCL stipulates that the state protects the transfer of the FUR, which is effected according to law, on a voluntary basis and with compensation. In its Article 16 which concerns the rights of the contractor, the rights to use the contracted land, to reap the yields and to transfer the right to contract and manage land are recognized. Then, it clearly provides that the contractor shall be the subject in the transfer of the FUR. The contractor has the right to make his own decision, on whether to transfer the right, and on the means by which to transfer the right (Article 34). Proceeds derived from the transfer, such as the subcontract charges, rent and assignment charges shall be determined by the two parties through consultation, and owned only by the contractor (Article 36). More notably, according to Article 57, any transfer of the FUR by a contractor under the compulsion of an organization or individual shall be invalid. The civil, administrative and even criminal liabilities that have to be assumed by the contract-issuing party and the State organ or its staff member are clearly listed in Article 54 and 61.

principles (from the second to the fifth principle in Article 33 of the RLCL): no change shall be made in the nature of the land ownership or the purpose of use of the land designed for agriculture; the term of the transfer may not exceed the remaining period of the term of contract; the transferee shall have the capability for agricultural operation; and under equal conditions, members of the collective (economic organization) concerned shall enjoy a priority. With the aim of protecting farmland resources, it is understandable that the agricultural land use purpose should not be changed after the transfer of the FUR. Since there is still a time limit imposed on the FUR, it is also reasonable that the transfer period may not exceed the remaining term of the contract, although it can be renewed when it expires. However, the necessity of the requirement for the transferee and the priority for the other collective members deserves further consideration. This will be discussed in detail in 4.3.

4.2.4 The local administration system concerning farmland transfer

As mentioned above, in addition to the confirmation of the FUR as a real property right and the protection of the party autonomy from the interference by collective leaders/village cadres or local officials, a comprehensive regulation covering almost every aspect of the market transfer of farmland has been provided by law and especially the ministerial rules. With the further explanation and the expansion of the content of this regulation system in latter central policies, a standardized procedure for the government administration of farmland transfer, which includes five aspects, can be summarized (4.1.2). Although a substantial right has been given to individual households to use and dispose of their contracted farmland, the contractor cannot dispose of/transfer his rights freely from a procedural point of view. For instance, according to Article 37 of the RLCL, where the FUR is assigned, the matter shall be subject to the consent of the contract-issuing party; and where subcontract, lease, exchange or other means is adopted for transfer, the matter shall be reported to the contract-issuing party for the record.¹¹⁴ It can be said that the ability of contractors to transfer their contracted land is still subject to the control of the vague collective in terms of the transfer procedure. On the one hand, the establishment of an administration system for regulating the market transfer of the contracted farmland is necessary, especially when this transfer market is still in a very initial stage. On the other hand, this land administration

¹¹⁴ According to Article 13 of the Interpretation of the Supreme People's Court about the Issues concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contract in 2005 (*zuigao renmin fayuan guanyu shenli sheji nongcun tudi chengbao jiu fen anjian shiyong falv wenti de jieshi* 最高人民法院关于审理涉及农村土地承包纠纷案件适用法律问题的解释), transfers without the consent of the contract-issuing party/the collective are invalid.

system shall focus on its main function, that is, to ensure the security of transactions and provide the services needed by the parties to transfer. Although certain restrictions on the transfer process and even on the qualification and the capacities of transferees are necessary for the sake of the public interests, the autonomy of individual farmers in transferring their own land use rights should not be sacrificed.

4.3 Restrictions on (market) farmland transfer in private law

As argued in chapter 2, as the holder of a property right, even it is an ownership right, restrictions may be imposed on the use and the disposition of the property from both private law and public law. In most Western European countries, it is mainly from public law, namely the rules and regulations concerning zoning and land use planning. However, in China, in addition to the strict control over the use and transfer of the collective land (including the farmland) in public law, the constraint on the exercise of the FUR in private law is also obvious.

4.3.1 Restrictions on the subcontract and lease of the FUR

Technically speaking, the limitation imposed on the subcontract and the lease of the FUR should not be strict as they are temporary transfers. In general, for the subcontract, the transferee is limited to the other farmers within the same collective. For the lease, however, there is no such a requirement. To some extent, the subcontract is one kind of lease that with a limited lessee. According to Article 33 of the RLCL, there are certain requirements for the qualification of transferees and the priority enjoyed by other farmers within the same collective — the fourth and fifth principle of transferring the FUR. In my opinion, these requirements need to be further defined.

Regarding the requirement for the capability of agricultural operation of the transferees, firstly, it is hard to define what an agricultural operation capability is. Does it mean that people in industrial, commercial or the service industry cannot be the transferee/lessee of the FUR? If so, only farmers who are engaged in agricultural production have the capacity to transfer in the farmland. It is no doubt that this will reduce the scope of the farmland transfer greatly. Also, it is not conducive to establish a transfer market for the FUR, let alone the formation of a market price. As regards the priority enjoyed by the other members living in the same collective, as a property right, theoretically the transfer of the FUR should not be restricted by the identity of the transferees, although the original acquisition of the land is based on the collective membership. However, based on the serious land fragmentation and the disadvantage of farmers in economic conditions, currently the advantages of this priority right of other collective members outweigh the

disadvantages. On the one hand, it can promote scale farming within the collective; on the other hand, it can help the other farmers to improve their income through the expanded farming. However, as there are no detailed rules for the ‘equal conditions’ in law, such as the obligation of the transferor to notify the price offered by the non-collective member and the duration of the exercise of this priority right, abuse of power may happen in practice. As the transformation of more rural farmers into urban citizens, more rural residents will no longer rely on farming to survive. This priority right later may be revoked. In that case, anyone who can reach an agreement with the transferor, whether he is a collective member or not, will have an equal opportunity to obtain the FUR.

Besides, in terms of the lessee, there is a clear restriction on the industrial and commercial enterprises (ICEs) and urban citizens, especially the former one. Indeed, the cooperation with the enterprises and its investment in land may stimulate the development of local economy. Yet, it may also result in non-agricultural use of farmland and violations of the legal rights of individual farmers as the weaker party. Thus, the 2013 No. 1 Document clearly states that a strict access and supervision system should be created for the farmland lease by the ICEs. Undoubtedly, studies on this access and supervision system helps to further define the qualification required for such enterprises. Restrictions like a landholding ceiling may also be considered, in order to prevent an excessive land concentration caused by large-scale transfers of farmland. This will be further discussed in chapter 7.

4.3.2 Restrictions on the assignment of the FUR

As there is no detailed regulation in the PL, rules on the assignment of the FUR are mainly from the RLCL. According to Article 41 of the RLCL, where a contractor has a stable and non-agricultural occupation or a stable source of income, he may, with the consent of the contract-issuing party, assign the total or part of his FUR to another household engaged in agricultural production and management. This household shall establish a new contractual relationship with the contract-issuing party, whereupon the contractual relationship on this land between the former contractor and the contract-issuing party is terminated. From my perspective, further consideration is also needed for these restrictions.

First, the requirements for the assignor are mainly for preventing the loss of land in the event that he transfers the FUR arbitrarily. As the guarantee of basic living, the contracted land/the FUR can only be transferred when the farmer transferor can make a living without relying on the land. However, as a property right, the economic function of the FUR may be developed through transfer, and the life-support function of the FUR will be weakened gradually. Besides, it is also difficult to define ‘a stable and non-farm occupation’ or ‘a steady source of

income'.¹¹⁵ In most cases, the transfer fee is also the funding source for farmers to engage in non-agricultural professions. Second, the consent of the contract-issuing party as a prerequisite for the transfer is mainly due to the need of supervision over the new contractor. Whether the assignee has the ability to conduct the agricultural operation relates directly to the performance of his obligations. However, as the holder of the FUR has been given a right to transfer his land independently and on a voluntary basis (Article 34 of the RLCL), the contract-issuing party, as the representative of the land owner, should not intervene in the transfer. Also, the so-called 'consent of the contract-issuing party' means that only in the event that the assignor does not have a non-farm occupation or no stable source of income or the assignee is not the farmer engaged in agricultural production, the contract-issuing party may have the right to disapprove the transfer. Once again, it is difficult to judge if the assignor has a stable and non-farm occupation or a steady source of income.

Therefore, current limitations on the assignment of the FUR cannot play a vital role in preventing farmers becoming landless. On the contrary, it may encroach upon farmers' rights to choose and change jobs freely and the right to migrate. Moreover, even if farmers have more freedom to assign their land use rights, it does not mean that they will assign their rights arbitrarily. As a normal trader, individual households/farmers will try to make full use of their land rights. In the meantime, as there is a change of the contractor due to the assignment, the parties should first report it to the contract-issuing party and conclude a contract under the instruction of the department of rural land contract management of township governments.¹¹⁶ The relevant formalities for the alteration of the contract (the original contract between the contract-issuing party and the original contractor) and the certificate of the FUR shall also be handled in time. This is for the security of market transactions.

4.3.3 Restrictions on the contribution of the FUR as a share

As an important way of transferring the FUR, contribution as a share plays a significant role in improving agricultural productivity, promoting scale farming and optimizing the allocation of land resources and agricultural labors. However, the RLCL and the PL provide few provisions on it. According to Article 35 of the 2005 Measures of the MOA, the 'contribution as a share' shall mean that the

¹¹⁵ Nowadays, each non-farm professional occupier either concludes a labor relationship or an employment relationship with the unit, or establishes an administrative relation with the unit as a civil servant, or become shareholders as the investors. No matter which kind of relationship, it is difficult to judge whether it is stable or whether the professional occupier can enjoy a stable source of income or not.

¹¹⁶ The 2005 Measures of the MOA, Article 26. The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3933&CGid=>.

contractor of the FUR contributes his right as a share to undertake cooperative agricultural production and management jointly of their own will for the purpose of developing agricultural economy; and the contractor taking other means of contracting land quantifies the land use rights as stock rights, and buys shares to form joint-stock company or cooperatives to undertake agricultural production and management.¹¹⁷ Based on this different definition of the contribution of these two types of rights to contract and manage land (RCML), it is obvious that the FUR is only allowed to be contributed to establish farmers' cooperatives, but not a joint-stock company. Moreover, as there is no regulation about the legal consequences of the contribution as a share of the FUR in the RLCL and the PL, it is hard to determine the legal nature of this legal act. Based on the different regulations about the modification registration of the FUR in the 2003 Measures of the MOA (Article 14),¹¹⁸ it seems that the legislator tends to characterize the contribution as a share of the FUR as a temporary transfer like the subcontract and the lease. Combined with the rules that 'the contractual relationship between the contractor and the contract-issuing party shall remain unchanged' and 'the land contributed shall be returned to the former contractor at the dissolution of the shareholding cooperative' in the 2005 Measures (Article 16 and 19),¹¹⁹ the contribution as a share of the FUR does not result in changes on the subject (the contractor) of this property right. Therefore, the 'contribution' here is different from the one in the 2006 Company Law, in which the contribution as a share in a company means an assignment of the property (right) involved.¹²⁰

Under the current legal system, there are no clear rules on the form that the farmers can adopt to contribute their FURs. In order to promote scale farming, the

¹¹⁷ The RLCL and the PL provide different rules for the contribution as a share of the two different types of RCML. For the FUR, the contractors may, of their own free will, jointly pool their FURs as shares to engage in cooperative agricultural production for the purpose of developing the agricultural economy (Article 42 of the RLCL). For the RCML obtained by bid invitation, auction or public negotiation, after the registration according to law and obtains the corresponding certificate, the contractor can transfer their rights through assign, lease, pooling of rights as shares, mortgage or other means (Article 49 of the RLCL and Article 133 of the PL). that is, for contractors who obtained land (usually barren mountains, gullies, hills and beaches) through such market means, more freedom is given to dispose of their land. This is also obvious in terms of the contribution of the acquired land use rights.

¹¹⁸ It provides that, within the contract term, if the contractor transfers the FUR by means of subcontract, lease or contribution as a share, it does not need to apply for a modification registration of the certificate of the RCML. A party who transfers the RCML by means of assignment or exchange may request a modification registration of the certificate of the RCML.

¹¹⁹ The 2005 Measures of the MOA, Article 16 and 19.

¹²⁰ Here the rules in the 2003 and 2005 Measures of the MOA are incompatible with the basic legal principles of the Company Law. As a separate legal entity, the company or the cooperative will own the FUR which has been transferred and became the asset of the company/cooperative. However, rules in the 2003 Measures and the 2005 Measures do not comply with this basic rule. This may be modified later, especially in the case of the RCML obtained through market means.

Law of the PRC on Farmers' Professional Cooperatives (LFPC) was made and adopted in 2006. According to its Article 2, a farmers' professional cooperative (FPC) is a mutual-aid economic organization, which is voluntarily formed by the production and business operators of similar agricultural products or by the providers or the users of similar agricultural production and business operation services on the basis of a rural household contractual management. The LFPC does not clearly provide the way of making the capital contribution to farmers' professional cooperatives. However, based on Article 8 of the Regulations of the State Council for the Administration of the Registration of Farmers' Professional Cooperatives (RARFPC) (*nongmin zhuan ye hezuoshe dengji guanli tiaoli* 农民专业合作社登记管理条例) in 2007, as a non-currency property that can be evaluated in currency and can be transferred according to law, the FUR can be contributed as capital to establish an FPC.¹²¹ Moreover, the RLCL has already provided that the contractors can jointly pool their FURs as shares to engage in cooperative agricultural production in 2002, although it does not clearly state that the FUR can be contributed to the FPC as shares.

In practice, a number of provinces have announced local laws or government regulations which clearly stipulate that the FUR can be contributed as a share to the FPC. For example, the Interim Measures of Zhejiang Province for the Registration of the Appraisal and Contribution of the Right to Contract and Manage Land (*zhejiangsheng nongcun tudi chengbao jingyingquan zuojia chuzi nongmin zhuan ye hezuoshe dengji zanxing banfa* 浙江省农村土地承包经营权作价出资农民专业合作社登记暂行办法) publicized in February 2009 provides that, the RCML contracted by households (the FUR) or through bid invitation, auction and public negotiation can be contributed to the FPC, after the contractor registers his right and obtains the certificate of the RCML. As a supplementary measure, the Industry and Commerce Bureau of Zhejiang Province and the Department of Agriculture of Zhejiang Province also publicized the unified Model Text of the Transfer Contract for the Right to Contract and Manage Land in Zhejiang Province (*zhejiangsheng nongcun tudi chengbao jingyingquan liuzhuan hetong shifan wenben* 浙江省农村土地承包经营权流转合同示范文本). According to the model text of the contribution contract of the RCML, the contractor has a right to withdraw the FUR when the contract expires, and there is no change of the relationship between the contractor and the contract-issuing party. That is, the contractor still has the right to contract the contributed land, but the FPC has the right to use and seek profit from the land. It also has the right to manage and dispose of the produce of the land. Besides, in accordance with the Notification of Relevant Issues about the Registration of the Contribution of the Right to Contract and Manage Land (*guanyu yi nongcun tudi chengbao jingyingquan rugu fazhan nongmin zhuan ye hezuoshe zhuce dengji youguan wenti de tongzhi* 关于以农村土地承包经营权入股发展农民专业合作社注册登记有

¹²¹ The full text of this Regulation (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=6078&CGid=>.

关问题的通知) announced by the Agriculture Committee of Chongqing and the Industry and Commerce Bureau of Chongqing in 2009, the Notification of Relevant Issues about the Registration of Market Subjects (*guanyu guifan shichang zhuti dengji youguan wenti de tongzhi* 关于规范市场主体登记有关问题的通知) publicized by the Industry and Commerce Bureau of Shandong Province in 2009, and the Implementation Measures of the Law of the PRC on Farmers' Professional Cooperatives in Sichuan Province (*sichuansheng zhonghua renmin gongheguo nongmin zhuan ye hezuoshefa shishi banfa* 四川省<中华人民共和国农民专业合作社法>实施办法) in 2010, members of the cooperative are allowed to contribute their FURs as shares under the premise that there is no change of the collective land ownership, no change of land use purpose and no prejudice to farmers' land rights and interests. In the meantime, in the dissolution or the bankruptcy liquidation process of the cooperative, the contributed FUR cannot be used for paying off the debts of the cooperative, or allocated as the remaining assets.

Even though the contribution of the FUR into the FPC is not absolutely forbidden by the law and certain local areas have allowed this kind of transfer, at least three peculiarities of this contribution are noteworthy. First, after the FUR is contributed, the contributor still holds the right to contract the contributed land, while the right to possess, use and seek profits from the land belongs to the cooperative. Second, as the cooperative is not established for profits, the surplus shall be returned to the members according to the volume (amount) of transactions between the members and the cooperative, the total amount of refund shall not be less than 60% of the distributable surplus. The balance of the surplus after the refund shall also be distributed to the members by taking into consideration the amount of capital contributions.¹²² Third, at the dissolution of the cooperative, especially in the case of bankruptcy dissolution, the contributed FUR cannot be used for paying off the debts. It should be returned to the contributor, namely the original contractor. This is undoubtedly unfair to other members who provide other kinds of contribution that will be used to reimburse the debt of the cooperative. In local practice, in order to overcome this drawback, members who contribute their FURs to the cooperative are required to replace the contributed FUR with equal

¹²² The LFPC, Article 3. In fact, each member of the cooperative has a special account, which mainly records the capital contribution, the concrete share of the accumulation fund of this member, and the volume (amount) of transactions between this member and this cooperative. The capital contribution can be contributions in currency or the non-currency property which should be evaluated in currency by the whole members. Under the articles of association or the resolution of the general meeting of members, the cooperative may draw an accumulation fund from the surplus of the current year, which shall be used to offset the losses, expand production and business operations or to be converted into the capital contribution of members. Moreover, it should be divided into the shares of each member. Each member bears the liabilities for the debts of the cooperative within the limit of capital contribution and its proportion of the accumulation fund recorded in its account. Meanwhile, the surplus shall be returned to the members according to the volume (amount) of transactions with the cooperative. After offsetting the losses and drawing the accumulation fund, the surplus of the current year shall be the distributable surplus of the cooperative (Article 5, 35-37 of the LFPC).

currency at the dissolution of the cooperatives.¹²³

Under the new definition of the FUR in the 2014 No.1 Document, when the FUR is contributed to an FPC, only the right to manage land is transferred. The right to contract the land is still owned by contributors — the original contractors. This provides a reasonable explanation for those protective rules in the 2005 Measures of the MOA and protective measures designed in local regulations. In the case of a bankruptcy dissolution, it is the contributed right to manage land that will be used for paying off the debts. In other words, what the creditor can claim to the contributed FUR is a right to manage land within a certain period.¹²⁴ After this period ends, this management right will be returned to the original contractor who still holds the right to contract the land.

4.3.4 Restrictions on the mortgage of the FUR

In accordance with the different ways of establishing the RCML, the RLCL and the PL also provide different regulations in terms of the mortgage. According to Article 184 of the PL, the RCML obtained through household contracts — the FUR — cannot be mortgaged. However, its Article 180 and Article 133 clearly provide that the RCML concerning barren land or other rural land that is contracted by other means (bid invitation, auction or public negotiation) can be mortgaged.¹²⁵ The main concern here is that if the FUR is allowed to be mortgaged, in the case that later farmers (the mortgagor) cannot return the loan, they will lose their land and also the guarantee of their livelihood. Yet, for the RCML concerning barren land or other rural land obtained through market transactions, there should be fewer restrictions on its mortgage.

¹²³ See the Notice of the Agriculture Committee of Chongqing City and the Industrial and Commercial Bureau of Chongqing City on Related Issues on the Registration of Farmer s' Professional Cooperatives Established through the Contribution of the Right to Contract and Manage Land (*chongqingshi nongye weiyuanhui chongqingshi gongshangju guanyu yi nongcun tudi chengbao jingyingquan rugu fazhan nongmin zhuan ye hezuoshe zhuce dengji youguan wenti de tongzhi* 重庆市农业委员会重庆市工商局关于以农村土地承包经营权入股发展农民专业合作社注册登记有关问题的通知) in September 2009. The full text of this notice (Chinese version) is available at: <http://www.cq.gov.cn/zwgk/zfxx/155640.htm>.

¹²⁴ Currently, the contract term of the FUR is 30 years. As most of the first-round contract (15 years) ended around in 1998, the renewed contract will expire in 2028. Therefore, if one contractor contributes his FUR, more precisely, the right to manage land to a FPC in 2014, the maximum period for the contributed management right is 14 years.

¹²⁵ Article 184 of the PL provides that, none of the following property may be mortgaged: (1) Land ownership; (2) The right to use cultivated land, house sites, land set aside for farmers to cultivate for their private use, hilly land allotted for private use and other collectively-owned land, unless it is otherwise prescribed by any law; As the FUR belongs to the right to use cultivated land, so it is forbidden to be mortgaged by law. Also, Article 180 of the PL stipulates that, the following property to which the obligor or the third party has the right to dispose of may be used for mortgage: (1) Buildings and other fixed objects on the ground; (2) The right to use land for construction; (3) The right to contract and manage barren land as obtained by means of bid invitation, auction and public negotiation.

From my perspective, this distinction is not so persuasive from the perspective of property law. First, like the other means of transferring the FUR — a usufruct (3.3.1), mortgage is also one way for farmers to dispose of their rights. Although the holder of this usufruct cannot dispose of the land ownership, he does have the right to dispose of his land (use right). Generally speaking, there are two aspects concerning this disposition right in law. One is the disposition of the right, such as the assignment of the FUR; the other one is the encumbrance on the FUR, such as the mortgage. Hence, the prohibition on the mortgage of the FUR is incompatible with its nature as a real property right. Second, from the perspective of its final effect, different from the assignment, the establishment of a mortgage is mainly to make use of the exchange value of the FUR. Only when the mortgagor fails to pay the due debts, or any circumstance for realizing the right to mortgage as agreed by the parties occurs, the mortgagee may apply for assigning the FUR. Furthermore, in the case of a mortgage, the contractor can still retain the complete possession, use, and profit-seeking power of the FUR. As the assignment of the FUR has already been permitted by law (even with certain restrictions discussed above), the mortgage of the FUR shall also be recognized in law.

After the division of the RCML (including the FUR) into a right to contract land and a right to manage land, the land management right is allowed to be mortgaged. Technically speaking, it is hard to regard this as a breakthrough in China's rural land reform, as this has been experimented in several local areas.¹²⁶ More importantly, in the case that the mortgagor, whether the original contractor of the land or other entities as the transferee of the land management right, cannot repay the loan, the disposition of the involved land is a rather tricky issue. Therefore, the government support is indispensable for establishing a mortgage system of the FUR, especially the support from the state-owned financial agencies.

4.3.5 Restrictions on the exchange of the FUR

According to Article 35 of the 2005 Measures of the MOA, the exchange/swap refers to the contractors exchange the contracted land subject to the same collective and the corresponding FUR at the same time for the purpose of convenience for plowing or their respective needs. Generally, although the contractors hand over their own land and give up the attached land use rights permanently or at least within the contract term, they can receive another piece of land of the same value (in most cases) as the consideration at the same time. After the exchange, the contractual rights enjoyed and the obligations undertaken by both parties shall also

¹²⁶ For instance, the Interim Measures of Shouguang City for the Mortgage of the Right to Contract and Manage Rural Land (*Shouguangshi nongcun tudi chengbao jingyingquan diya jiekuan zanxing banfa* 寿光市农村土地承包经营权抵押借款暂行办法) issued in 2009.

be interchanged. Hence, the exchange of the FUR also results in the change of farmers' property rights and the parties concerned may require a modification registration of the certificate of the FUR. If not, no one may oppose the third party acting in good faith.¹²⁷ Besides, one restriction on the land exchange in law is that the swap is only limited to farmers who are from the same collective. In essence, this is aimed at maintaining the integrity of the collective. However, with the urbanization and the migration of rural residents, the exchange may also be extended to farmers from other collectives.

To some extent, the great role played by the exchange of the contracted farmland in promoting scale farming in China is underestimated, especially the exchange within the same collective. However, even if farmers tend to swap their dispersed plot with the appropriate parcel of other farmers (usually in the same collective), it is not easy for them to initiate a reciprocal exchange due to the concern for future disputes. The lack of legal protection built on land registration and certification also stifles such an initiative. Currently, with the promotion of farmland registration from the central government and the construction of basic farmland zone in local areas, the exchange of the contracted farmland should also be stimulated in order to achieve a scale operation. In this respect, the 2013 No. 1 Document is a very good start, even though there is only one sentence mentioning this reciprocal transfer of farmland.¹²⁸

4.3.6 Restrictions on the inheritance of the FUR

According to the law, regardless of whether cultivated land, grassland or forestland, as a property of the former contractor, none of them can be directly inherited by the heir.¹²⁹ The legislator believes that as farmland is contracted to the household as a unit, the death of some family members will not result in the inheritance of the FUR.¹³⁰ In fact, during the making process of the Law of Succession of the PRC in 1985, there was significant divergence of opinions on the inheritance of the FUR. However, in the end, there is no specific provision made for this issue. Only Article 4 stipulates that contracting with an individual, if permitted by law to be continued

¹²⁷ The RLCL, Article 38 and the 2005 Measures of the MOA, Article 17.

¹²⁸ The full text of this decision is available at: http://www.china.org.cn/chinese/2014-01/17/content_31226494.htm.

¹²⁹ Article 31 of the RLCL provides that the benefits derived from the contract which are due to the contractor shall be inherited in accordance with the provisions of the Succession Law. In the event that a contractor for forestland is dead, his successor may, within the term of the contract, continue to undertake the contract. This cannot be regarded as the inheritance of the FUR.

¹³⁰ For more information, see the Paraphrase of the Rural Land Contracting Law for the PRC (*zhonghua renmin gongheguo nongcun tudi chengbaofa shiyi* 中华人民共和国农村土地承包法释义), provided by the website of the National Peoples' Congress (NPC) of the PRC, http://www.npc.gov.cn/npc/flsyywd/jingji/nod_e_2211.htm.

by the successor, shall be treated in accordance with the terms of the contract. That is, at that time the legislator treated the farmland contract as a contractual relationship, and the application of the law of succession was explicitly excluded. Then, Article 13 of the Agricultural Law of the PRC in 1993 provides that, if a contractor dies during the term of a contract, the successor of the deceased contractor may continue the contract. This cannot be regarded as the recognition of the inheritance of the FUR either, as there is a time limit on the use of the contracted land. Moreover, this article was abandoned by the revised 2003 Agricultural Law. In the 2002 RLCL and even the 2007 PL, there is no special rule about this issue. Therefore, under the current law system, no general provisions about the inheritance of the FUR are provided.

This obscured provision provided by law is mainly because of the concern of the legislator about the problems that may arise. If the FUR can be inherited, in the case that many heirs have an inheritance right (according to the principle that men and women have equal inheritance rights and the tradition that the heritage should be distributed equally among all the children), it predictably may lead to land fragmentation. This is unfavorable to agricultural production in specific countries. Furthermore, as farmers have been endowed with a long-term and guaranteed land use right, if a right to inherit the land is established for relevant heirs, the FUR will be even closer to an ownership right. This may affect the collective control over the farmland. It can be said that the oblique attitude of the legislator to the inheritance of the FUR is an intentional choice or a last resort option (J. Zhang. 2010: 73).¹³¹

Although these concerns mentioned above are reasonable in some degree, they cannot be the grounds for avoiding or even denying the inheritance right to the FUR. As an independent and complete usufruct, the FUR can be disposed of not only when the contractor is still alive. It should also be possible for the contractor to make arrangements for the future use of his land use right. In my opinion, the inheritable nature of the FUR later should be further recognized in law. First, it is reasonable and logical that the FUR can be inherited as a real property right. With the continuing stabilization of the contractual relationship and almost zero reallocation of the contracted land, the FUR will be a pure property right. In

¹³¹ Because the law does not recognize the inheritance of the FUR, the contradiction between the principle of an equal distribution of farmland in the collective and the promotion of a long-term and secured FUR is also rather significant. According to the original intention of the rural land contractual management system, all the members of a collective have the right to contract a piece of land from the collective equally. In order to safeguard this equivalent allocation, the contracted land has to be reallocated according to the changes in population. Thus, the contracted land of individual households cannot be specified, which is incompatible with the specificity of the object of a property right and makes the FUR inheritable. With the improvement in a long-term and secured land use right, the contracted land cannot be reallocated frequently in order to keep the stability of land use rights. This provides the prerequisite for recognizing the inheritance right.

particular, under the joint-stock cooperative system reform of the collective, the FUR may be transformed into a stock right (if the collective farmers choose to contribute their FURs to the cooperative) which can be inherited. Second, from the perspective of China's long history, whether in ancient society or modern times, use rights to farmland are inheritable, such as the emphyteusis (or tenancy in perpetuity) (*yongdianquan* 永佃权), the surface right (or right to the ground) (*dishangquan* 地上权), the surface field right (*tianmianquan* 田面权) and the foundational right of land (*tiandiquan* 田底权) (Cheng, 2002). Meanwhile, with regard to the negative effects that may be caused by the succession, a detailed and scientific design of the provisions for the inheritance system may be adopted.

Above all, the starting point of the distribution of the heritage (the FUR) is to improve the production of the farmland and maximize its economic benefits. In the meantime, the distribution should be conducive to a scale operation of farmland and the prevention of further land fragmentation, especially in the case that there are more than one heir. As the farmland is contracted to the household and its main purpose is to safeguard the livelihood of the whole family members, in my opinion, only the heir within the household has the right to inherit the FUR. In fact, in the case of an inheritance that has more than one heir, the heritage is not just the FUR. Thus, the heirs themselves can negotiate who can inherit the FUR, and the others can succeed to the remaining legacies. Or the heir who receives the FUR can compensate the other heirs if the rest of the legacy is not enough for them. If all the heirs want to inherit the land use right, they can co-inherit it as common property to cultivate directly or transfer it to other people. They can also inherit the FUR separately, but only in the case that the area of the inherited land is large enough to be divided (mainly for the inheritance of the forestland). If the deceased made a will, then the distribution of the legacy depends on this testamentary succession. At any rate, the bottom line is to keep and promote an appropriate scale-operation of the contracted farmland.¹³²

¹³²According to Cheng (2002: 63), when the actual heir of the FUR is two or more persons, the following measures can be adopted to deal with the inheritance: (1) Respective inheritance. It means every heir has the right to inherit part of the farmland use rights. This only applies to the inheritance of a relatively large area of farmland that does not make the farmland further fragmented, and the heir does not want to inherit the land concerned jointly. (2) Co-inheritance. It is mainly suitable in the case that the FUR inherited should not be divided; otherwise, it will lead to land fragmentation, or significantly affect the economic benefits of the land. Besides, the heirs are willing to co-inherit. (3) Inheritance by a part of inheritors. It means that the FUR will be succeeded to part or just one of the successors, who will be the new contractor of the farmland. The *de facto* successor should provide an appropriate economic compensation to the other *de jure* successors. This method is mainly for the inheritance that is neither suitable to adopt the co-inheritance, nor the respective inheritance. (4) In the case that all the heirs have become non-agricultural population and cannot continue to cultivate the contracted land, or even if the heirs still live in the rural area, but they are not willing to cultivate the land themselves, they can subcontract, lease or assign the inherited farmland use rights to others and split the fees. In this case, the heirs as a whole transfer the inherited FURs to others, and go through the appropriate procedures according to the law.

4.3.7 Brief summary

It is no doubt that the holder of the FUR has been endowed with a broad transfer right to their contracted land through the law and a series of ministerial rules. Moreover, based on the latest central policies (from 2008), especially the 2014 Opinion of the CCCPC and the State Council on guiding the transfer of the right to manage land, a comprehensive system for regulating the market transfers of farmland is available at the central policy level. Nevertheless, it is still an initial guidance on the transfer process and characterized by a well-organized local administration system at least in theory. Under the current definition of the FUR (in the 2014 No. 1 Document), with the stabilization of the right to contract land, the collective ownership of the contracted farmland will become nominal. Moreover, with the development of urbanization and the decline of the number of farmers in specific collectives, this collective ownership may coincide with the right to contract land. Regarding the right to manage land, it is essentially a renewable lease from the collective. As analyzed above, certain restrictions are still imposed on the transfer of the FUR. With the repeated emphasis on the priority right enjoyed by the other collective members and a prior consent of the collective, it is obvious that the farmland transfer inside the collective is greatly supported by the central government. This is also reflected by the limitations imposed on the land lease by various enterprises in the newest policies.

More importantly, the initiative of individual households as the main transferor of the FUR is highlighted. Local governments are also allowed to conduct (more) pilots relating to innovative practice in farmland transfer. In short, a clear and right direction of the transfer of the FUR has been taken in the central policies. However, from the perspective of (good) government regulation, these new developments have to be legalized through the design of detailed legal rules. Although current rules in the RLCL and relevant rules in the PL provide a legal recognition and protection for the transfer of the FUR, government control over the transfer process is pretty obvious. The initiative or the participation of farmers in the transfer process is not well reflected in law. In addition to these constraints from private laws, restrictions on the transfer of the FUR from public laws are even stricter.

4.4 Restrictions on farmland transfer in public law

4.4.1 Restrictions in the Constitution and the LAL

In the Chinese context, all the rural land is owned by the collective, and most of the farmland in the collective is contracted to individual households/farmers (members

of the collective). This is the so-called communal land tenure (Bruce, 1998: 3).¹³³ In accordance with the property-rights theory, the collective as the land owner should have the right to possess, use, seek profit from, and dispose of the land (Alsen, 1996: 24). However, in law the right to seek profits and the right to dispose of the land are extremely limited. These limitations are mainly from the Constitution and the Land Administration Law (LAL).

Urban land is not necessarily state-owned land

As the fundamental law of China, the irreplaceable status in the whole legal system made the enactment of a new Constitution become one of Deng's first steps in reforming the legal system in 1978.¹³⁴ Although the 1978 Constitution looked back heavily to the 1954 Constitution, it recognized the view of the CPC's moderates that the rule of law was necessary to put off the problems of the Cultural Revolution. Once Deng's economic reforms were established and became operative, the CPC drafted a new Constitution, which is the current Constitution of the PRC. It was adopted in 1982 and amended in 1988, 1993, 1999, and 2004 respectively, which provides the foundation for China's legal system, including the collective land system.

Regulations in the Constitution concerning the collective land mainly refer to its Article 10. According to the 1982 Constitution, the 'socialist public ownership of the means of production' takes two forms: ownership by the whole people, which is also known as the state ownership and collective ownership by the laboring masses (Article 6). As regards the land ownership, it provides that all the land in cities is

¹³³ According to Bruce, communal land tenure is used in Africa/Asia to describe tenure that involves a large amount of community control over land use. The community is the owner of the land, but it allocates land to its members for cultivation. Members only have use rights or usufructory rights (or usufruct) to their allocated piece of land. In the meantime, the collective may retain the right to reallocate landholdings among its members to guarantee the egalitarian basis. Inside communal land tenure, not only the farmland is allocated to the members to use, but also collective property in other resources, like the homestead distributed to every household in the collective. This term was first proposed by western social scientists to describe non-western property systems.

¹³⁴ In total, there are four Constitutions in the history of the new China from 1949, which were adopted in 1954, 1975, 1978 and 1982 respectively. The 1954 Constitution was actually abandoned soon after its adoption, because it did not give due attention to uphold the dignity of the Constitution itself, and due to the lack of effective regulations about specialized agencies and procedures to supervise the implementation of the Constitution. The 1975 Constitution only existed for about 3 years, because of the contempt of the 'gang of four (*si ren bang* 四人帮)' to the rule of law, and it legalized and institutionalized many errors in the theory and the practice during the 'Cultural Revolution'. It was not taken seriously and carefully implemented in practice. The 1978 Constitution did not completely get rid of the impact of the 1975 Constitution. It had to be partially adapted twice after its promulgation in order to meet the needs of real life, until it was replaced by the 1982 Constitution.

owned by the state;¹³⁵ land in the rural and suburban areas is collectively owned, except for those belonging to the state. Moreover, the state may, in the public interest, requisition land for its use in accordance with law (there is no regulation concerning the compensation for the requisitioned land here). Also, no organization or individual may appropriate, buy, sell, or lease land or otherwise engage in the transfer of land by unlawful means (Article 10). Then, based on the 1988 amendment to the 1982 Constitution, the right to the use of land may be transferred in accordance with law. This is the constitutional foundation for the emergence of a new regime of private property rights in land, which guarantees that the farmland use right of individual farmers can be transferred by lawful means.¹³⁶ In the 2004 amendment, the payment of compensation for land expropriation or requisition by the state in public interests is finally required.¹³⁷ However, this does not reduce the violations in expropriation. On the contrary, more infringements occurred due to the controversy over the allocation of the compensation (James, 2007: 466, 488-489). Overall, these regulations create the basic structure of collective land ownership, which separates individual land use rights from the collective land ownership, and allows a limited transferability of the land use rights. This is further refined in the following LAL. As the fundamental law of China, the Constitution cannot provide detailed regulations for each issue concerning land. More notably, it cannot be the cause of action for individuals to bring a lawsuit. Therefore, other basic laws, such as the LAL are needed in order to guide the actions of individuals and the governments concerning land use.

In addition, according to Article 6 of the 1993 Amendment and Article 15 of the 1999 Amendment to the Constitution, the household responsibility system (HRS) and the two-tier management system as China's basic management system in rural areas, were

¹³⁵ This provision actually had the effect of nationalizing privately owned urban land on which privately owned residential buildings stood without compensation — some such land existed at the time of the enactment of the 1982 Constitution (Yu, 2011: 82).

¹³⁶ There were some disputes about the meaning of 'the right to the use of land' in academia. Some scholars hold that the land use rights which was allowed to be transferred, in fact, only refers to the state-owned land use rights, rather than the rural land. According to Paragraph 4 of Article 2 of the 1988 amended LAL, however, both the state-owned land and the collectively owned land can be transferred according to law. The specific methods of transfer will be provided by the State Council. Yet, there is only a specific regulation about the transfer of the urban land use right — the Interim Regulations of the PRC Concerning the Assignment and Transfer of the Right to Use the State-owned Land in Urban Areas (*zhonghua renmin gongheguo chengzhen guoyou tudi shiyongquan churang he zhuanrang zanxing tiaoli* 中华人民共和国城镇国有土地使用权出让和转让暂行条例), which was released in 1990. There is still no such a regulation on the transfer of rural land use rights, especially the collective construction land use rights.

¹³⁷ The full text of the 1988 Amendment and the 2004 Amendment to the 1982 Constitution (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2008-01/24/content_1381975.htm and http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381906.htm, respectively.

finally recognized in the fundamental law.¹³⁸ The 1999 amendment is significant also because it introduces the concept of ‘the primary stage of socialism’, which holds that, before the true Marxist can be realized, China must endure a period of limited private ownership. It further confirms some kinds of private ownership within the primarily socialist economic system (James, 2007: 465). In the 2004 amendment, individuals are endowed with more protection of their private property. In the case that the private property is expropriated or requisitioned by the state in the public interest, the affected holders are entitled to obtain certain compensation. To some extent, Chinese citizens now have an ‘inviolable’ right to private property and can get compensation from the state whenever their property are expropriated or requisitioned.

More notably, judging from the literal sense of ‘land in the cities is owned by the state’ (paragraph 1 of Article 10), it is easy to take the nationalization of land as the premise of the urbanization of land. That is, all the urban land should be considered as state-owned land.¹³⁹ This general understanding led to an almost unlimited scope of expropriation of collective land in practice (R. Zhong, 2012). A reasonable interpretation of this statement should be ‘the urban land may belong to the state’, which means the collective may own certain urban land in some cases. This is the precondition for future reform of the expropriation system.

Too broad expropriation of land in the LAL

The Land Administration Law (LAL) was adopted in 1986, amended in 1988 and revised in 1998.¹⁴⁰ The latest amendment was in August 2004, whose stated purposes are ‘strengthening the administration of land, safeguarding the socialist public ownership of land, protecting and developing land resources, ensuring a rational use of land and giving a real protection of cultivated land to promote sustainable development of the socialist economy’ (Article 1). In the early 1980s, as the development of China’s economic construction, the occupation of land expanded rapidly. The management of urban and rural land was separated. The

¹³⁸ The full text of the 1993 Amendment and the 1999 Amendment to the 1982 Constitution (English version) are available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381974.htm and http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381953.htm, respectively.

¹³⁹ Article 8 of the 1998 LAL provides a further refined regulation which states that land in the urban districts shall be owned by the state. This is consistent with the following regulation that usually land in the rural areas and especially suburban areas are collectively owned by farmers. Actually, suggestions for modifying this article have been proposed in the legislative process of the 1998 LAL. With the continuous expansion of urban constructions, collective land may also locate in the urban areas. However, as the Constitution is the fundamental law of the state and the legal basis for all legal regulations, if there is no change in Article 10 of the Constitution, Article 8 of the 1998 LAL cannot be modified either.

¹⁴⁰ Here the difference between the amendment and the revision of law should be distinguished. If the change of the contents of the law is small, the legislature usually adopts an amendment to the law concerned, which is called a ‘partly modification’. Being different from the partly modification of amendment, the revision of law is to modify the law completely, which is called an ‘overall modification’. If it is a revision of law, it means a new law is made (Wu, 2010).

unclear amount of land resources, confused land ownership and frequent land disputes led to an indiscriminate use of urban and rural non-agricultural construction land and a serious waste of land.¹⁴¹ Under the circumstances, the 1986 LAL was made to meet the needs of the new situation. This is the first law on the management of land resources, which gives a comprehensive adjustment of land relations since 1949 when the new China was founded. Its promulgation shows China's major shift in land management and the fundamental reform of the management system, marking the land management in China enters into a track of legal management. This is mainly reflected in three aspects: the achievement of a unified management system for urban and rural land; the initial formation of a legal framework of land management; and the land use system began to run orderly in practice.

Conforming to the 1988 amendment to the 1982 Constitution, the 1988 amendment to the 1986 LAL also confirmed that state-owned land use rights and collective land use rights can be transferred according to law. Also, a paid use system of state-owned land was introduced in (mainland) China. However, with the deepening of the reform and the development of economy, the 1988 amendment could not adapt to the need to protect the farmland effectively. The development zone fever and the real estate fever led to a sharp drop in the farmland area, and the contradiction between more people and less land became increasingly acute.¹⁴² In this case, the CPC and the State Council published the Notice on Further Strengthening Land Management and an Effective Protection of Farmland (*zhonggong zhongyang guowuyuan guanyu jinyibu jiaqiang tudi guanli qieshi baohu gengdi de tongzhi* 中共中央、国务院关于进一步加强土地管理切实保护耕地的通知) on 15 April, 1997 (commonly known as the No. 11 Document), in which a series of measures to strengthen land management and the protection of

¹⁴¹ These problems have been summarized in the Notice of the CCCPC and the State Council on Strengthening Land Management and Stopping the Indiscriminate Use of Farmland (*zhonggong zhongyang guowuyuan guanyu jiaqiang tudi guanli zhizhi luanzhan lanyong gengdi de tongzhi* 中共中央国务院关于加强土地管理制止乱占滥用耕地的通知) issued in March 1986, three months before the promulgation of the 1986 LAL. Among the measures for strengthening land management, the making and improvement in the rules on land management, more precisely, the making of a land law in China is proposed. This directly promotes the promulgation of the 1986 LAL.

¹⁴² According to the Description on the 'Revision of the Land Administration Law of the PRC (Draft)' published in April 1998, from 1986 to 1995, more than 7,000 *mu* of the farmland was damaged because of the adjustment of the agricultural structure and natural disasters. Besides, 2,960 *mu* of farmland was occupied by non-agricultural constructions, which means too much farmland has been occupied due to urban expansion and the scattered construction of villages. Facing the changing economic situation, the 1986 LAL showed its limitations, such as the lack of strict legal restrictions on the conversion from agricultural land into construction land, the lack of strong legal supervision system and the means to punish violations, the lack of strict legal restrictions on compulsory land acquisition and the lack of clear regulations on the management of land resources and land market.

farmland, and the freezing of the non-agricultural use of farmland are proposed. Taking the 1997 No. 11 Document as a guide, the focus of the 1998 LAL was on changing the way of land management from the previous land classification and a quota approval system to a strict control over the land use system, strengthening the effectiveness of the overall land use planning and the annual land use plan, and reinforcing the protection of farmland through a land use control system. Under this land use control system, the approval power of the overall land use planning, the approval power of the occupancy of farmland and the approval power of land expropriation are transferred to higher levels of governments.¹⁴³ Punishments for land violations are also emphasized. It can be said that the 1998 LAL is a huge reform in the way of land management and land use patterns. It is also a direct embodiment of the fundamental change in the thinking about land management of the central government.

The report of the SCNPC Inspection Team's inspection of the enforcement of the LAL published in August 2000 summarizes the results achieved in the implementation of the 1998 LAL.¹⁴⁴ In the meantime, the situation of land resources and the main problems in the enforcement of law are proposed. First, the situation of land resources is grim, and the task of achieving the goal of balancing the total amount of farmland is arduous. Second, land violations frequently happened, and the law enforcement needs to be further strengthened. Third, contradictions in implementing the new LAL still exist, and some institutions need to be further improved. The Ministry of Land and Resources (MLR) soon issued a written statement on this report in December 2000, in order to deal with the problems involved in the report. In addition to strengthening the publicity of the 1998 LAL, issues concerning farmland protection, enforcement of the LAL, approval and enforcement of the overall land use planning, efficiency of the approval of construction land use, research on the property-rights system of collective land, the contradiction between the adjustment of agricultural production structure, and the protection of basic farmland are also discussed. It is noteworthy that certain resolutions put forward in this statement have become the guidelines of current land reform, such as the balance of the occupation and the supplementation of farmland in terms of farmland protection, and the separation of the FUR into a right to contract land and a right to manage land in terms of the reform in the property-rights system of collective land.

Although a number of problems are discovered during the implementation of the 1998 LAL, there is no big change in the 2004 amendment, except for the distinction between land expropriation (*zheng shou* 征收) and land requisition

¹⁴³ See Article 21, 33 and Article 45 of the 1998 LAL, respectively.

¹⁴⁴ There are five results mentioned in this report, which include: the reinforcement of the construction of supporting laws and regulations, and the promotion of a legal system for land management; the formulation of land use planning and the implementation of the land use control system; the sorting out of land resources, the balancing of the occupation and the supplement of land, and the new progress in farmland protection; the vigorous promotion of land administration according to the law and the regulation of land management practices; the careful implementation of the 1998 LAL and the fortification of law enforcement.

(*zheng yong* 征用) (Washburn, 2011: 80). Actually, this amendment is directly connected with the 2004 amendment to the Constitution, which recognized the right of specific people whose land is expropriated to obtain compensation. As early as the 1986 LAL, regulations regarding the compensation for land expropriation already existed. Moreover, the amount and the scope of this compensation have been increasing. Nevertheless, the compensation is still quite low as it is based on the original use of the land expropriated, namely the output value of the farmland. Even though it was increased to 6-10 times of the average output value of the three years preceding the expropriation of the farmland (that is, individual households can only get compensation equivalent to the value of the agricultural output from the expropriated land in the future 6-10 years), there is no compensation for the remaining 20-24 years of farmers' land use rights.¹⁴⁵

With regard to the modification of other contents of the 1998 LAL, as said by Li Yuan — the former Vice Minister of the MLR, the State Council planned to propose a motion about the comprehensive revision of the LAL after the publication of the CPC's policies on the reform of the land management system (Li, 2004). In fact, the main contradiction in land expropriation is that the scope of expropriation is too wide. Even under a requirement for a public purpose, large amounts of collective land was expropriated for commercial constructions, and the enormous price difference caused by this change in land use is controlled by the government. According to the 2013 Decision of the CCCPC, the scope of land expropriation should be narrowed in the later land reform, which means the state cannot expropriate the collective land that planned for profit-oriented uses, and then grant it to developers. The landowner (collective farmers as a whole) can

¹⁴⁵ According to Article 27 and 28 of the 1986 LAL, compensation fees for expropriated land include land compensation fees, resettlement fees and compensation for attachments to or green crops on the land. The land compensation fees shall be 3-6 times of the average output value of the three years preceding the expropriation of the cultivated land. The resettlement fees for each agricultural person to be resettled shall be 2-3 times of the average annual output value of the three years preceding the expropriation of the cultivated land. But the maximum resettlement fee per hectare of land expropriated shall not exceed 10 times of the average annual output value of the three years prior to the expropriation. In the event that the land compensation fees and resettlement fees paid are not enough to maintain the original level of living of the affected farmers, the resettlement fees may be increased with the approval of provincial governments. But the combined total of land compensation fees and resettlement fees shall not exceed 30 times of the average output value of the three years prior to the expropriation. In the 1998 LAL, in addition to clearly stating that the compensation should be made according to the original purposes of the land expropriated. The land compensation fee is increased to 6-10 times of the average output value of the three years preceding the expropriation. The resettlement fee concerned is improved to 4-6 times of the average annual output value of the three years preceding the expropriation. Besides, the maximum resettlement fee and the combined total of land compensation fees and resettlement fees are raised to 15 times and 30 times of the average annual output value of the three years prior to the expropriation, respectively (Article 47). The full text of the 1986 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=12916&CGid=>.

develop such construction land itself or transfer it to developers, according to the local land use planning. However, this is the biggest difficulty in the current land reform, as the government does not want to limit its own power. That is why the latest central policies or the drafts for legal revisions mainly focus on improving the compensation for the affected collectives and farmers, instead of limiting the scope of expropriation.¹⁴⁶ Furthermore, if the scope of expropriation is about to be confined further, which means the land used for non-public purposes can be developed by collective farmers themselves without changing its collective ownership, Article 10 of the Constitution must be modified first. It is also quite a difficult reform as the main local revenue is from granting the expropriated land to developers for high profits — the so-called ‘land finance’. Owing to the enormity of local debts, the land finance will not disappear in the near future. That is, the reform of land expropriation system in China will be a slow process.¹⁴⁷ This will be further discussed in chapter 8 and 9.

4.4.2 An overall suppressed land rights of individual farmers

Since the promulgation of the 1998 LAL, the protection of farmland has been treated as the most critical task of governments at all levels in China. For this purpose, land rights and interests of the collective and individual farmers involved are greatly restricted. This is reflected in three aspects:

First, in addition to the strict restriction on the conversion of agriculture land to construction land through the land use control system, the transfer of farmers’ collective land use rights including the FUR, the collective construction land use right and the right to use the collective residential land, are constrained. Specifically, the FUR can only be transferred for agricultural purposes; the collective construction land which mainly concerns the land used by the township

¹⁴⁶ In the latest Draft of the LAL submitted by the central government to the Standing Committee of NPC at the end of 2012, the former Article 47 concerning the compensation of land expropriation was modified. However, it was denied by the Standing Committee as there is no fundamental reform in the expropriation system (Ji, 2013). According to this Draft, the focus of these revised articles is on the improvements in the compensation standards, but not the narrowing of the expropriation scale. Regarding the definition of the expropriation scope, the MLR has initiated certain local pilots. In the meantime, reforms in the transfer of collective construction land are promoted, together with a more strict definition of the public interest. The final objective is to make sure that the desired land used for non-public purposes lies outside the scope of land expropriation. It is obvious that a further revision of the 1998 LAL concerns a series of reforms, which are still in a pilot stage according to the plan of the MLR.

¹⁴⁷ According to the audit report on government debts issued by various provinces and cities nationwide, as of June 2013, the proportion of debts fall due of local governments at the end of December 2013, in 2014 and 2015 is up to 62%. This means local governments still face enormous pressure to repay debts in 2014. Besides, the repayment of local debts relies greatly on land revenue. The balance of the debt that should be paid by land revenue nationwide accounts for 37.23% of the balance of debts that the local government bears the responsibility to repay, while the ratio is higher in some provinces. For instance, the ratio is up to 66.27% (W. Chen, 2014). The relation between land finance and local debts will be discussed in chapter 9 (9.2.1).

and village enterprises (TVEs) can only be transferred due to bankruptcy or merging or for other reasons; the right to use the collective residential land/homestead can be transferred together with the house on it, but the former rights-holders cannot apply for another homestead.¹⁴⁸ The private land rights of collective farmers to use the collective land in China are overall suppressed.

Second, as a unified law concerning land use planning is not currently available, public powers have an enormous impact on the farmland use in China (Dong, 2013). In terms of the acquisition of land rights, as the FUR is acquired through the contract between farmers (the contractor) and the collective (the contract-issuing party), it is not affected directly by the planning.¹⁴⁹ Regarding the exercise of the FUR, restrictions mainly relate to the control over the change of land use and the protection of farmland. Thus, land expropriation as a compulsory way to transfer farmland and change the farmland use is regulated by the planning system. Usually, the public control or government intervention in the land use is justified by public purposes/public interests. However, this strict control over farmland use in China infringes the legal rights and interests of the collective landholders (the collective and individual farmers). More notably, the strict land use control system is not observed well in China, especially the violations from local governments greatly weakens its desired effect (Bramall, 2004: 130).

Third, the distribution of the added value of the expropriated land is totally controlled by local governments — the acquiring authority, as the collective land including the farmland can only be transacted on the market after it is expropriated and transformed into state-owned land. In accordance with the existing law, the compensation for the expropriated land is based on its original use, while the transfer price paid to the government is based on its market value. This means the price difference is merely owned by the government. On the basis of this low

¹⁴⁸ With regard to the collective construction land use right, there is an independent chapter (Chapter Five Construction Land in the Town (ship) and the Village) in the 1986 LAL and its 1988 Amendment. The right to use homestead was also regulated in this chapter as one type of collective construction land. Yet, in the 1998 LAL and its 2004 Amendment, the collective construction land is regulated together with the state-owned construction land in the same chapter (Chapter Five Land for Construction Purposes), in order to provide an equal protection for both types of land.

¹⁴⁹ Before the foundation of the New China in 1949, village planning was based on the traditional ideas and customs within the individual villages. There were strict rules on the layout and orientation of houses. During the first national five-year economic plan (1953-1957), there was a certain development of the village planning. However, after entering the People's Commune era, almost all the villages within certain local areas was re-planned with the same pattern. During the implementation of the HRS in the late 1970s (after the collapse of the commune system), the allocation of collective farmland was based on the quality and the location of the land without following any unified planning. Until in 1993, the State Council issued the Regulations on the Construction and Management of the Village and Town Planning (*cunzhuang he jizhen guihua jianshe guanli tiaoli* 村庄和集镇规划建设管理条例), which only concerns the construction and layout of residential land, land used by TVEs, and land used for township public facilities and public utilities.

compensation standard, the final compensation paid to farmers is usually far enough to compensate their real loss (Dang, 2005). The legal interests deserved by farmers whose land has been expropriated are not well protected.

In accordance with the four variables in balancing the private rights and the public power involved in land transfer I proposed in chapter 2, whether in terms of the delineation of property rights in land (regulations on the property rights on land from both private law and public law), the allocation of private rights and public powers in land use planning, or the economic right in land development process, the unequal distribution of private rights and public powers in the transfer of land in China is obvious.¹⁵⁰ In other words, the government regulation of farmland transfer in China does not secure a balanced protection for the private interests and the public interests involved. This can be further proved from the analysis of the current land tenure security of Chinese farmers in the next chapter.

4.5 Particularities of Chinese farmland transfer system

4.5.1 Public interests involved in transfer process

An obvious feature of the farmland transfer system in China is the various restrictions imposed on the transfer process. It is usually in the name of certain public interests. Regarding the public interests involved in the restrictions on market transfers of farmland, two main reasons that used for limiting the transferability of the FAR are noteworthy. One is the social security function imposed on the farmland, and the other one is the avoidance of the non-agricultural use of the farmland. As regards the social security function of the contracted farmland, it is closely related to the distinctive social and economic structure of China — a typical dual economic and social structure. In terms of the land system, the household registration system and the social security system, two different sets of provisions are employed in the urban and the rural China separately.¹⁵¹ Before the establishment of a sound and a comprehensive social security system in rural areas, farmers' living has to rely on the contracted farmland. This is also why farmers as collective members can obtain certain land from the collective freely in accordance with a strict egalitarian basis. Also, a periodic land reallocation is

¹⁵⁰ The fourth variable — legal relief provided for the parties involved — will be discussed in detail in chapter 5.

¹⁵¹ Since the adoption of a binary land ownership system, generally all the land in cities is owned by the state. The state provides the employment opportunity, the social insurance, the minimum living security system and other public goods for urban residents with land revenue, taxes and other sources of income. Yet, in rural areas, the land generally belongs to the collective. Farmers as the member of the collective can obtain a piece of farmland for free and seek profits from this contracted land, which can help them meet the basic needs of life. Needless to say, this is a classic characteristic of the subsistence agriculture.

adopted to ensure this equality according to the demographic changes. However, this egalitarianism guarantees the basic living of every collective member at the expense of the farmland use efficiency. Since the early 1980s, farmers have been encouraged to transfer out their land use rights, through which households with new family members may transfer in more land that they need to feed themselves. Nevertheless, certain restrictions are still there to prevent farmers from being landless. From my perspective, such restrictions may be rational and practical in the past, when farmers had to worry about their basic living. With the transition from an agricultural society to an industrial economy, the central issue in rural China is not the living security of farmers, but how to increase the production in agriculture (Chen, 2010). This requires a more efficient use of farmland. Based on the regulations in the RLCL and the PL, farmers have been endowed with more rights to use and dispose of their land rights. Meanwhile, due to the life-support function of the farmland, many restrictions have to be enforced to protect farmers from being landless. This is an inextricable contradiction. A critical question here is whether this limited use of farmland really secured the livelihood of farmers.

First, I have to say that the contracted farmland (with limited use) did solve the problem of food and clothing of most farmers (I cannot say all of them), but it cannot resolve the other needs of farmers, like the medical expenses, the tuition fee and the employment problem of their children. Farmers have to find other income resources to afford all these costs. That is why non-farm jobs and migrant workers became so popular in China from the end of 1990s. Second, with the rapid explosion of urbanization, the scale of farmland is increasingly decreased (being converted into construction land). An increasing number of farmers become landless, which means the life-support function of the farmland weakens (Liang et al., 2014). The low value of land production also abates the living security afforded by farmland. The key point is that, as a basic constitutional right, farmers have the right to enjoy the material assistance from the state and the society when they are old, ill or disabled.¹⁵² That is, each farmer has a right to access the social security, for which the state should bear the responsibility. Even if later farmers can enjoy more freedom to use and dispose of their land rights, the state still needs to establish a sound social security system for them.¹⁵³

¹⁵² Article 45 of the Constitution stipulates that, citizens of the PRC have the right to material assistance from the state and society when they are old, ill or disabled. The state develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right.

¹⁵³ The central government/the State Council has started the establishment of a social security system in rural areas. In 2009, it issued the Guidance of the State Council on Carrying out the New Pilot of Social Pension Insurance in Rural Areas (*guowuyuan guanyu kaizhan xinxing nongcun shehui yanglao baoxian shidian de zhidao yijian* 国务院关于开展新型农村社会养老保险试点的指导意见). This new system is based on the contribution of individual farmers, the assistance of collectives and the subsidies from governments.

The second reason for limiting the transferability of the FUR is the concern of the central government on the non-agricultural use of farmland, which also relates to the protection of food security. It was and is the biggest concern of every government, and the Chinese government is no exception. The adoption of the HRS gave farmers a right to use the farmland on an egalitarian basis on the one hand; on the other hand, it results in a serious fragmentation and a small-scale management of farmland. In fact, the central government has always advocated scale farming since the Deepening the Rural Reform was issued in 1987. From the late 1980s, it approved a series of experiments on farmland transfer, especially those carried out by some developed coastal areas regarding a moderate scale of farming. In my opinion, even though moderate-scale farming is a desired objective of the government regulation of farmland transfer, the dominant position of the household management of the farmland should be safeguarded. Based on the huge amount of farmers, the household management will be the leading form of using the farmland in the near future.¹⁵⁴ However, it does not mean that the other business entities cannot engage in farmland use. The problem is how to guarantee the agricultural use of the transferred farmland and how to protect farmers' land rights and interests during the transfer process. Actually, all these purposes can be achieved by a more effective land use control system, which includes a more detailed and enforceable land use planning system, a further improved land registration and cadastral system, a sound land transfer market, and a due punishment system for violations. More importantly, the initiative or the participation of the farmers involved in the transfer plays a key role in realizing those purposes above. This will be discussed in detail in chapter 7. As regards the public interest involved in land expropriation, it is mostly for the economic growth of local areas. As it will be argued in chapter 8, participation of the affected farmers is also vital to the definition of public interests in land expropriation.

Meanwhile, it combines with the current family support for the elderly, the security provided by the land, the social assistance and other social security measures, in order to protect the basic living of elderly rural residents. The objective is to achieve a full coverage in rural areas before 2020. Since 2002, a new rural cooperative medical system (the NCMS) has been established, in which the individual farmer, together with the collective and local governments is responsible for the financing. At present, the NCMS has covered about 812 million people; the coverage is more than 98%. In 2013, the NCMS starts focusing on the serious diseases and up to 20 kinds of serious illness is included in this system. It is reported that the reimbursement rate shall be no less than 90% (China Youth Daily, 2013).

¹⁵⁴ According to one report, 84.24% of (surveyed) households' income was mainly from the contracted farmland in the early 1980s; while by the end of 2010, farming was still the main occupation of 37.7% of (surveyed) households. It can be said that the management of contracted farmland is still the main channel for absorbing household labors of one third households and the most stable source of their economic incomes (Wang, 2013).

4.5.2 A lack of legalization of current central policies on farmland transfer

Whether in terms of market transfers of farmland or the reform of land expropriation system, a tendency towards a market-oriented mechanism is increasingly clear. As proved above, related land policies provide a more comprehensive system for farmland transfer than the legislation. Moreover, due to the significance of land policies in China, new regulations in central policies indicate the reform direction of relevant land laws. In terms of the market farmland transfer, although the earlier policies on promoting farmland transfer have been legalized through the 2002 RLCL, the 2007 PL and the two ministerial rules of the MOA, policies since the 2008 Decision of the CCCPC which provide a more detailed and balanced regulation have yet to be legalized. Meanwhile, the regulation system under the existing legal rules is characterized by a strict government administration. In particular, rules in the LAL mainly focus on the land management power assumed by different levels of governments, and the protection of private land rights is limited. With the redefinition of the collective land ownership and the quasi-private nature of the FUR confirmed in the policy, a series of relevant laws and regulations concerning land should be modified consequently. More specifically, the restrictions on the collective land ownership and individual farmers' rights to transfer land should be further released in law, especially the one in the Constitution and the LAL. Only with a prompt legalization of these advanced policies, farmers' land rights can be better protected. To sum up, more empowerment to use the farmland should be available for Chinese farmers not only in central policies, but also in the legal framework.

4.6 Concluding remarks

Under the current legal system, land rights and interests of collective farmers in China are overall suppressed by the related public powers. Although the FUR has been increasingly strengthened, it has been done so mainly through the central policies instead of the legislation. The gradualist approach in land reform adopted by the central government is evident. In terms of land use, there are mainly two ways of regulating the property rights in land, and China chose the direct way. This means the public power directly restricts the exercise of private land rights, with a view to ensuring food security and the social security function of farmland to Chinese farmers. In accordance with the first three variables in balancing private rights and public powers in farmland transfer, the current government regulation of farmland transfer in China is unbalanced. Limited private land rights suppressed by enormous public power, the lack of private rights in land use planning, and the absolute control of local governments over the added value of the expropriated land require further reforms in the current regulation system. It also necessitates the

adoption of a new governance perspective in the government regulation of farmland transfer in China. As shown above, a relatively complete system for regulating the market transfer of farmland has been established, although it is not totally legalized. However, a fundamental reform regarding the non-agricultural use of farmland and the resulting distribution of the benefits, namely an ultimate and comprehensive reform of the land expropriation system is still absent, even at the central policy level. It can be said that the excessive expropriation of land caused by barely restricted public power is the biggest threat to farmers' land rights.

From the perspective of law-making under a governance perspective, as the main basis for making and revising relevant laws on land use, the market-oriented reform in farmland transfer supported by the latest policies will be the direction of the coming legal reforms. What is more notable is that these innovations in land policies mainly concentrate on a fair outcome of government regulation. This leads to the lack of procedural rules in law. In other words, rules on the detailed procedures through which farmers may better safeguard their land rights are needed. In the next chapter, through an analysis of the land tenure security of Chinese farmers, problems that caused by the unbalanced government regulation of farmland transfer can be better observed. Also, through a further detailed analysis of the legal rules involved in farmland transfer, an examination of the availability of procedural rules on securing the participation of the parties involved will be conducted.

5 Unsecured land tenure and a need for a transformation in the law

After the adoption of the household responsibility system (HRS) in rural China, the farmland use right (FUR) of Chinese farmers has been increasingly strengthened by legislation together with central policies. In particular, a series of legal rules have been provided to ensure individual households' rights to possess, use, seek profits from, and dispose of their contracted farmland under certain conditions. However, the establishment of the rule of law in a certain country requires norms for both the making and the implementation of rules (UN, 2011). In accordance with the New Institutional Economics (NIE), the function of the rule of law is to create best institutions for the clarification and the enforcement of property rights (Ringer, 2007: 151). Although the concept of the rule of law is narrowed in this perspective, it does identify the significance of the implementation and the enforcement of legal rights to a society with the rule of law. This also applies to the interpretation of land tenure security. Without a well-functioning enforcement of these legal rights, even with a clearly-defined system of land property rights in law, secured land tenure cannot be established in practice. As argued in chapter 4, the current regulation system of farmland transfer in China is unbalanced. Even though private land rights, especially the FUR, have been endowed with a quasi-private nature, the direct intervention by public authorities in the transfer process is obvious. More empowerment of Chinese farmers in law is still needed to protect the initiative of individual farmers in the transfer process. This is the requirement for full empowerment and effective participation of private parties, according to the first dimension of the government regulation based on a governance perspective introduced in chapter 2.

Overall, there are two main purposes served by this chapter. First, on the basis of a detailed analysis of the current land tenure security of Chinese farmers, problems caused by the unbalanced government regulation of farmland transfer will be identified. Second, through a closer look at the relevant legal rules concerning farmland transfer, the availability of the rules that protect farmers' participation will be examined. Regarding the structure of this chapter, after elucidating the various dimensions to understand and measure the land tenure security in theory, an assessment of the legal land tenure security in China will be followed. Due to the complexity of the enforcement of land rights in China, aspects such as farmland registration, reform of the land expropriation system and resolution of disputes in farmland transfer will be discussed in turn in section 5.3, 5.4 and 5.5. Based on the real situation and individual farmers' perceptions of farmland transfer, a key question concerning the existence of a *de facto* and a

perceived land tenure security in rural China will be answered. The sixth section discusses how the legal land tenure security can be improved to safeguard its *de facto* and perceived counterparts, and a need for a transformation of the law on farmland transfer in China is pointed out. The last section provides a conclusion.

5.1 What is land tenure security?

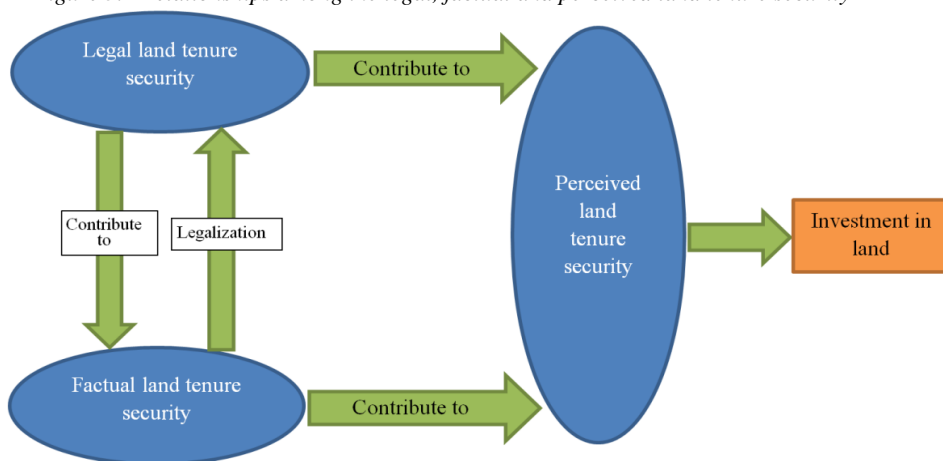
5.1.1 Different dimensions to tenure security

According to Place et al., land tenure security (LTS) can be defined as existing when an individual or a group is confident that he/she or they have rights to a piece of land on a long-term or a continuous basis, free from dispossession by outside sources, and with the ability to reap the benefits of labor or capital invested in land, whether through direct use or upon transfer to another holder (Place et al., 1994; Hanstad et al., 2009). This definition contains three measurements for assessing land tenure security, which are breadth, duration, and assurance. Although it provides a relatively comprehensive description of how to measure the security of certain land tenure, it is still confusing that whether the confidence of individuals or groups is from an established and well-functioning legal system or an actual situation guaranteed by a series of informal measures that implicitly admit the existence of a property right. Van Gelder (2009) then proposed a tripartite model of tenure security which includes a legal tenure security, a factual tenure security and a perceptive tenure security. Although it is based on the urban housing informality in Buenos Aires, this research provides a better understanding of the concept of tenure security. Returning to the definition of the LTS above, it clearly belongs to the perceived tenure security, which can be generated by both the legal or *de jure* tenure security and the factual or *de facto* tenure security.

Literally, the legal LTS refers to the security provided by the land use legislation and policies, in which the delineation of property rights is the main issue. In other words, the legal system shall provide a clear property-rights regime or formal rules for rights-holders, and only those with a formal title can be protected by state laws. However, a protected property right in law does not necessarily give rise to a secured right to use the property in practice. A certain level of *de facto* tenure security may exist without legal recognition, which means LTS can also be achieved through the factual situation on the ground or an actual control over the property. As argued by van Gelder (2009: 41-47), continuing increases in the *de facto* tenure security through measures like registration and taxation may eventually lead to a legal tenure security. This undeniably offers a new perspective in the adjustment of informal land tenure for countries where informal land rights prevail. On the one hand, the state should adjust its norms to

accommodate these informal practices; on the other hand, with the aim of obtaining the legal recognition, the *de facto* land tenure shall meet the requirements of the state law to a maximum extent. With this mutual adjustment, legal LTS can finally be implemented and enforced in practice. In essence, the existence of *de facto* LTS relates closely to the enforcement of the legal one. Through the analysis of *de facto* tenure security, flaws in the legal tenure security can be better observed. More importantly, the increase in both legal LTS and factual LTS contribute to a perceived tenure security. Relationships among these three levels of LTS can be illustrated through Figure 5.1 below.

Figure 5.1 Relationships among the legal, factual and perceived land tenure security



The definition of LTS mentioned at the beginning of this section cannot precisely demonstrate whether legalized LTS exists in one jurisdiction or not. Theoretically, under established legal tenure security, the rights-holders should have an overarching, long-term and well-protected right to their land. Meanwhile, a land tenure, which simultaneously satisfies these requirements for breadth, duration and assurance can only be legal land tenure, as the assurance of land tenure should be guaranteed by state authorities through formal rules. Hence, the legal LTS can be analyzed via the examination of these three measurements.

5.1.2 The breadth, duration, and assurance of land tenure

Based on the definition provided by Place et al. (1994: 15), breadth refers to the quantity and the quality of the land rights held, which may include rights to possess land, to grow or harvest crops, to sell or lease land to others, and to mortgage land as security for credit. The transferability of land rights provides the most typical example. The right to transfer one's land includes market transfers, such as sale, lease, sublease, transfer and mortgage; and non-market transfers, such as inheritance and bequest. It can also be divided into temporary transfers, such as

lease and sublease; and permanent transfers, such as assignment. In general, the more the rights to land are held by a landholder, the greater the tenure security is considered to be. In terms of the quality of farmers' transfer rights, restrictions imposed on the transferability of land rights are key influencing factors. As mentioned above, the confidence of landholders in using the land freely and the possibility of acquiring benefits from their investments in land are the main components of LTS. Therefore, the more limited the land transfer is, the less secured the land tenure would be. The amount of limitations on the transferability of land rights has an inverse relationship with the LTS. It is worth noting that although private land ownership may provide a broader bundle of rights, it does not mean that the strongest land tenure can be established consequently. For instance, due to the dominant paradigm of liberal legalism in Brazil, more precisely, 'absolute' private property rights, private land are almost regarded as a commodity whose exchange value is solely determined by the individual interests of private owners. Thus, state intervention in land use in the interest of the public is greatly limited (Fernandes, 2007: 209). This legal LTS for private landowners is at the cost of the insecurity of people who do not have property. Therefore, as long as the land rights provided by law can guarantee a full and a secured use of land for individuals, tenure security may be established, whether it is under private land ownership or not.

The second measurement of the LTS is the duration, which refers to the time period that land rights remain valid. Technically, it is not necessary that every tenure right has the same duration. Yet, there is no doubt that a longer duration means a greater LTS. For example, land ownership or its peer rights in common law are perpetual, but other long-term rights may provide similar incentives to land users and bring about similar behavior, such as the right to perpetual usufruct in Polish law. It is usually created for 40 to 99 years, depending on the purpose of its creation. Together with the renewability of the time period, conceptually this right is perpetual.

The third measurement is the assurance, which refers to the certainty or the enforcement of the breadth and the duration of land rights. Even if a person is perceived to have land rights with a certain breadth and a stable duration, difficulties in enforcing these rights may exist. The assurance of land rights is consequently damaged, and rights that cannot be enforced are meaningless to the holders. Moreover, the more costly it is to exert the right (whether in terms of money, time or effort), the less valuable the right is (Prosterman et al., 2009: 36).

In a nutshell, the security of (legal) land tenure can be measured from these three dimensions. On the contrary, land tenure insecurity can be defined to exist where an individual or a group has: (1) inadequate number of rights or lack of key

rights; (2) inadequate duration long enough to recover the benefits from the investment in land; and/or (3) lack of assurance to prevent the interference from outside (Roth and Haase, 1998). Below, the tenure security of Chinese farmers to their contracted farmland will be examined based on the three measurements above.

5.2 How secured are Chinese farmers' land use rights in law?

5.2.1 Breadth of the FUR

According to Article 16 of the Rural Land Contracting Law (RLCL), farmers or contractors shall enjoy the rights to use the contracted land, to reap the yields and to transfer the contracted land (use right). They also enjoy the right to make their own decisions regarding the arrangements for production and operation, and the disposition of the products. That is, this article endows farmers with the right to use and manage their contracted land. Then in the Property Law (PL), after clarifying the nature of the FUR as a usufruct, Article 125 further secures farmers' rights to possess, use and seek proceeds from their cultivated land.¹⁵⁵ These are statutory rights.¹⁵⁶ Even if there is no agreement in the contract, the contractor is legally entitled to enjoy these rights.

These statutory rights concern the quantity of the land use rights of Chinese farmers. Apart from the rights to possess, use and seek proceeds from the FUR, farmers can also dispose of their land use rights under certain circumstances. Regarding this disposition right, contractors can transfer their land use rights to others in a narrow sense. They can also create an encumbrance on their rights in broad terms. For instance, the contractors may mortgage their land use rights, which touch upon the quality of the FUR. As discussed in chapter 4 (4.2.2), in

¹⁵⁵ The full text of the RLCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm; and the full text of the PL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm.

¹⁵⁶ The right to possess means the contractor has the right to manage the contracted farmland directly and exclusively. It is the precondition of using and seeking proceeds from the land. Moreover, the purpose of the right to contract and manage land (RCML, including the FUR) is for farmers to engage in farming, forestry, animal husbandry or other agricultural productions of the collective land. Therefore, a contractor can rationally and effectively use their contracted land is one of the important powers of the RCML. Regarding the types and the methods of agricultural production, the contractor can make their own decisions in accordance with the land use purpose. The contractor has autonomy in production and management, and the contract-issuing party/the collective and any other third parties have no right to intervene in such activities. The right to seek proceeds from the contracted land means the contractor can obtain the revenue generated by using the land, which is mainly from the interests in the cultivation of agricultural and forestry crops, and livestock on the ground. For example, grains produced in the grain field and fruits produced by fruit trees. Besides, contractors have the right to freely dispose of products and the freedom to decide whether to sell, how to sell the agricultural, forestry, and animal husbandry products.

accordance with relevant rules in the RLCL and other ancillary provisions of the Ministry of Agriculture (MOA), the FUR can be transferred by means of subcontract, lease, exchange, assignment and contribution as a share to farmers' cooperatives. Besides, the mortgage and guaranty of the FUR have been confirmed in the new central policies in 2013 and 2014. In the meantime, certain restrictions, such as the requirements for certain capacities of both the transferor and the transferee, and the consent of the contract-issuing party in the case of assignment/permanent transfer of farmland, are imposed on the transferability of the FUR. Therefore, in terms of the quality of the land use rights, Chinese farmers do not have a full autonomy to transfer their land.

5.2.2 Duration of the FUR

As discussed in chapter 3 (3.3.3), in accordance with the Decision of the CCCPC on Several Major Issues about the Rural Reform and Development in 2008 (the 2008 Decision), a stable and permanent land contractual relationship shall be established. If this policy can be further confirmed in law, the land tenure security (LTS) of Chinese farmers will be strengthened in terms of duration. This can be achieved either through extending the current 30-year contract for a longer term like 99 years, or providing more clear rules on the renewability of the FUR. Based on the experience of the first extension (from 15 years to 30 years) which was confirmed in the 1998 Land Administration Law (LAL), a majority of farmers' land use rights will expire around 2028. It is desirable that relevant legal provisions about the extension or the formalities of renewing the FUR are available before that time. This can be done either through an amendment to the RLCL or the PL, or an amendment to the Constitution, which can strengthen the LTS of farmers and their investments in land.

5.2.3 Assurance of farmland use rights for Chinese farmers

As mentioned above, the assurance of LTS implies that land rights and duration are held with certainty in strict terms. However, land rights and duration are usually held with varying degrees of certainty at different times (Place et al., 1994: 20). Rights that are absolutely assured will improve incentives for long-term investments, which relates to the perceived tenure security. To some extent, the more assured a land right is, the more confident the landholders are in their rights. As a result, they will choose to invest more in their land (Deininger and Jin, 2006). Measures such as the implementation of land registration, the settlement of land disputes and the improvement in the land expropriation system are typical components of this assurance system. In China, the prohibition on land reallocation of the collective also contributes to secured land rights of farmers. As argued in chapter 3 (3.2.3), the reallocation of contracted farmland in accordance with the

changes of household members should be prohibited not only in law, but also in practice. Current legal restrictions on the reallocation of contracted farmland should be implemented further in local areas. Regarding the disproportion between the landholding and the scale of individual households, the construction of a land rental market may promote equity in landholding in rural areas, as farmland can be transferred to more productive households through market transactions (Deininger and Jin, 2007). Besides, reforms in China's Hukou system (the Household Registration Management System/HRMS) can be regarded as a supplementary solution. More specifically, local governments shall issue urban Hukou to rural migrants under certain conditions, so that they can have access to the social welfares associated with the urban Hukou in the near future. To some extent, the release of these restrictions on the Hukou system may encourage the migrants to transfer their land to other farmers (Dong, 1996: 919). Therefore, households who are expert at farming may hold more land to conduct scale farming. In the meantime, migrants who choose to assign their farmland use rights should get adequate compensation.¹⁵⁷ In addition to land reallocation by collectives and establishment of a legal system for land registration, reform in the land expropriation system and availability of a sound resolution mechanism for the transfer disputes also have close ties with the security level of the FUR.

5.3 How important is farmland registration to Chinese farmers?

5.3.1 Farmland registration in Chinese history

First of all, systems of land survey and registration have a pretty long history in China. As early as the first dynasty (Xia Dynasty, 2183-2177 BC), a classification survey was conducted for collecting land taxes. Based on this, a land register was developed gradually in later dynasties. With the emergence of 'Cadaster Brought to Household (*tudi qingzhang* 土地清丈)', a modern land survey and registration system was initially established in the last Qing Dynasty (1644-1279 AD). Before the foundation of the New China in 1949, a developed land registration system had been available in times of the Republic of China.¹⁵⁸ After 1949, a Department of Land Administration was established by the former Ministry of Internal Affairs¹⁵⁹

¹⁵⁷ The RLCL, Article 26.

¹⁵⁸ See the Systems of Land Survey and Registration in China, <http://wenku.baidu.com/view/5ccc56d4240c844769eae4.html>, assessed on 16-07-2013.

¹⁵⁹ The Ministry of Internal Affairs of Central People's Government was established in November 1949. In September 1954, it was renamed as the Ministry of Internal Affairs of the PRC. Then, it was abolished in January 1969. In May 1978, the Ministry of Civil Affairs of the PRC was founded. See http://en.wikipedia.org/wiki/Ministry_of_Civil_Affairs_of_the_People's_Republic_of_China, assessed on 16-07-2013.

to be in charge of land surveying and registration, and issuing certificates. With the issuance of the Land Reform Law in 1950 and the Instruction on the Issuance of Land and House Ownership Certificates (*guanyu tianfa tudi fangchan suoyouzheng de zhishi* 关于填发土地房产所有证的指示), farmers' private ownership rights to their land and houses were confirmed in law (Wu and Zhu, 2013: 5). However, as the appearance of a highly centralized and planned economy and socialist public ownership, the private ownership was strictly limited. Furthermore, there was no legal recognition of private property (rights) at that time. During the Cultural Revolution (1966-1976) in particular, the land registration system was totally abolished (Ma et al., 2009: 10). With the adoption of the HRS nationwide in the early 1980s, former collective land was gradually individualized by contracting with individual households, orally or in writing. In 1982, a Department of Land Management was created in the Ministry of Agriculture (MOA) by the State Council, which was responsible for land surveying and registration, among other things. Later, it was replaced by the former State Land Management Bureau in 1986. Inside the Bureau, a Department of Cadaster Management was in charge of land surveying and registration, which meant the start of a modern land registration system in China. However, the registration and certification of land use rights did not involve contracted farmland.¹⁶⁰ Besides, although a batch of pilots relating to land registration and land statistics have been conducted since 1987, it has only been limited to urban land. In 1997, a so-called nationwide land cadastral survey and registration¹⁶¹ was finished, yet there has still been no land surveying, land registration and statistical system within the collective. Even though a contract is concluded between the collective and specific households under the HRS, it is usually held by the collective. Some farmers did not really have a contract in hand, let alone the issuance of land certificates.¹⁶² This remains unchanged even after the promulgation of the 1998 LAL.¹⁶³

¹⁶⁰ After the promulgation of the 1986 LAL, certain rules on the registration and certification of the collective land ownership and the state-owned land use rights, and the related change in the registration of land are provided in law (Article 9 and 10 of the 1986 LAL). However, no rules are available for the collective land use rights including the contracted farmland. The full text of the 1986 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=12916&CGid=>

¹⁶¹ The main contents of this program include an initial cadastral survey of urban land, an initial registration of urban land and a county-level survey of the national land use. Besides, in 1992 the former State Land Management Bureau issued the Measures for Management of Daily Cadastre <rural part> (For Trial Implementation). However, it is limited to the scope of the national land use survey, namely the land use above county level. Land within the villages and towns are not included (Jiang, 2008: 38).

¹⁶² According to the survey of the RDI (Rural Development Institute, now the Landesa) in 1999, 48.5% of surveyed households signed a 30-year contract with the contract-issuing party, and only 38.3% of the surveyed households really received a contract. This figure is much higher than the results of previous surveys. In other words, around 61.7% of the households across China did not get a signed contract from the collective at the end of 1999 (Ye et al., 2000: 167). Another report on the survey of rural households in

In order to protect farmers' rights to their contracted land, the Department of Rural Economic System and Management (*nongcun jingji tizhi yu jingying guanli si* 农村经济体制与经营管理司)¹⁶⁴ within the MOA began the registration of the FUR in accordance with the 2002 RLCL. As the elevation of the former State Land Management Bureau to the Ministry of Land and Resources (MLR) in 1998, the registration and certification of collective land ownership were accordingly handed over to the MLR, more precisely, the Department of Cadastral Management. Although the nationwide registration of collective land ownership started much earlier and almost finished in the middle of 2013,¹⁶⁵ only the boundaries between villages have been confirmed.¹⁶⁶ In practice, due to the weakening of the functions

Anhui and Shandong provinces supported by the World Bank in 2010 shows that large numbers of households have no contracts or certificates. Even for those who have one, basic elements, such as accurate land descriptions, definite area or boundary demarcation are missing in the documents (World Bank, 2012: 32). The Summary of 17-Province Survey's Findings issued by Landesa in 2011 also shows that, although 77.1% of all surveyed households have at least one land document and 36.7% have both documents as required by law and policies, only 20.9% of the issued contracts and 40.3% of the issued certificates include all the legally required information and can be considered strictly law-compliant. This reduces the contribution of land registration and documentation to land tenure security (Landesa, 2012).

¹⁶³ According to Article 11 of the 1998 LAL, the registration and certification of the right to use collective construction land is recognized by law. However, the registration and certification of farmers' rights to use the contracted farmland are still not mentioned. In order to accelerate the registration and certification of the collective land rights, the Several Opinions on Land Ownership Registration and Certification for Rural Collectives (*guanyu nongcun jiti tudi quequan dengji fazheng de ruogan yijian* 关于农村集体土地确权登记发证若干意见) was issued jointly by the Ministry of Land and Resources (MLR), the Central Leading Group Office of Rural Affairs, the Ministry of Finance and the MOA in November 2011. However, it still mainly concerns the registration and certification of the collective land ownership and the use rights to collective construction land. There is no special regulation on the registration of the contracted farmland. The full text of the 1998 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7125&CGid=>.

¹⁶⁴ Its main functions include the land contract management, management of farmers' burdens, management of collective assets and finance, guidance on farmers' professional cooperatives, guidance on the industrialization of agriculture, guidance on the social service system, the agricultural and economic statistics and analysis. See the Ministry of Agriculture, People's Republic of China, <http://english.agri.gov.cn/aboutm/oa/departments/>.

¹⁶⁵ According to Leng Zhihong, the vice head of the Department of Cadastral Management, until the end of 2012, the total number of registration and certification of collective land ownership across China is around 6.2 million, the certification rate is 94.7% (Shao, 2013). Besides, reportedly, the registration of collective land ownership has been finished in July 2013. According to the statistics published by the MLR, as of the end of May 2013, the registration and certification rate of collective land ownership nationwide is 97%, in which the rate of 30 provinces is above 90%. Overall, there are 23 provinces, 5 autonomous regions, 4 municipalities directly under the central government (Beijing, Shanghai, Tianjin and Chongqing), and 2 Special Administrative Regions (Hongkong and Macao) in China. This statistic only involves the 32 provinces in the mainland China. It can be said that most collective land ownership has been confirmed through land registration and certification. This report is available at the website of the MLR, http://www.mlr.gov.cn/xwdt/mts/people/201307/t20130725_1245423.htm, accessed on 14-02-2014.

¹⁶⁶ According to the Notice of the MLR on Accelerating the Registration and Certification of Collective Land Ownership (*guanyu yifa jiaukai jiti tudi suoyouquan dengji fazheng gongzuo de tongzhi* 关于依法加快

of village collectives, land rights of individual households are frequently violated (Wu and Zhu, 2013: 7). In other words, the registration of collective land ownership cannot significantly improve the LTS of individual farmers. Only through the registration and certification of the FUR of each household can individual security be guaranteed.

Before the passage of the RLCL in 2002, farmers' right to use the contracted land was generally protected through the management of land contracts. There were no registration and certification for the FUR. As contracted farmland is primarily allocated and managed through contracts, an archive system is required to be created. That is, the management of the contracted farmland in rural China relies primarily on the contract between the collective and individual households, rather than a cadastral management based on land registration. In the 2002 RLCL, on the basis of a valid contract, local governments at or above the county level are required to issue a certificate of the FUR to the contractor and have it registered (Article 22 and 23). The Measures of the PRC for the Administration of the Certificates of the Right to Contract and Manage Rural Land issued by the MOA in 2003 (2003 Measures of the MOA) provides more rules on the making, issuance and modification of the certificate. It is noteworthy that the issuance of a certificate is just for confirming the contractors' land use rights. The contractor shall obtain the FUR as of the date the contract comes into effect.¹⁶⁷ Later, the Measures for the Administration of Transfer of the Right to Contract and Manage Rural Land in 2005 (2005 Measures of the MOA) provides more rules on the modification registration of the certificate in the transfer process of the FUR.¹⁶⁸ On the basis of the registration book on the certificate of the FUR, the registration documents on

集体土地所有权登记发证工作的通知) in 2001, the ownership should be confirmed to villagers' groups, villages (village collectives) or township collectives according to the local situation. As argued in Chapter 3, currently most collective land is owned either by village collectives (administrative villages) or villagers' groups (one part of an administrative village). In the latter case, the land ownership shall be registered under the name of individual groups, instead of the village collective. However, in the almost finished registration program, this requirement is not well fulfilled.

¹⁶⁷ Although the land registration and certification does not affect the acquirement of the FUR, it is still important to the protection of farmers' land rights and the security of land transfers. This is also recognized by the Supreme People's Court (SPC). According to the Interpretations of the SPC about the Issues concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting in 2005 (the 2005 Interpretations of the SPC), in the case that the contractor transfers out his land without a legal registration and a land certificate, the claim of the contract-issuing party for confirming the transfer contract is invalid should be supported, unless it is not because of the contractor that the land is unregistered (Article 21).

¹⁶⁸ The 2003 Measures of the MOA, Article 14 and the 2005 Measures of the MOA, Article 17 and 29. The full text of the 2003 Measures (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3277&CGid=>; and the full text of the 2005 Measures (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3933&CGid=>.

the contract, together with the modification registration of the certificate, a basic management system for the information on the registration of the FUR is established at the policy level. However, in practice, the management of land is still primarily based on the agreement between the collective and individual households. The registration is unstable, due to the existence of land reallocation in specific collectives (3.2.3). As discussed below, in order to obtain accurate information on contracted farmland and better the land management, a series of pilots concerning the registration of the contracted farmland have been conducted since 2008.

5.3.2 Lack of farmers' participation in the registration process

With the stress of registering the FUR in central documents, especially the 2008 No. 1 Document, certain local pilots appeared, such as the pilots in Feidong County (肥东县), Anhui Province which started from July, 2008.¹⁶⁹ Then, the MOA selected 8 villages for piloting the registration of the FUR across China in 2009¹⁷⁰ and since 2011 it has been preparing the second round of pilots and issued specific instructions for this pilot project. For instance, the Work Rules on Registration Pilot of the Right to Contract and Manage Rural Land (For Trial Implementation) (*nongcun tudi chengbao jingyingquan dengji shidian gongzuo guicheng* 农村土地承包经营权登记试点工作规程(试行)) issued in June 2012. As the issuance of the 2013 No.1 Document, a goal of completing the registration of farmers' RCML (including the FUR) within 5 years is proposed and certain financial supports and subsidies are provided by the central and local governments for this national project (GAIN Reports, 2013). However, a number of difficulties still exist, which challenge the effectiveness of these central policies as well as the local pilots in practice (Wu and Zhu, 2013: 9). First, although the MOA started organizing the second round pilot since 2011, attitudes of some local governments

¹⁶⁹ See the Measures of Anhui Province for Reducing Registration Costs and Improving Registration Procedures (*Anhuisheng jiangdi dengji chengben wanshan dengji banfa* 安徽省《降低登记成本 完善登记办法》) in 2011. In total, there are three steps regarding the registration pilot in Anhui Province. First, based on the registration pilot program, it accumulates certain initial experiences concerning the establishment of a rural land registration system. Specifically, under the existing land contractual relations, the plot, area, spatial location, use, land type and grade of the contracted land of each household will be recorded in a special book. The current contractual relations will be maintained for a long term through the confirmation of farmers' land use rights. In the second stage, it shall focus on exploring the methods of reducing the costs of rural land registration. The third stage is supposed to compare a variety of measuring methods, in order to meet the actual needs of different regions.

¹⁷⁰ Actually, before the pilot program carried out by the MOA, a China Rural Land Registration and Certification Piloting Project (CRLRCPP) was conducted from August 2005 to the beginning of 2008 with the support of the FAO and the World Bank. According to this survey, the necessity of an efficient agricultural land registration system in China has been aware of by most farmers, at least in the surveyed areas (Zhao, 2009).

are rather negative. In collectives where land reallocation still exists, local officials believe the registration of each tiny plot is not necessary. Even in areas where the reallocation of land is zero, local officials are not active in registering and certifying the FUR of each household due to the pursuit of scale farming. Second, in order to save money, land registration in some areas is either based on a prorated distribution of the total surveyed area of a certain collective, or based on farmers' own reports. Actual surveying of farmland is ignored. This cannot help to stabilize the FUR and reduce the occurrence of land disputes, as it cannot confirm the area and the spatial orientation of each plot within the collective. From the perspective of local governments, the lack of funding and staff also constrains the implementation of this policy. Indeed, most of the pilot areas are large agricultural counties where the local governments usually cannot get the necessary finance for conducting registration. In the remote areas in particular, the responsible staff of local agricultural departments for registering farmland is not enough to finish this huge and technical work (Chen et al., 2013).¹⁷¹

It can be expected that the promotion and the coming completion of the registration of the FUR may restrain the reallocation of land within collectives, and helps to improve the LTS of individual households. Nevertheless, the registration process depends heavily on local officials' knowledge and awareness of the significance of farmland registration. What is more important is that, the role played by the participation and the assistance of individual farmers in the registration process is not well recognized. In practice, most farmers do not quite understand the significance of land registration to the protection of their land rights and interests. From the perspective of certain Chinese farmers, if the land has been contracted to them, others will not easily rob it. Accordingly, it does not make much sense to have a land certificate (Chen et al., 2013). Besides, they have to spend time helping the surveyors investigating the land, and dealing with the potential conflicts caused by unclear boundaries. Overall, the importance of land

¹⁷¹ According to another report of Nanfang Daily on the registration pilot of the MOA in Guangdong Province in November 2013, problems in current registration work which can also be attributed to land reallocation and the shortage of financial supports are mentioned. First, due to the implementation of no land reallocation policy within 30 years, the ratio between population and contracted farmland within specific households becomes unequal. The new-born population cannot receive any land, while the land of the farmers who have left the collective because of migration, marriage or death are still kept in the household concerned. Therefore, people who received no land asked for a reallocation of all contracted land based on the changes in the population, which was refused by other villagers in most cases. Conflicts are unavoidable and the whole process of registration is consequently affected. Second, the funding from local governments cannot cover the necessary costs for meetings of villagers, employment of professional surveyors and preparation of relevant materials. According to the report, each pilot villages only received 75,000 Yuan (almost \$12,225) for the registration of the FUR, which is far enough for the whole cost. It is no wonder that the village cadres and villagers are not enthusiastic about this registration pilot (South Daily, 2013).

registration and certification to provide security for future land transactions are not well appreciated by (certain) Chinese farmers. The lack of financial support, together with the lack of enthusiasm of local officials and local farmers results in a relatively slow process in practice. The local innovations in promoting the registration of the FUR based on an effective cooperation with local farmers, therefore, are noteworthy. This will be discussed in chapter 6 (6.5.1).

5.3.3 Legal issues involved in the registration of the contracted farmland

The registration pilot mentioned above mainly concentrates on the technical and administrative issues, instead of the legal issues. Issues like the legal effect of this registration and the issuance of a strictly law-complaint land certificate are essential for creating a sustainable land registration system (Wu and Zhu, 2013: 12). This does not mean that there are no relevant rules in the current legal system. In accordance with Article 38 of the RLCL, Article 29 of the 2005 Measures of the MOA and Article 129 of the PL, a consensual or a voluntary system is adopted for the transfer registration of the FUR.¹⁷² That is to say, it is not compulsory for the parties to register the transfer in local governments. This is different from the registration system for the transfer of urban land which adopts a constitutive or compulsory system (L. Chen, 2014).

In addition to the different principle of the legal effect of registration, another crucial issue concerns the unification of registration agencies. The current registration system in China is firstly characterized by a bifurcation between the registration of land rights and the registration of the buildings attached to the land. Thus, both a land registration department and a housing registration department have to be available in local governments, in accordance with the Measures for Land Registration (*tudi dengji banfa* 土地登记办法) and the Measures for Housing Registration (*fangwu dengji banfa* 房屋登记办法).¹⁷³ Another typical feature of the Chinese registration system is the division of the real estate registration departments, which originates from the planned economy. In particular, as shown in Table 5.1, the registration of land rights in rural China is handled by several agencies. With the aim of establishing a unified (real estate) registration

¹⁷² Both the RLCL (Article 38) and the PL (Article 129) provide that, where the parties to the transfer of the RCML by means of exchange or assignment request registration, they shall apply for registration to the local governments at or above the county level. If the above is not registered, no one may oppose the third party acting in good faith. Besides, according to Article 29 of the 2005 Measures of the MOA, the parties may apply for a transfer registration in the case that the land is transferred through exchange or assignment. Literally, it is not compulsory for the parties involved to register the assignment or the exchange.

¹⁷³ The Measures for Land Registration was promulgated in December 2007 by the MLR, while the Measures for Housing Registration was promulgated in February 2008 by the Ministry of Construction (replaced by the current Ministry of Housing and Urban-Rural Development). Both of them are issued as ministerial rules.

system, a unified registration agency, a unified registration (legal) basis, a unified register and a unified platform for registration information are needed. This is further confirmed in the Provisional Regulations on Real Estate Registration (*budongchan dengji zanxing tiaoli* 不动产登记暂行条例) issued by the State Council in November 2014. Regarding the registration of the RCML (including the FUR), it is included in this unified registration system. However, as it is still in progress, more rules and pilots are needed during the transition of the separated registration system to a unified registration.¹⁷⁴

Table 5.1 Agencies responsible for registering land rights in rural China

	Type of rights	Responsible agencies	Controlling laws
Farmland and grassland	Collective ownership rights	MLR	LAL, RLCL
	Household use rights	MOA	
Residential foundation plot	Collective ownership rights	MLR	LAL
	Household use rights		
Forest land	Collective ownership rights	SFA (State Forestry Administration)	RLCL, Forest Law
	Household use rights		

Source: Wu and Zhu, 2013.

5.4 Reform of the land expropriation and compensation system

5.4.1 Effect of land expropriation on land tenure security

The protection of farmers' land tenure security in terms of land expropriation has been gradually improved with the reform of Chinese rural land law system (see the last part of 4.1.2). Based on the 2004 amendment to the 1982 Constitution, the state may now only expropriate or take over private property of citizens in the public interest, and pay compensation in accordance with the law (Article 10). However, as discussed in chapter 4 (4.4 and 4.5), the definition of public interest, the legal procedure for expropriation and the method of compensation are still not well-defined in law. Land expropriation in rural China through the state eminent domain has grown rapidly, resulting in increasing numbers of land-losing farmers. Controversies, conflicts or even violent confrontations between land-losing farmers

¹⁷⁴ Currently, the MLR is in charge of the registration of collective land ownership, and the MOA is responsible for the registration of the RCML including the FUR. In terms of the registration of the RCML, a Certificate for the Right to Contract and Manage Land will be issued to individual households. Furthermore, before the 5-year deadline for the registration of the RCML, the MOA is still responsible for the contractual management of agricultural land (including farmland, grassland and water) and the resulting conflicts. After the deadline expires, the MLR may replace the MOA concerning the (modification) registration of the RCML nationwide. A unified registration of the property rights in collective land is expected to be established.

and local governments/the acquiring authority also frequently occur (Zhu et al., 2007: 804). To some extent, the abuse of the land expropriation power is the main threat to Chinese farmers' land rights.

With the promulgation of the Regulation on the Expropriation of Houses on State-owned Land and Compensation (*guoyou tudi shang fangwu zhengshou yu buchang tiaoli* 国有土地上房屋征收与补偿条例) by the State Council in January 2011, the claim for a legal reform in the expropriation system of collective land has been increased. However, due to the complex interests involved in the expropriation of collective land, especially the great profits obtained by the acquiring authority/the local governments, this reform was repeatedly postponed. At this moment, with the worsening debt crisis in most local governments, the 'land finance' built on the land expropriation system is struggling to continue (W. Chen, 2014). On the one hand, local debts relying on land mortgage in the past gradually come due; on the other hand, because of the serious inequalities in the distribution of land appreciation created by the change of land use, requests for reforming or even abolishing the current expropriation system are growing. The high frequency of expropriation has a negative effect on the perceived land tenure security of Chinese farmers, which dampens their investment in land and hinders the growth of land productivity (Washburn, 2011: 98). In the meantime, with the gradual increase in the compensation standards, attitudes of certain farmers towards the farmland have also changed, especially those living in suburban areas. In the suburban area of economically developed regions, since the farmland per capita is quite small and the non-farm employment opportunity is relatively abundant, most farmers holding land is not for producing food, but for receiving a higher compensation in the case that the land is expropriated.¹⁷⁵ Usually, they choose to plant saplings as it costs less time, and a higher compensation is paid for trees than for grains. This first endangers the food security of the whole country, while affecting the transfer of farmland to more capable farmers. To some extent, this speculative motive is caused by the non-public, non-transparent and non-participatory process of land expropriation.

In recent years, reports on farmers' replanting (fruit) trees due to land expropriation are quite common. For instance, in the sewage pipeline project of Guangzhou City in 2009, after hearing that certain land along the road needs to be acquired for the pipeline, farmers who may be affected immediately replaced the vegetables planted before with fruit trees. In accordance with the compensation standards, the compensation for crops is 3,000 Yuan (around \$489) per mu (around 666.7 m²), while the compensation for each sapling can be up to 100 Yuan (around \$16.3). Profits from this replanting will

¹⁷⁵ This information is based on the author's interview with a local official who works for the Bureau of Land and Resources in Tonglu County (桐庐县), Hangzhou City, Zhejiang Province. The economy of Zhejiang Province is relatively developed compared with other provinces in China.

undoubtedly increase. In addition to causing a waste of agricultural crops, this phenomenon also hinders the overall progress of this project. Moreover, according to the announcement about the expropriation issued beforehand, any newly planted plants cannot get compensation since the release of the announcement. It seems that this was not well understood by the affected farmers. In other cases like the construction of Yanjiang Road in Dongguan City, farmers also chose to replace the old trees with new saplings in order to get a higher compensation. Because most of the trees that have been cut used to grow in the hills, this illegal logging damages the vegetation seriously, posing a threat to the houses located in the foot of the hills once there is a storm. Ironically, the land expropriation and compensation for the construction of this road have already completed. With regard to the several hills nearby, local governments already had a draft plan, yet it is still unknown about how and when to develop these hills. This is a serious information asymmetry between local governments and the farmers involved. In a recent case happened in Xi'an City, it is just because the land in several villages in the surrounding is being expropriated, villagers in Caofang village destroyed the growing young wheat in their field. As stated by a local official, the land expropriation in Caofang village has not yet been approved. In fact, among the total 2000 *mu* land within the village, only 400 *mu* of them is needed. However, as the villagers did not know the detailed planning, it is not surprising that such a large amount of young wheat was destroyed.¹⁷⁶

5.4.2 Absence of individual participation in expropriation process

According to Article 46-49 of the LAL and Article 20, 25 and 26 of the Regulation on the Implementation of the Land Administration Law (RILAL), the expropriation procedure of collective land mainly includes five steps: (1) preparation of farmland conversion plans, farmland supplement plans and land expropriation plans; (2) review and announcement of these plans; (3) registration for the compensation for the expropriated land; (4) announcement of compensation and resettlement plans; and (5) transfer of the expropriated land. Among these, affected farmers may only have a chance to participate in the last three steps of an expropriation process. That is, only after the land expropriation plan is publicized, the affected farmers and collectives may play a part in the procedure. Regarding the making of the compensation and resettlement plan, even though opinions of involved farmers should be solicited before implementation, their voices are intentionally disregarded by the decision-making authorities (Zhang, 2013: 5-7). To overcome this limitation, the Decision of the State Council on Deepening the Reform and

¹⁷⁶ For detailed information of these cases, please see Rush-planting of farmers in Baiyun District which affects land expropriation (白云农民菜地抢种树木影响征地), 南方网, 03-27-2009, <http://gz.oeeee.com/a/20090327/711879.html>; Felling of trees by farmers who want to have a compensation for land expropriation (农民砍树改种‘龙眼苗’望获征地补偿), 东莞阳光网, 04-23-2010, http://news.sun0769.com/dg/sh/201004/t20100423_822133.shtml; and The change of fields into ‘woods’ by villagers in order to improve the compensation (因风传村里要征地 村民为提高赔偿毁田变‘树林’), 华商网, 01-03-2014, <http://news.hsw.cn/system/2014/03/01/051869168.shtml>.

Tightening Land Management (*guowuyuan guanyu shenhua gaige yan'ge tudi guanli de jue ding* 国务院关于深化改革严格土地管理的决定, 2004 Decision of the State Council) (Article 14) and the following Guidelines of the Ministry of Land and Resources (MLR) on Improving the Land Compensation and Resettlement System (*guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian* 关于完善征地补偿安置制度的指导意见) (Article 9-11) require that before the approval of land expropriation plans, the responsible departments should inform the affected farmers of the use of the desired land, its position, compensation standards and resettlement schemes. Also, the investigation findings on the status of the land subject to expropriation should be confirmed by affected farmers and collectives. If it is necessary, certain hearings should be organized by the land and resources departments.¹⁷⁷ All of these can strengthen farmers' rights to know and rights to participate before an expropriation plan is approved. However, these participatory requirements are not fulfilled in local areas. In most cases, those able to bargain with the public authorities are not the affected farmers, but the collective who is usually represented and controlled by certain local cadres. Farmers who have lost their land are not directly involved in the negotiations. Coupled with the weak legal consciousness of a majority of farmers, this leads to the lack of participatory awareness of affected farmers in land expropriation. Below, certain statistics from two large-scale surveys on the real situation of China's land expropriation system will be used, in order to demonstrate this extreme lack of farmers' participation rights.

The first report comes from the Annual Report on China's Rule of Law (*zhongguo fazhi fazhan baogao* 中国法治发展报告) in 2011, in which a survey on farmers' land rights in today's China contains a number of expropriation cases (Prosterman et al., 2011). This survey covers 17 major agricultural provinces of China, and households from 1,564 villages were interviewed (one farmer is surveyed in each village). Based on the investigated expropriation cases, in 28.8% of all cases, farmers did not get any notice in advance. In 58.2% of all cases, farmers' own opinions on the amount of compensation were not asked beforehand. Furthermore, based on the data analysis, if a prior notification was available when the land was expropriated, 52% of the surveyed farmers would feel satisfied with the compensation; if not, only 16% of them expressed satisfaction. Also, if the government solicited the views of farmers on the amount of compensation beforehand, 59% of the surveyed farmers would feel satisfied with the compensation; if not, only 27% of them expressed satisfaction. Overall, in the surveyed villages where land expropriation happened, 60% of the farmers interviewed are not satisfied with the compensation, and 69.7% of this dissatisfaction are due to a too low compensation. The second report is provided by the Research Group of Land

¹⁷⁷ The full text of the 2004 Decision (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/flfg/tdglflfg/200601/t20060112_642080.htm; and the full text of the Guidelines (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/flfg/tdglflfg/200506/t20050617_638344.htm.

Expropriation System Reform (2013), the Economic System and Management Institute of the National Development and Reform Committee, who conducted a questionnaire survey from January to April 2013 on farmers who lost land due to expropriation. This questionnaire involves six aspects of the expropriation system and 77 problems in total. Besides, 438 questionnaires were issued to 17 provinces and municipalities directly under the central government, and 400 of them are valid. That is, 91.32% of the questionnaires are effective. Generally, in the public interest, a reasonable compensation and a sound procedure are the three basic criteria measuring farmers' satisfaction level with expropriation. In accordance with the analysis results, the level of compensation is the most important indicator affecting farmers' satisfaction with expropriation, followed by an open and transparent expropriation procedure. As shown in Table 5.2, the affected farmers have a high tolerance of the expropriation for various purposes. In addition to more attention is paid to the material compensation caused by a low standard of living and a big pressure to survive, the vague collective land rights and farmers' low awareness of their land rights also contribute to this high level of tolerance. Nearly one-third of the surveyed farmers believe that the land they contracted and cultivated belongs to the state. Hence, the compensation and resettlement situation directly affects farmers' attitudes towards land expropriation (Table 5.3). The survey results also confirm that the low compensation and the lack of security for future living is the main reason for farmers' dissatisfaction. Almost 80% of the surveyed farmers choose it as one reason for their dissatisfaction, in which 40% farmers consider it as a primary reason.

Table 5.2 The support rate of landless farmers for different purposes of land expropriation

Attitude to various purposes of expropriation (support/object)	Average	Variance
The construction of key national projects, roads, schools or public hospitals	5.82	2.29
Reconstruction of old urban districts, renewal of shanty towns, and the construction of affordable housing	5.20	3.54
The construction of Industrial Development Zone, Science and Technology Park in order to attract investments in local areas	5.05	3.45
Development for profit-oriented purposes, such as the real estate development, the construction of business center	3.91	4.90

Sourced from: Research Group on Land Expropriation System Reform (2013).

Table 5.3 Views of farmers on the compensation for expropriation

Views on land expropriation	Agree	Disagree	Not sure
People who move first may be in a disadvantage	63.25 %	28.75 %	8.00 %
Nail households profit at other people's expense	71.00 %	24.00 %	5.00 %
People who have relationships may get a better compensation and resettlement	81.50 %	13.00 %	5.50 %
People who are rich and respectable may be better compensated and resettled	76.75 %	17.00 %	6.25 %

The compensation and resettlement in different villages greatly differ	67.00 %	26.75 %	6.25 %
The compensation and resettlement in different times greatly differ	82.75 %	9.75 %	7.50 %

Sourced from: Research Group on Land Expropriation System Reform (2013).

More importantly, based on the statistics in the second report, affected farmers have a rather low satisfaction with the transparency of the whole expropriation process. In terms of the right to know and the right to participate, legal regulations and policies on land expropriation are not well understood by individual farmers. On the one hand, this can be attributed to farmers' limited knowledge and capacity to gather relevant information; on the other hand, it is because these regulations and policies are not well publicized in practice. In this survey, up to 68% of affected farmers did not attend any meetings organized by local governments, and their opinions on expropriation and compensation were not solicited either. Besides, 27% of the surveyed farmers experienced forced acquisition and brutal demolition, half of which were conducted by village cadres and developers. Due to the fear of being punished by local governments or retaliated by local mafia, or even offending village cadres, many farmers did not dare to fully express their real thinking. 50.4% of the surveyed farmers chose to be subject to the top-down arrangements (Research Group of Land Expropriation System Reform, 2013).

Therefore, in addition to a vague public interest and a low compensation standard mentioned above, the lack of participation of the affected people in the expropriation process is also a critical issue in China. Unlike the low enthusiasm of farmers in the land registration process, most of the affected farmers and communities are rather active in getting access to all the relevant information relating to land expropriation. Based on the current changes in central policies and certain local pilots, it can be expected that the collective members as a whole may enjoy more autonomy in managing the collective land as the release of the public control over collective land use.¹⁷⁸ As a gradual transfer of the collective construction land that used for profit-oriented purposes, which is obviously not for a public use, the scope of expropriation may be decreased. In the meantime, real participation of the affected farmers in this narrowed expropriation of land may contribute to the judgment of public interests. The key issue here is how to guarantee the actual participation of farmers in the expropriation process. This is the major topic of chapter 8.

¹⁷⁸ Certain pilots concerning the transfer of the commercial collective construction land use rights have been conducted in local areas. For instance, specific guiding documents on this transfer have been introduced in Shenzhen, Anhui, Chongqing and Zhejiang Province in 2013 (Huang, 2013).

5.5 Resolution of disputes concerning farmland transfer

As the final guarantee for protecting the legal rights and interests involved in farmland transfer, a developed resolution mechanism for the transfer disputes is indispensable. It is also a central issue for the central policy regarding farmland transfer. In recent years, as the scale of farmland transfer expands progressively, related disputes also grow rapidly. Due to the diversity of transfer disputes, different means of resolution appeared and an initial dispute resolution mechanism has been established by law and other legal regulations.

5.5.1 Types of farmland transfer disputes

Generally, there are two main types of disputes which occur in farmland transfer: the so-called ‘policy transfer disputes’, and disputes regarding farmland expropriation and compensation. The ‘policy transfer disputes’ refer to the disputes caused by the major changes in national policies in rural areas, such as the elimination of agricultural tax in 2006¹⁷⁹ and a growing number of preferential policies, such as grain subsidies and seed subsidies. With the increase in the benefits attached to the FUR, farmers previously abandoned or rented out their contracted land have demanded the return of their land, which has resulted in enormous disputes (Tang and Wang, 2008). The second type of dispute relates to the expropriation of farmland and the resulting issues of compensation. With the rapid development of urbanization, an increasing number of farmland is expropriated and thus converted into state-owned construction land. Generally speaking, the causes of such disputes consist of the defects in both substantive law and procedural law. On the one hand, the expropriation power of governments is relatively broad, as there is no clear definition of public interests in law. Also, the compensation standard for the desired farmland is pretty low, in comparison with the value after it is converted into non-agricultural use. On the other hand, there is no strong protection of the affected farmers’ rights to know before the government approval of expropriation. They are not able to participate in the determination of the expropriation scope, the compensation criteria and even the resettlement schemes.

¹⁷⁹ After the adoption of the HRS in the early 1980s, each household was allocated a piece of land. As a consideration, the household had to pay certain taxes and fees. As the implementation of the tax sharing system in 1994, collection of agricultural taxes became the main source of local revenue, especially in areas where the agricultural income accounts for a large proportion in local economy. Before the gradual cancellation of various agricultural taxes in 2006, due to the heavy tax burden and the low profits from agricultural cultivation, many farmers chose to abandon their land, or hand the land over to their relatives and friends or other farmers, to do farming. This led to a great number of disputes on the use of the contracted farmland after 2006 (Whiting, 2011: 574).

Overall, what is behind the frequent occurrence of farmland transfer disputes is the profound social background. First and foremost, the implementation of a number of preferential agricultural policies in recent years increased the profits from farming. This is a key incentive for the numerous land disputes after 2004.¹⁸⁰ Second, the dispute over the interests generated by land expropriation due to the construction of key projects and urban expansion is another reason for the increasing disputes. The process of urbanization is usually accompanied by a large number of rural land conversions, which is done via land acquisition activities. The acquisition activities have made the land more valued to farmers. Lots of farmers who transferred out their FURs demand the resumption of their land in order to acquire a higher compensation later when the land is expropriated. Third, the *ultra vires* (the act in excess of authority) and negative acts of the village cadres in their own interests also contributes to the increasing disputes. On the one hand, some local cadres withdraw farmers' farmland illegally¹⁸¹ or lease farmers' contracted land back and then rent it out to outsiders (usually agricultural or even industrial and commercial enterprises). On the other hand, certain local cadres tend to hand over the disputes directly to township governments or do nothing in order to avoid offending any parties in dispute (Beijing Rural Legal Research Association, 2011). To some extent, the disharmony between the change of land policies and its legalization is the root cause of the chaotic status quo of those transfer disputes. As discussed in chapter 4 (4.1.2), there are four periods of land policies in China since 1949. More contradictions are occurring between the flexible land policies and the hysteretic legislation. This can also be proved in terms of the regulations concerning the resolution of these diverse disputes.

5.5.2 Different preferences in resolving farmland transfer disputes

Because of the particularity of farmland transfer disputes, a diversified resolution mechanism was meant to be established. Although an initial resolution system was proposed in the 2002 RLCL, there is no detailed procedure for the parties in

¹⁸⁰ According to the 2004 No. 1 Document of the CCCPC and the State Council, governments should provide two types of tax relief and three subsidies to farmers. This is the starting point of the historic change that more urban resources will be put into the rural area. However, the payment of the grain subsidy is not standardized. In some areas, farmers still can receive various subsidies through improper ways, although they do not conduct agricultural planting anymore. In order to benefit from the preferential policies, many migrant farmers who work in the cities began to return to their hometown to reclaim their land (Yang et al., 2011: 89; Long and Zhao, 2012: 54).

¹⁸¹ Since the 1984 No. 1 Document, the collective can withdraw the abandoned farmland from the individual households. This power is finally confirmed by the 1998 LAL. According to its Article 37, where a unit or an individual that contracts to operate cultivated land but lets the land lie idle for two years running, the contract-issuing party shall terminate the contract and take back the land under contract. In the later RLCL, in order to control the random withdrawal of the collective in practice, certain restrictions are imposed on this withdrawal power. For instance, Article 26, 30, 35, 54 and 55 of the RLCL.

dispute to follow.¹⁸² With the enormous growth of land disputes after 2004, the Ministry of Justice (MOJ) emphasized the role of people's mediation in dealing with these grassroots disputes. The MOA also started the pilot of arbitration in farmland (transfer) disputes in 2004.¹⁸³ Meanwhile, in order to facilitate the trial for cases involving rural land contracting disputes, the Supreme People's Court (SPC) issued the Interpretations about the Issues concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting (*zuigao renmin fayuan guanyu shenli sheji nongcun tudi chengbao jiufen anjian shiyong falv wenti de jieshi* 最高人民法院关于审理涉及农村土地承包纠纷案件适用法律问题的解释) in March 2005.¹⁸⁴ As the promulgation of the Law of the PRC on the Mediation and Arbitration of Rural Land Contracting Disputes (*nongcun tudi chengbao jingying jiufen tiaojie zhongcai fa* 农村土地承包经营纠纷调解仲裁法) in 2009 and the People's Mediation Law of the PRC (*renmin tiaojie fa* 人民调解法) in 2010, an initial resolution mechanism for farmland transfer disputes stated in the 2002 RLCL was finally established through legislation.

¹⁸² Chapter IV of the RLCL is about the settlement of rural land disputes and legal responsibility, in which the two parties may resolve the dispute by consultation, mediation by the villages' committee or the township governments. Where the parties are not willing to have it settled through consultation or mediation, or if the consultation or mediation fails, they may apply for arbitration, or directly bring a suit to the court. It is clear that this is a sequential resolution mechanism and parties in dispute are encouraged to resolve their controversies through negotiation or mediation first. This was confirmed further in Article 33 of the 2005 Measures of the MOA.

¹⁸³ In April 2004, the General Office of the State Council issued an emergency notification on the proper settlement of the current rural land contracting disputes (*guowuyuan bangongting guanyu tuoshan jieju dangqian nongcun tudi chengbao jiufen de jinji tongzhi* 国务院办公厅关于妥善解决当前农村土地承包纠纷的紧急通知), in order to guide the resolution of the severe problems in farmland (transfer) disputes. It accentuates the mediation responsibility of the township government and the villagers' committee, and encourages the pilots of arbitration. In May, the MOJ released an emergency notification on guiding the people's mediation organizations to resolve the current rural land contracting disputes (*sifabu guanyu zhidao renmin tiaojie zuzhi jishi huajie dangqian nongcun tudi chengbao jiufen de jinji tongzhi* 司法部关于指导人民调解组织及时化解当前农村土地承包纠纷的紧急通知). The MOA then issued a notification on the implementation of the emergency notification of the State Council in June, which further explains the arbitration pilot. These two later notifications can be seen as a division of the dispute resolution work proposed by the State Council. The MOJ focuses on the mediation of the autonomous mass organizations at the grassroots level, and the MOA concentrates on the creation of arbitration agencies to deal with the farmland (transfer) disputes.

¹⁸⁴ It provides regulations for the acceptance of cases on land disputes and the subject of proceedings, the processing of the household contract disputes, the handling of the other kinds of contract disputes, the allocation of the compensation for land expropriation, and the processing of the disputes about the succession of the RCML including the FUR.

Development of the mediation of farmland transfer disputes

According to the Law on the Mediation and Arbitration of Rural Land Contracting Disputes (LMARLCD), parties in dispute may resolve the dispute through their own reconciliation first, or they can apply for the mediation by the villagers' committee or township governments. Meanwhile, they may directly agree to arbitration by the arbitration committee on rural land contracting, or lodge a lawsuit in court.¹⁸⁵ It should be noted that the disputes concerned here consist of disputes generated by the conclusion, fulfillment, modification, cancellation and termination of the contract for contracting farmland, and disputes arising from the transfer of farmland. Disputes caused by land expropriation and the compensation are therefore not included, which may be settled via administrative reconsideration or lawsuits.¹⁸⁶ Hence, there are different preferences in resolving different types of disputes. Regarding the farmland transfer disputes, usually the mediation by the villagers' committee or township governments is applied first. Moreover, the mediation mentioned in the LMARLCD is different from the one in the People's Mediation Law (PML). The mediation in the first law includes the mediation by the villagers' committee and township governments, and the mediation by arbitration agencies. Together with the people's mediation in the second law, a so-called 'large' mediation system has been established in China.¹⁸⁷

As a matter of fact, the people's mediation has a rather long history in China.¹⁸⁸ It has a deep impact on the modern people's mediation system, which originates from the years

¹⁸⁵ The LMARLCD, Article 3 and 4. The full text of this law (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7526&CGid=>.

¹⁸⁶ *Ibid*, Article 2.

¹⁸⁷ Currently, there are four types of mediation practices in China: civil mediation (mediation by People's Mediation Committees outside the court); judicial mediation (mediation by a court of law in civil and economic disputes and minor criminal cases inside the court); administrative mediation (which can be outside-the-court mediation by grassroots governments, such as a township government in ordinary civil disputes, or outside-the-court mediation by government departments in compliance with the legal provisions in specific civil disputes, economic disputes and labor disputes); and arbitration mediation (mediation by arbitration bodies in arbitration cases, which is called upon only if the prior mediation fails to resolve the differences and as an outside-the-court mediation, too). These constitute the so-called 'large' mediation system. See Mediation System, <http://www.china.org.cn/english/Judiciary/31185.htm>, assessed on 26-08-2013.

¹⁸⁸ A special position had been set to be responsible for mediating disputes more than three thousand years ago in Chinese history. Later, certain personnel were established under the county government, which was the lowest level of governments at that time. Generally, the private dispute shall be handled by the local mediation official in the village or the township level first, then it can be submitted to the county government if the mediation fails to reach an agreement. As the judiciary was integrated with the administrative system in history, the county magistrate was also the judge. That is, ordinary civil disputes shall be mediated first before they are adjudicated by the county government with a power of making judicial decisions. It was in the Ming Dynasty (1368-1644) that civil mediation was finally regulated by legal norms. Three modes of mediation were formed after this long development, which include the mediation by local officials, mediation by clans, and mediation by relatives or friends (Zeng, 2009: 1-29).

of revolutionary war in the early 1920s. The issuance of the Provisional and General Rules on the Organization of People's Mediation Committee (*renmin tiaojie weiyuanhui zanxing zuzhi tongze* 人民调解委员会暂行组织通则) by the Government Administration Council of the Central People's Government in 1954 means the official establishment of a people's mediation system in the New China. In 1982, it was recognized by the Constitution as one of the functions of these mass organizations of self-management at the grassroots level, such as the villagers' committee in rural areas and the residents' committee in urban areas.¹⁸⁹ In 1989, the State Council issued the Regulations on the Organization of People's Mediation Committee (*renmin tiaojie weiyuanhui zuzhi tiaoli* 人民调解委员会组织条例) to define the basic mediation organizations. However, due to the increasing popularity of lawsuits after the reform and opening-up policy in the early 1980s, the transformation of social structure to a 'stranger society and the rising difficulty of civil disputes, the people's mediation was in decline at that time (Zhu, 2012: 177).¹⁹⁰ With the vigorous official promotion since 2002, this mediation system got revived to a certain extent. At the policy level, as the Decision of the CCCPC on Major Issues of Building a Harmonious Socialist Society (*zhonggong zhongyang guanyu goujian shehuizhuyi hexie shehui ruogan zhongda wenti de jue ding* 中共中央关于构建社会主义和谐社会若干重大问题的决定) in 2002 stated, mediation should be used more to resolve conflicts at the grassroots level.¹⁹¹ Then, a series of central policies and legal regulations were issued to promote the development of people's mediation.¹⁹² The MOJ also issued a number of regulations concerning the

¹⁸⁹ The Constitution of the PRC, Article 111.

¹⁹⁰ According to the study of Zhu (2012: 178), the number of people's mediation to resolve disputes continued to decline from 1986 to 2002, compared to the number of the first instance civil cases accepted by the court. Deficiencies in the system itself affect the role of people's mediation in coping with civil disputes. For instance, as the agreement reached through mediation is not legally binding, the parties are free to breach the agreement. This undermines the credibility of the mediation system. Also, the overall capacity of the mediator is not high enough to deal with the increasingly specialized and complex disputes.

¹⁹¹ The formulation of a harmonious society originates from the Confucianism, which has a two thousand year history in China. In terms of the social order, it focuses on the pursuit of a 'litigation-free' society. Thus, the prevention of the occurrence of litigation was one of the most important tasks of local authorities. The application of these non-litigation/alternative dispute resolutions (ADR) may help to resolve the dispute in a timely manner on the one hand; on the other hand, it can reduce the burden of the judiciary. However, the litigious rights of ordinary people may be suppressed by local governments as a result of this pursuit of a 'litigation-free' society.

¹⁹² Since the issuance of the Provisional and General Rules on the Organization of People's Mediation Committee (*renmin tiaojie weiyuanhui zanxing zuzhi tongze* 人民调解委员会暂行组织通则) in 1954, 32 national laws and regulations regarding the people's mediation (including laws, administrative regulations, judicial interpretation, ministerial rules, and ministerial normative documents) were released, of which 20 are promulgated and implemented since 2002. Several Provisions of the SPC on Trying Civil Cases Involving the People's Mediation Agreements (*zuigao renmin fayuan guanyu shenli sheji renmin tiaojie xieyi de minshi anjian de ruogan gui ding* 最高人民法院关于审理涉及人民调解协议的民事案件的若干规定) in 2002, Some Provisions Concerning the Work of People's Mediation of the Ministry of Justice (*renmin tiaojie gongzuo ruogan gui ding* 人民调解工作若干规定) in 2002, People's Mediation Law of the PRC in 2010, and Several Provisions of the SPC on the Judicial Confirmation Procedure for the People's Mediation Agreements (*zuigao renmin fayuan guanyu renmin tiaojie xieyi sifa queren chengxu de ruogan gui ding* 最高

making of stamps of People's Mediation Committee, the training of People's Mediators, and the funding guarantee of the people's mediation work, in order to support the creation of people's mediation organizations.¹⁹³

Against this political background, the people's mediation system is paid more attention, as it is rooted in the grassroots and can solve the disputes in a timely and peaceful manner. The other mediation systems, especially the mediation by arbitration agencies and the judicial mediation have also been improved gradually from the 2000s. To some extent, certain civil disputes, such as cases that are less controversial or where the parties concerned have a close (civil or commercial) relationship, can be better resolved through people's mediation — a much simpler procedure than lawsuits. In terms of the disputes concerning farmland transfer, the parties concerned may apply for mediation by villagers' committee (which belongs to people's mediation) if they are from the same village and the controversy is not so serious, or mediation by township governments (which is an administrative mediation). Otherwise, they can request arbitration or even a lawsuit.

Arbitration of farmland contract disputes

In addition to the strong support to the mediation system of the MOJ, rules about the arbitration of farmland (transfer) disputes are improved by the MOA through a series of pilots since 2005.¹⁹⁴ As the promulgation of the Law on the Mediation and Arbitration of Rural Land Contracting Disputes (LMARLCD), the particular Rules on the Arbitration of Rural Land Contracting Disputes (*nongcun tudi chengbao jingying zhongcai guize* 农村土地承包经营仲裁规则) was issued also in 2009 to provide detailed instructions for local arbitration agencies. A series of regulations regarding the model text of arbitration legal instruments, the training of arbitrators and the arbitration work norms, were also released successively by the

最高人民法院关于人民调解协议司法确认程序的若干规定) in 2011 are the most important regulations in this respect.

¹⁹³ For example, the Official Reply of the Ministry of Justice to the Issuance of a Seal for the People's Mediation Committee (*sifanbu guanyu zhifa renmin tiaojie weiyuanhui yinzhang wenti de pifu* 司法部关于制发人民调解委员会印章问题的批复) in 2003, the Opinions of the Ministry of Justice on Strengthening the Training of People's Mediators (*sifabu guanyu jiaqiang renmin tiaojieyuan peixun gongzuo de yijian* 司法部关于加强人民调解员培训工作的意见) in 2003, and the Opinions of the Ministry of Finance and the Ministry of Justice on further Strengthening the Security of the Funding for People's Mediation Work (*caizhengbu sifabu guanyu jinyibu jiaqiang renmin tiaojie gongzuo jingfei baozhang de yijian* 财政部、司法部关于进一步加强人民调解工作经费保障的意见) in 2007.

¹⁹⁴ The issuance of the Notification of the MOA on the Implementation of the Measures on Facilitating the Construction Projects for the Arbitration Pilot of Rural Land Contracting Disputes (*nongyebu guanyu yinfa nongcun tudi chengbao jiufen zhongcai shidian sheshi jianshe xiangmu zuzhi shishi banfa de tongzhi* 农业部关于印发农村土地承包纠纷仲裁试点设施建设项目组织实施办法的通知) in 2005 marks the beginning of these pilots.

MOA alone or together with the State Forestry Administration.¹⁹⁵ An arbitration committee on rural land contracting shall be established for this arbitration in the county-level governments, instead of township governments or villagers' committees like the mediation. The rural land management department in the government undertakes the arbitration function.¹⁹⁶ As mentioned in the last section, the arbitration agency may also settle disputes through mediation.¹⁹⁷ Furthermore, the arbitral tribunal shall mediate the disputes before the commencement of arbitration proceedings. If an agreement is reached upon mediation, the tribunal shall make a mediation paper.¹⁹⁸ This mediation paper has equal effect with the arbitral award made by the arbitration agency. If one party fails to fulfill its obligations within the time limit, the other party may file an enforcement

¹⁹⁵ For example, the Model Text of Legal Instruments for the Arbitration of Rural Land Contracting Disputes (For Trial Implementation) (*nongcun tudi chengbao jingying jiu fen zhongcai falv wenshu shifan wenben* 农村土地承包经营纠纷仲裁法律文书示范文本(试行)) in 2010, the Opinions of the MOA on Strengthening the Training of Mediation and Arbitration of Rural Land Contracting Disputes (*nongye bu guanyu jiaqiang nongcun tudi chengbao jingying jiu fen tiaojie zhongcai peixun gongzuo de yijian* 农业部关于加强农村土地承包经营纠纷调解仲裁培训工作的意见) in 2011, the Outline for the Training of Mediator and Arbitrator for Rural Land Contracting Disputes (For Trial Implementation) (*nongcun tudi chengbao jingying jiu fen tiaojie zhongcaiyuan peixun dagang* 农村土地承包经营纠纷调解仲裁员培训大纲(试行)) in 2012, and the Work Norms on the Mediation and Arbitration of Rural Land Contracting Disputes (*nongcun tudi chengbao jingying jiu fen tiaojie zhongcai gongzuo guifan* 农村土地承包经营纠纷调解仲裁工作规范) in 2013.

¹⁹⁶ The LMARLCD, Article 12 and the Rules on the Arbitration of Rural Land Contracting Disputes, Article 4. Meanwhile, according to Article 5 of the Work Norms on the Mediation and Arbitration of Rural Land Contracting Disputes in 2013, the arbitration committee shall be created universally in the counties (county-level cities, municipal districts) where involves agriculture to assume the mediation and arbitration of rural land contracting disputes in the area. Besides, an Arbitration Committee Office shall be created to undertake the daily work of the committee in the local rural land management department. It can be a legal person through registration (Article 14). The full text of the Rules on the Arbitration of Rural Land Contracting Disputes (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=8274&CGid=>; and the full text of this Work Norm (Chinese version) is available at: http://www.moa.gov.cn/govpublic/NCJJTZ/201301/t20130118_3202468.htm.

¹⁹⁷ As a matter of fact, before the proclamation of the LMARLCD, the first draft just concerns the arbitration of the land contracting disputes, which was named as the Law of the PRC on the Arbitration of Rural Land Contracting Disputes (Draft) (*zhonghua renmin gongheguo nongcun tudi chengbao jingying jiu fen zhongcaifa* 中华人民共和国农村土地承包经营纠纷仲裁法(草案)). It was first deliberated at the 6th meeting of the 11th National People's Congress in December 2008. However, when it was deliberated in June 2009 for the third time, a separate chapter about the mediation was added and the Draft was retitled as the Law of the PRC on the Mediation and Arbitration of Rural Land Contracting Disputes (Draft) accordingly. Here the importance of mediation to the resolution of rural land contracting disputes and its priority over arbitration and lawsuits are obvious.

¹⁹⁸ If the mediation fails, the arbitral tribunal shall make an award in a timely manner. It is clear that this mediation here is compulsory not only for the tribunal, but also for the parties in disputes. However, in the later Work Norms on the Mediation and Arbitration of Rural Land Contracting Disputes in 2013, this prior mediation is supposed to be based on the willingness of the parties involved (Article 33).

application with the grassroots court of the place where the domicile or the property of the respondent is located.¹⁹⁹

It is evident that the central government, more precisely, the MOA and the MOJ have provided lots of support for the development of mediation and arbitration of farmland disputes. As most Chinese farmers are still liable to settle disputes by reconciliation between the parties or mediation by a third party, a sound mediation system is rather meaningful to the resolution of farmland transfer disputes. Meanwhile, with the rising complication of such disputes, a more professional arbitration system is also necessary.

According to a survey in 2006, when a farmland dispute occurs, 81.3% of farmers are willing to resolve it through negotiation; 47.7% choose the mediation by villagers' committees, and 20% select the mediation by governments. This further confirms the significant role played by reconciliation and mediation in the settlement of farmland disputes in rural China (Jiang et al., 2006). Based on the newest statistics in August 2013, there are 817, 000 people's mediation organizations and 4.28 million people's mediators in China. The number of disputes solved by the people's mediation organizations increases every year (about 8 or 9 million per year), and the success rate is over 96% (B. Zhou, 2013). With the promotion of arbitration in recent years, in total 2,259 (rural land contracting) arbitration committees have been set up across China at the end of 2012. This involves 80% of all the agricultural counties (county-level cities and municipal districts), and around 545, 100 cases were settled through arbitration. More notably, a unified identification of rural land contracting arbitration (Figure 5.2) has been published in July 2013. This means the arbitration agency may play a bigger role in resolving farmland transfer disputes in the future (Zhuang, 2013).

Figure 5.2 The logo of the arbitration agencies for rural land contracting disputes in China



Effectiveness of the mediation agreement on farmland disputes

Although a growing number of mediation and arbitration agencies have been created in local areas, legal issues, such as the effect of the mediation agreement

¹⁹⁹ The Arbitration Law of the PRC, Article 51 and the LMARLCD, Article 49. The full text of the Arbitration Law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm.

and the arbitration award are crucial to the application of these two systems. Regarding the mediation agreement, different rules are adopted for the diverse practices of mediation. In general, the mediation agreement made by the people's mediation committee, the administrative authority and the arbitration agency shall be considered as a civil contract after it is signed or sealed by both parties. The parties should fulfill their own obligations pursuant to the stipulations in the contract, and cannot unilaterally modify or rescind the agreement.²⁰⁰ In the event that one party does not perform his duty, the other party can file a lawsuit to the court. Moreover, in the event that an agreement was concluded due to a major misunderstanding or was obviously unfair at the time of conclusion, or an agreement was concluded under the circumstance that one party violates his true intention as a result of being cheated, coerced or being taken advantage of his unfavorable state by the other party, the aggrieved party has a right to request the court to modify or rescind it.²⁰¹

More notably, if the disputants need to strengthen the effectiveness of the mediation agreement, a special judicial confirmation procedure is available. If the application complies with legal provisions upon examination, the court shall issue a ruling to confirm the validity of the mediation agreement. Only with this confirmation ruling, the opposing party may apply for enforcement to the court, if the other party refuses to perform or fails to fully perform the mediation agreement. If the application does not comply with legal provisions upon examination, the court shall issue a ruling to dismiss the application, rather than a ruling to make the agreement invalid. Then, the parties may, through mediation, modify the mediation agreement or reach a new mediation agreement, or file a lawsuit to the court to settle the dispute.²⁰²

After the nature of the people's mediation agreement as a civil contract was recognized in 2002 by the SPC, the mediation agreement can be further given a judicial effect through the application of the parties for a confirmation of the court and may be enforced under certain conditions, in accordance with Article 33 of the 2010 People's Mediation Law (PML).²⁰³ The Several Provisions of the SPC on the Judicial

²⁰⁰ The Several Provisions of the SPC on Trying Civil Cases Involving the People's Conciliation Agreements (*zuigao renmin fayuan guanyu shenli sheji renmin tiaojie xieyi de minshi anjian de ruogan gui'ding* 最高人民法院关于审理涉及人民调解协议的民事案件的若干规定) (2002), Article 1.

²⁰¹ *Ibid.*, Article 6.

²⁰² The 2011 PML, Article 33 and the Civil Procedure Law (2012 Amendment), Article 195. The full text of the PML (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=8266>; the full text of the CPL (2012 Amendment) (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=11161&CGid=>.

²⁰³ In detail, after a mediation agreement is reached upon mediation by a people's mediation commission, when necessary, the parties may jointly apply to the court for judicial confirmation within 30 days after the mediation agreement becomes effective. The court shall examine the agreement and confirm its effect in a timely manner. After the court confirms the effect of the mediation agreement, if one party refuses to perform

Confirmation Procedure for the People's Mediation Agreements in 2011 and the 2012 amendment to the Civil Procedure Law (CPL) further refine the whole process of such a judicial confirmation. The judicial confirmation procedure recognized in the 2012 amended CPL means a final legalization of the diversified dispute settlement mechanism to some extent, in which the litigation and non-litigation methods are interlinked.

Another type of mediation agreement is made by the court, which can be divided into two sub-types of agreements in terms of the final effectiveness. More specifically, the court may assign certain cases to a mediation organization²⁰⁴ before placing the case on file, and after a mediation agreement is reached, the disputants shall ask the assigning court for a judicial confirmation if they want.²⁰⁵ Also, even after the court places a case on file, it can still assign it to certain mediation organizations based on its own power or the application of the parties concerned. According to Article 2 of the Provisions of the SPC about Several Issues Concerning the Civil Mediation Work of the People's Court (*zuigao renmin fayuan guanyu renmin tiaojie gongzuo ruogan wenti de gui'ding* 最高人民法院关于人民法院民事调解工作若干问题的规定) in 2004, for civil cases that may be resolved through mediation, the court is supposed to apply mediation.²⁰⁶ Besides, according to its Article 1 and Article 122 of the 2012 amended CPL, all the mediation initiated by the court shall obtain the consent of the parties involved, whether it is before the case is placed on file or not. As to the case that has been filed, if a mediation agreement is reached, the parties may apply for a withdrawal

or fails to fully perform his duty, the other party may apply to the court for enforcement. In addition, according to the Several Opinions of the SPC on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation (*guanyu jianli jianquan susong yu feisusong xiangxianjie de maodun juafen jie jue jizhi de ruogan yijian* 关于建立健全诉讼与非诉讼相衔接的矛盾纠纷解决机制的若干意见) in 2009, the judicial effect of other types of mediation agreements like the administrative mediation agreement and the arbitration mediation agreement can also be confirmed by the court.

²⁰⁴ It may be an administrative authority, a people's mediation organization, a commercial mediation organization, an industry mediation organization, or other organizations with mediation functions.

²⁰⁵ The Several Opinions of the SPC on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation (2009), Article 14; the Several Provisions of the SPC on the Judicial Confirmation Procedure for the People's Mediation Agreements (*zuigao renmin fayuan guanyu renmin tiaojie xieyi sifa queren chengxu de ruogan gui'ding* 最高人民法院关于人民调解协议司法确认程序的若干规定) (2011), Article 2; and the CPL (2012 Amendment), Article 122. The full text of the Several Opinions of the SPC in 2009 (English version) is available at: <http://www.lawinfochina.com/display.asp?lib=law&id=7744&CGid=>; the full text of the Several Opinions of the SPC in 2011 (English version) is available at: <http://www.lawinfochina.com/display.asp?lib=law&id=8680&CGid=>.

²⁰⁶ In accordance with this Article 2, the court shall mediate those civil cases which may be settled through mediation. The court shall not mediate the cases that are governed by special procedures, the procedures for supervising and urging the clearance of debts, the procedures of public summons for exhortation and the procedures of bankruptcy liquidation, the confirming cases of marriage and identity relationship and other civil cases that cannot be mediated, considering the nature of the cases. The full text of this provision (English version) is available at: <http://www.lawinfochina.com/display.asp?lib=law&id=3735&CGid=>.

or a judicial confirmation, or the court may form a mediation paper after a review, which has an equal legal effect as a written judgment.²⁰⁷

According to the 1982 CPL (For Trial Implementation) [Expired], the court shall stress mediation in conducting civil proceedings. Moreover, the people's mediation committee should follow policies or laws in conciliating a case; otherwise, the court can make correction. In 1991, the official CPL was released, and since then the mediation shall be conducted on a voluntary and lawful basis. That is to say, it became one important form of completing cases for the court. With the issuance of the Provisions of the SPC about Several Issues Concerning the Civil Mediation Work of the People's Court in 2004 and the 2012 amendment to the 1991 CPL, mediation by the court has become one of the indispensable alternative dispute resolutions (ADR) in China.

In short, whether the mediation is conducted by the peoples' mediation committee or the arbitration agency — the so-called non-judicial mediation, or the mediation is assigned by the courts and conducted by mediation organizations, the final agreement can be confirmed by a competent court. The party concerned may also apply to the court for enforcement. More importantly, all the mediation shall be based on the willingness of the disputants, especially the mediation initiated by the court. This is one distinctive difference compared to the mediation system in ancient China.

Effectiveness of the arbitration award of farmland disputes

As mentioned above, the arbitral tribunal shall mediate the rural land contracting disputes after it accepts the case, and the mediation should be based on a voluntary basis. However, if the mediation fails or if either party backs out of the agreement before the mediation paper is served, an award shall be made in time by the tribunal.²⁰⁸ With regard to the effect of the arbitration award, usually the first award is final. After the award is given, the arbitration committee or the court shall not accept the re-application concerning the same dispute by any of the parties concerned.²⁰⁹ The arbitral award is effective upon its issuing, and the parties concerned are supposed to fulfill the award. If one party refuses to fulfill the award, the other party may apply for an enforcement of the court, which should enforce it according to the CPL.²¹⁰ However, in terms of the arbitration of the rural land contracting disputes, the arbitral award is not final. If one party is dissatisfied with the arbitral award, he may lodge a lawsuit in the court within 30 days from the date on which he receives the arbitral award. If he fails to lodge a lawsuit within the

²⁰⁷ The Several Opinions of the SPC on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation, Article 15 and 16.

²⁰⁸ The Rules on the Arbitration of Rural Land Contracting Disputes, Article 29; and 30 and the Work Norms of the Mediation and Arbitration of Rural Land Contracting Disputes, Article 28 and 33.

²⁰⁹ The Arbitration Law, Article 9.

²¹⁰ The Arbitration Law, Article 57 and 62; and the CPL (2012 Amendment), Article 237.

time limit, the arbitral award will become legally effective thereupon and shall be fulfilled by the parties in a specified time.²¹¹

In short, after the dispute is submitted to an arbitration agency, the sole arbitrator or the arbitral tribunal may mediate the case based on the willingness of the parties. If a mediation agreement is reached, the tribunal should make a mediation paper which is legally binding as an arbitral award. Otherwise, an award ought to be given in a timely manner. Unlike the normal arbitral award, the award for rural land contracting disputes is not a final verdict. The parties can still file a lawsuit in the court. It can be said that the mediation, arbitration and litigation are closely linked together in terms of the resolution of farmland (transfer) disputes.

5.5.3 Is the litigation ignored in the resolution of farmland transfer disputes?

With the promotion of the people's mediation and the arbitration on rural land contracting by the MOJ and the MOA respectively, together with the reform in the judicial system, a diversified dispute resolution mechanism for farmland (transfer) disputes is created in China. It includes the reconciliation of the parties by themselves, mediation by people's mediation committee or administrative authorities, arbitration including the mediation by arbitration agencies, and litigation. Meanwhile, the central government encourages the application of reconciliation and mediation first, which is more favorable to keep the harmony between the disputants and the harmony of the whole society. In particular, if the controversy concerned is not severe and the disputants have a close relationship, it is better to have the dispute resolved through reconciliation, or mediation by villagers' committees or township governments. As the development of people's mediation organizations at the grassroots — the villagers' committees in rural areas and the residents' committees in urban areas, such small disputes could be resolved in time. From the farmers' point of view, improvements in the reconciliation and mediation system are more significant, as individual farmers may participate in the dispute resolution process more effectively. However, an inescapable fact is that disputes involved in farmland transfer are increasingly complex and professional. The establishment and improvements in arbitration agencies in local areas are more meaningful to Chinese farmers to a certain extent.

²¹¹ The LMARLCD, Article 48 and 49. This special regulation on the rural land contracting disputes is mainly attributed to the underdevelopment of arbitration system in rural areas. This can be seen from the required strong support from the local governments and a series of central regulations concerning the establishment and improvements in arbitration agencies I mentioned above. Indeed, as the arbitration agency concerning rural land contracting is not common in rural China, it is not popular for the disputants to deal with their case through arbitration. Also, the capacity of arbitrators remains to be improved. Therefore, the final ruling system is not suitable for the arbitration concerning rural land contracting. In the event that one party is not satisfied with the award, he shall have a right to file a lawsuit to the court. This can better protect the parties in dispute.

Lawsuits were not the first choice for most Chinese farmers to resolve disputes (Alsen, 1996: 18-19). As a result of the long-term influence of Confucianism, even today litigation is still not popular in rural China. The reduced need for litigation is partly due to its high cost, the reduced trust of farmers in the proceedings because of the miscarriage of justice, and the poor enforcement of judgments (Zhang and Saqi, 2004). Nevertheless, the emphasis on mediation and arbitration does not mean the role of litigation is ignored in terms of resolving farmland transfer disputes. A better expression could be that, it is due to the real need in practice and the advantage of mediation and arbitration over litigation. In order to strengthen the link-up of legal proceeding to mediation and arbitration in rural land contracting disputes, the SPC issued the Interpretation on Several Issues concerning the Laws Applicable to the Mediation and Arbitration Cases of Rural Land Contracting Disputes (*zuigao renmin fayuan guanyu shenli sheji nongcun tudi chengbao jingying jiufen tiaojie zhongcai anjian shiyong falv ruogan wenti de jieshi* 最高人民法院关于审理涉及农村土地承包经营纠纷调解仲裁案件适用法律若干问题的解释) in January 2014. This means the function of litigation in resolving farmland disputes will be further strengthened, in addition to mediation and arbitration. In short, as the complexity and specialization of farmland transfer disputes increases, more professional institutions such as the arbitration agency and courts should play a bigger role.

Another important issue concerns the resolution of disputes in the farmland expropriation process. In accordance with the law, disputes generated by farmland expropriation — a compulsory land transfer — cannot be settled through reconciliation, mediation or even arbitration, but an administrative reconsideration or litigation.²¹² However, in practice neither the administrative reconsideration nor the litigation is well applied (Legislative Affairs Office of the People's Government of Anhui Province, 2010; Zhong, 2011). As regards the administrative reconsideration, it mainly concerns the approval of an expropriation decision, and the decision on the compensation and resettlement plan. In terms of the approval of an expropriation decision, in accordance with the Law of the PRC on Administrative Reconsideration, the affected party shall first apply for an administrative reconsideration, if he disagrees with the approval or the making of an expropriation decision.²¹³ For the decision on the compensation and resettlement plan, in accordance with the Regulation on the Implementation of the Land Administration Law (RILAL), the approval agency of this plan is the municipal or the county government. When a dispute arises over the compensation

²¹² The LMARLCD, Paragraph 2 of Article 2.

²¹³ The Law of the PRC on Administrative Reconsideration, Article 30. The full text of this law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm.

standards, coordination shall be carried out by local governments above the county level, if the coordination failed, a ruling shall be resorted to by the government that approved the expropriation.²¹⁴ In other words, the compensation and resettlement decision of the government which is an administrative act is considered as a civil act in current regulations. Moreover, the way through which the government that approved the expropriation can make a ruling is not clear. In accordance with relevant legislation, it should include administrative reconsideration. It can be said that existing rules and regulations relating to the administrative reconsideration of disputes concerning expropriation are seriously incomplete.

The vague expression about whether the affected party can apply for an administrative reconsideration concerning the approved expropriation decision and the compensation and resettlement plan is the first manifestation of the deficiency of the law. Second, no provisions for the administrative reconsideration of the act of governments in the preparation stage of land expropriation are provided in current laws and regulations. In order to better protect the rights to know and the rights to participate of the affected parties, government acts such as the announcement of the expropriation decision, the organization of hearings and the site investigation of the land that proposed to be expropriated are indispensable. Furthermore, they should be confirmed as the legal obligations of the acquiring authority/the government. If the government did not meet such obligations before the expropriation decision is made, the affected party may apply for an administrative reconsideration. Even after the expropriation decision is made, if the affected party believes the government did not fulfill its obligations properly, he can still apply for a reconsideration of the decision on the grounds of procedural flaws. Third, current law does not provide rules on the specific procedure for the administrative reconsideration of land expropriation disputes. For instance, there are no clear rules regarding the eligibility of the applicant and the duration that the right can be exercised. This lack of procedural provisions results in an ineffective exercise of the right to apply for reconsideration in reality (Legislative Affairs Office of the People's Government of Anhui Province, 2010).²¹⁵

More importantly, the imperfection of current rules on this administrative reconsideration has a close relationship with the deficiencies in the law relating to

²¹⁴ The RILAL, Article 25. The full text of this regulation (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1118&CGid=>.

²¹⁵ The current situation of the administrative reconsideration of the disputes concerning land expropriation, and the problems in exercising the right to apply for a reconsideration of the affected party have been summarized in a practical research on the administrative reconsideration of land expropriation (*tudi zhengshou xingzheng fuyi shiwu yanjiu* 土地征收行政复议实务研究). It is conducted by the Legislative Affairs Office of the People's Government of Anhui Province (*Anhuisheng renmin zhengfu fazhi bangongshi* 安徽省人民政府法制办公室) from 2009 to 2010.

land expropriation. As argued in 5.4.2, there is no detailed procedure for the affected parties to secure their rights in the expropriation process. Due to the lack of clear criteria concerning the compensation standard, the exercise of the rights to know and the rights to participate and the definition of the public purpose, it is hard for the reconsideration agency to make a fair decision. To put it differently, an essential prerequisite for future developments in the reconsideration of expropriation disputes is the improvements in the rules and regulations on the expropriation procedure. In addition to the ineffective reconsideration of expropriation disputes, litigation against the acquiring authority is not popular for the affected farmers either.²¹⁶ Deficiencies in the litigation concerning land expropriation will be further discussed in chapter 8. Based on the analysis of the resolution of disputes concerning both market transfers and expropriation of farmland, it can be concluded that the importance of litigation as a final safeguard for the affected farmers has been recognized by the legislature, the highest judiciary and the central government. Nevertheless, more detailed rules on the exercise of this litigious right are needed in future legislation.

5.5.4 A not totally secured land tenure in law

Based on all the analysis above, a series of legal rules have been available to clarify and protect Chinese farmers' land use rights, especially in terms of the breadth, duration and the resolution of farmland transfer disputes. The central government is also trying to strengthen the individual farmers' land rights through a number of central policies. However, it is still conservative in terms of promoting farmland transfer and endowing individual farmers with more autonomy to deal with their own property rights. Regarding the farmland registration and the reform in the current land expropriation system, more legal rules are needed to improve the protection and the assurance of farmers' land tenure security. Indeed, certain farmers have not been aware of the importance of the farmland registration and the participation in the expropriation process to the protection of their rights. However, the establishment of specific rules and institutions that encouraging them to participate in the registration and the expropriation procedure is meaningful to the implementation and enforcement of relevant laws and policies.

Currently, there is still no unified legislation on farmland transfer. In addition to the central legislature — the National People's Congress and its Standing

²¹⁶ As stated by the two reports introduced in 5.4.2, the likelihood that landless farmers choose to solve expropriation disputes through normal channels is low. According to the first report, among all the resolutions to expropriation disputes chosen by the surveyed farmers, lawsuits against the acquiring authority only account for 1.8%. In the second report, among the 359 valid questionnaires, only 63 reply that they have tried to bring a lawsuit before the court. This only accounts for 17.5%. Overall, the expectation of Chinese farmers for the court is pretty low.

Committee, legal rules and regulations concerning farmland (transfer) contract, farmland registration, resolution of farmland (transfer) disputes, land expropriation and land use planning are provided by different agencies, particularly the Ministry of Agriculture (MOA) and the Ministry of Land and Resources (MLR). This unavoidably results in a complex and somewhat chaotic regulation of farmland transfer. As the most important property (rights) of Chinese farmers, there should be a sound and unified regulation on the use of the contracted farmland in the 2007 Property Law (PL). However, in addition to confirming the FUR as a usufruct — a real property right, there are no more detailed provisions for its exercise and protection. Moreover, different interests involved in this issue may give rise to difficulties in reforming and unifying the dispersed regulations. At this time, it is hard to say that a legally secured land tenure has been established for Chinese farmers.²¹⁷

5.6 Do Chinese farmers have a *de facto* land tenure security?

Although land tenure is not secure enough in the current legal framework, it does guarantee a relatively independent land use right for Chinese farmers. Otherwise, an increasing growth of China's grain output would not have been achieved (Xu et al., 2014). After the adoption of the HRS created by farmers themselves, transfer of the contracted farmland developed automatically due to a gradual migration of rural labors. However, the characteristics of farmland transfer in practice and the problems appeared show that the legal land tenure security (LTS) of Chinese farmers is not well protected in practice. This is first reflected in the dominance of subcontract and lease of farmland in the transfer practice.

5.6.1 Dominance of farmland subcontract and lease in practice

Practically speaking, the subcontract and the lease of farmland²¹⁸ were and still are the leading choice of individual households to transfer their contracted land. Due to

²¹⁷ In a recent research on the land tenure security of Chinese farmers, it is argued that the legal land tenure security in rural China in recent decades has been significantly improved through market-oriented legal reforms (Ma et al., 2015: 297). However, it merely focuses on the quantity instead of the quality of those rules. Besides, the case study and the following analysis do not mention rules on land expropriation and their effect on land tenure security. If these factors were considered, the legal land tenure security would not be that strong. Through a further detailed examination of related legal rules in this chapter, the current legal system still cannot provide a secured land tenure for Chinese farmers.

²¹⁸ According to the legal meaning of the subcontract and the lease of the FUR, the main difference between them is the scope of transferees. However, in practice, the lease of the FUR is very different to the subcontract. First, the lessee is always someone from the outside of the collective to which the lessor belongs; while the party receiving the subcontract is limited to the other members of the same collective. Second, the purpose of land lease is mainly for scale farming; while for land subcontract, the purpose is more various. Third, the object of land lease includes the land itself, and the attachments on the ground; while for land

the consistent pursuit of scale farming since the early 1980s, transfer of the FUR as a way to realize this goal was and still is being promoted by the central government. Meanwhile, as the most basic and maybe the safest way (from the farmers' point of view) to transfer the FUR, subcontract has always been the most popular way for Chinese farmers to deal with their land which they cannot provide enough labor and time for. According to the land survey of the RDI (Rural Development Institute, now the Landesa) in 2008, nearly four-fifths (79.1%) of transfers out were to others within the surveyed village. That is to say, the land is transferred through subcontracts. The main reason for transferring out the land is the lack of labor in the household, which accounts for 55.5% (Prosterman et al., 2009: 24; Ye et al., 2010: 67). One primary reason for the popularity of subcontract and lease, usually short-term transfers of the contracted farmland, is the implementation of the land reallocation policy in local areas. Although the reallocation of the contracted farmland is gradually prohibited by both law and central policies, it is not well observed in all local areas (3.2.3). Even though there is a decrease in the total amount of reallocation, a certain percentage of farmers still do not fully agree with the no-reallocation policy.²¹⁹ As the FUR of each household is not stable in collectives that maintain land reallocation, the transfer of the FUR can only for a short term.

Legally speaking, subcontract of the FUR should follow certain contract rules. In practice, however, most of the transfer agreements are concluded orally, instead of through a written contract. Between the year 1984 when the subcontract was officially recognized by the central government and the year 2002 when the RLCL was passed, there were no detailed rules on the formalities to be fulfilled regarding farmland transfer. This further worsened the lack of use of a formal and written contract in reality. From 2003 on, with the promulgation of the RLCL and the 2005 Measures of the MOA, some detailed and comprehensive regulations were provided to adjust the relationship in farmland transfer.²²⁰ It is mainly about the

subcontract, it is only limited to the contracted land (Chen, 2004: 27). Besides, requirements for the transferees of the subcontract and the lease are different. For the lease in particular, the lessee shall have the capability for agricultural operation and under equal conditions, members of the collective shall enjoy priority (Article 33 of the RLCL and Article 9 of the 2005 Measures of the MOA).

²¹⁹ According to one survey in 2008 in 6 provinces of China, more than 60% of the surveyed households still prefer to reallocate the contracted land, especially the household with an increased population (Tao et al., 2009).

²²⁰ Article 37 of the RLCL provides that where the FUR are transferred by means of subcontract, lease, exchange, assignment or by other means, the two parties shall conclude a written contract. Where subcontract, lease, exchange or other means is adopted for transfer, the matter shall be reported to the contract-issuing party for the record. Also, a detailed content of the transfer contract is listed, which includes the following clauses: (1) the names and domiciles of the two parties; (2) the name, location, area and quality grade of the land concerned; (3) the term of transfer and the dates of beginning and end; (4) the purpose of use of the land concerned; (5) the rights and obligations of the two parties; (6) the price for the right transferred and the

formulation of a transfer contract and the corresponding registration system. Nevertheless, the use of written contracts is still not so common in practice, let alone the report to the contract-issuing party for a record.²²¹ In addition to the lack of farmers' awareness of written contracts, the lack of government services in the transfer process, especially the provision of the transfer information is also noteworthy. As mentioned in chapter 4 (4.2.4), although a strict administrative system for managing farmland transfer is provided by relevant laws and regulations, it is not fully implemented in practice. In other words, the dominance of the subcontract and short-term lease of the contracted farmland is in part attributed to the absence of government services. This can be further proved in the series of reports below.

5.6.2 Forced transfers of farmland due to the lack of participatory procedures

As discussed, the level of a *de facto* tenure security has close ties with the enforcement of relevant laws and regulations. Although an initial legal framework for farmland transfer has been available, it is not well enforced in practice, especially the principle of transfers on the basis of farmers' willingness. According to the People's Daily (owned by the Central Committee of the Communist Party of China, the CCCPC), overall there are five tricky problems in current transfer practice.²²² First, in addition to farmers' independent transfers, village cadres and local officials also make decisions to transfer the contracted farmland. In certain cases, the county or township government transfers farmers' land use rights without their authorization. Affected farmers were only notified by village cadres after the transfer agreement was signed (Yang and Liu, 2014). This forced transfer unquestionably denies farmers' rights to participate in the transfer of their own land rights. Second, in terms of farmers' voluntary transfer, in most cases the land

method of payment; and (7) liabilities for breach of the contract. In the 2005 Measures, Article 23 provides a more detailed content of the contract, in which the ways of transfer and the handling of the appurtenance of the land and the relevant facilities after the expiry of the transfer contract are also required to be presented in the final contract.

²²¹ According to the 2005 Measures of the MOA, the contract-issuing party shall handle archival filing in time upon the request of the contractor for transferring contracted land by subcontracting, leasing, exchanging or by other ways, and report it to the department of rural land contracting management of township governments. Then, the department shall provide a uniform text format to the contractor that has reached the transfer intention, and provide guidance to the signing of the contract (Article 25 and Article 26). The contract should be in quadruplicate, each party of the transfer shall own one copy, the contract-issuing party and the department shall have one copy respectively for archival purpose (Article 21). That is, since 2005, all the transfer of the FUR should be first reported to the rural land contracting management department of the township government. Then, the department will instruct the parties to sign a written contract. This will improve the popularization of the written contract enormously, if it can be well implemented in practice.

²²² A link to these five reports is available at: <http://news.sohu.com/20140318/n396766717.shtml>.

is transferred without a written contract. In some cities, the proportion of verbal agreements is more than 70%. Third, most of the transferred farmland, especially the land transferred by village cadres or local officials is not used for growing food or grains, or even not for agriculture. According to these reports, around 30% to 80% of the transferred land is used for growing fruits or flowers, developing efficient agriculture or facility agriculture, and sometimes for starting a business. More problematically, for farmers who transferred out their land, whether temporarily or permanently, the main profit is from the rent, which is usually low and not decided by themselves. In other words, the real transferor — individual households — cannot make much profits from the transfer. Fourth, as the regulator and the supervisor of land transfer markets, local governments shall establish a service system, such as information gathering, consulting services, contract services, land evaluation and resolution of disputes, to facilitate the transfer. However, in most local areas this service system is still not available. Last but not least, besides the forceful intervention in the transfer decision and the absence of a service system, most local governments are not active in dealing with the registration of the contracted farmland, the social security of landless farmers and the resolution of land disputes. It can be said that local governments do not play a due role in assisting the transfer of individual households' contracted farmland.

These violations and omissions attenuate the *de facto* tenure security of specific farmers, which also show that these protective measures in central policies and relevant laws are not effectively implemented. Thus, they cannot provide a factual tenure security for farmers. For instance, the maintenance of collective land ownership and a prior permission of the collective for the transfer of contracted farmland are aimed at preventing individual households from losing their land use rights. However, it is because of these limitations (although it is not the only reason) that the collective has more room to abuse its power. In order to rent the land successfully, the lessee will go to the collective directly to negotiate the land lease, but not the legal lesser — the individual households (Suganuma, 2005: 7). As regards the priority enjoyed by the other collective members under equal conditions, it is mainly for the prevention of non-agricultural use of the transferred farmland, especially the non-agricultural use by commercial investors. However, no detailed procedure is available to secure the exercise of this priority. For the definition of the 'equal conditions' of the priority right enjoyed by the other collective members, the decisive factor is the rent paid to the lessor. On the one hand, compared with the commercial investor, other collective farmers are usually in a weaker position. On the other hand, generally the investor owns more technology and machinery, especially more capital, and plays a bigger role in promoting the modernization of agriculture. To some extent, the investment from

commercial capitals in agriculture is inevitable, which should not be completely banned. Therefore, it is necessary to establish a strict regime for the enterprises in accessing to the leased farmland and strengthen the supervision. In my opinion, certain procedural rules shall be available to secure the participation of individual households in the farmland lease by various enterprises. Meanwhile, punishments for violations in the transfer process, such as the change of farmland use purpose by investors, are supposed to be imposed. Yet, the current law only provides sanctions for the violations of contractors/lessors.²²³

According to the survey of Landesa in 2011, big boss or corporate contracting is a big threat to farmers' land rights. About 32.6% of the surveyed villages reported some kind of farmland leasing to the outside boss or company. The average size of the rented land is 100 *mu* (about 6.67 ha)²²⁴ or so, and in 69.5% of all cases the rented land is a large and continuous tract of land. This shows a strong pressure for farmers whose average holding of farmland (for each household) is around 1 *mu* (≈ 0.067 ha). It can be deduced that violations of farmers' willingness in farmland leasing are widespread in practice. Meanwhile, the duration of the lease tends to be long, even longer than the remaining period of farmers' contracting term. What is worse is that the rented farmland by the company is used for various purposes and some are illegal. According to the report, 10.2% of the transferred farmland is used for apartment buildings or tourism, and 20.7% is used at least partially for factories or commercial development (Landesa, 2012). As stated by the Xinhua News Agency, until the end of June 2012, there has already 2,500 *mu* of farmland being used by industrial and commercial enterprises (ICEs), an increase of 84.6% compared to the end of 2009 (Dong and Lin, 2013).

In addition to the violations in the market transfers of farmland, more severe infringement of farmers' land rights is from the disordered expropriation system, which has been discussed above (5.4). It is worth noting that no matter how secure or insecure of the legal land tenure and the *de facto* land tenure, it is the perceived tenure security of individual farmers that decides if and how much farmers will invest in their land (van Gelder, 2007: 227). It also determines if farmers choose to

²²³ According to Article 60 of the RLCL, where a contractor, in violation of law, uses the contracted land for non-agricultural development, the relevant department of local governments at or above the county level shall impose punishments on him. Where a contractor causes permanent damages to the contracted land, the contract-issuing party has the right to put a stop to it, and to demand the contractor to compensate the losses entailed. This is the obligation of the contractor to maintain an agricultural use of the contracted farmland. For the violations of lessees who change the agricultural use of the transferred farmland, no clear legal punishments exist in law. In the Research Report of the Zhejiang Higher People's Court on the Law Applicable Issue on Land Transfer Disputes in Rural Reform and Development (*Zhejiang gaoyuan guanyu nongcun gaige fazhan zhong tudi liuzhuan jiu fen falv shiyong wenti diaoyan baogao* 浙江高院关于农村改革发展土地流转纠纷法律适用问题调研报告), regarding the effectiveness of the land transfer contract, in the case that the transferee changes the agricultural purposes of the transferred farmland, the transfer contract shall be held to be invalid. However, there are no more regulations on the punishments for the violations of transferees.

²²⁴ 1 ha = 10,000 m², 1 *mu* = 666.6667 m², so 1 ha \approx 15 *mu* and 1 *mu* \approx 0.0667 ha.

transfer out their land to more capable users or not. In order to have an accurate assessment of the current tenure security of Chinese farmers, a further analysis of the perceived tenure security is needed.

5.7 What should be done to protect the perceived tenure security?

5.7.1 Real thinking of Chinese farmers on farmland transfer

As shown above, although the central and certain local governments are encouraging and sometimes urging farmers to transfer out their land to more capable users, a formal and long-term transfer is still not the first choice of most Chinese farmers. In addition to the outside intervention, farmers' real thinking on farmland transfer also has a great impact on this decision-making. Due to the diversity of local areas, especially the great disparity of economic development, farmers living in the developed areas may be more eager to transfer out their land, based on a higher land value and a greater availability of off-farm jobs (Xu et al., 2012). However, regardless of the farmers living in the developed areas or those living in underdeveloped areas, an independent decision to transfer their contracted farmland should be assured. In total, there may be three reasons behind the preference of farmers for keeping the contracted land. First, for most Chinese farmers, contracted farmland is still a guarantee of their basic living.²²⁵ There was no social welfare system for Chinese farmers when the PRC was established in 1949. Although a social welfare system has been implemented in rural China in recent years,²²⁶ it is rather immature. Second, it is related to the cultural tradition in rural China. As a farmer, he is supposed to hold a piece of farmland. If the farmland is lost, he may feel isolated from the community. In particular, for those who experienced the 'three years of natural disasters (1958-1960)' during the People's Commune period, farmland is much more valued. Third, farmers'

²²⁵ Most Chinese farmers still choose to keep the land even though they have already found a job in cities, due to the concern about losing their jobs. Also, the low rent is not attractive enough for these moved farmers to give up their land. Sometimes, they may ask their relatives to cultivate the land and usually it is for free. Hence, for farmers who decide to stay in the countryside and focus on farming, it is not easy to transfer in more land to obtain more income. As regards the part-time farmers, whether the one focusing on farming or the one focusing on off-farm jobs, they still prefer to keep control of the land. That is, the income source of most Chinese households consists of both farming and off-farm jobs. Because of the instability of off-farm jobs, the income from farming becomes the basic and also the ultimate guarantee of most farmers' livelihood.

²²⁶ See the Report of the State Council on the construction of a social security system in rural areas (*guowuyuan guanyu nongcun shehui baozhang tixi jianshe qingkuang de baogao* 国务院关于农村社会保障体系建设情况的报告), 22-04-2009, http://www.npc.gov.cn/huiyi/cwh/1108/2009-04/22/content_1499331.htm; and the Investigation Report on the construction of a social security system in rural areas (*guanyu nongcun shehui baozhang tixi jianshe qingkuang de diaoyan baogao* 关于农村社会保障体系建设情况的调研报告), 22-04-2009, http://www.npc.gov.cn/huiyi/cwh/1108/2009-04/22/content_1499330.htm, accessed on 26-08-2013.

awareness of the ownership of the contracted farmland also affects the transfer practice. According to one field survey of the research group of ‘Legislation of Rural Land Issues’, around 41.91% of surveyed farmers think the contracted farmland is owned by the state. In almost half of the surveyed provinces (four of the ten), this proportion is over 50% as shown in Table 5.4.²²⁷ This perception affects farmers’ choices of transferring farmland especially the permanent transfer, as it is not their own property. Overall, Chinese farmers are not enthusiastic about farmland transfer, more precisely, the formal transfer of their farmland use rights. In the meantime, some farmers do have a need to transfer out their contracted land for a certain period of time, due to the lack of labor or time.

Table 5.4 Perception of respondents (farmers) of the owner of the collective land

	A.	B.	C.	D.	E.	F.
	State	Township governments	Village collectives	Villagers’ groups	Individuals	Others
Shandong	42.70	3.93	37.64	6.74	8.99	0.00
Jiangsu	3.33	0.00	66.11	22.78	7.78	0.00
Guangdong	14.92	1.11	76.24	4.97	2.76	0.00
Guizhou	53.04	4.42	14.92	2.76	20.99	3.31
Sichuan	64.20	6.25	7.95	3.41	16.48	1.14
Shanxi	38.33	2.78	23.89	1.11	31.67	1.67
Heilongjiang	41.99	2.21	19.89	1.10	32.60	1.10
Henan	58.43	3.93	19.10	6.74	11.80	0.00
Hubei	49.72	9.94	16.57	6.08	16.57	1.10
Hunan	53.01	1.09	13.11	6.56	26.23	0.00
Average	41.91	3.56	29.57	6.23	17.62	0.83

Source: Gao, 2012, p. 151.

In the circumstances, the spontaneous and independent transfer dominated by farmers themselves in certain local areas becomes increasingly important (Zhu et al., 2007: 785). More notably, these spontaneous transfers do solve the problem of abandoned land on the one hand; on the other hand, additional land can be

²²⁷ Based on the results of this survey, 41.91% farmers think the owner of their contracted farmland is the state, while only 4.67% farmers think that the state is the contract-issuing party. Meanwhile, 35.8% farmers think that the owner of their contracted land is the village collective or the villagers’ group, who is considered as the contract-issuing party by 76.16% farmers. It can be said that the village collective or the villagers’ group is mistakenly considered as the representative of the state by the surveyed farmers (Gao, 2012: 151).

available for farmers who cannot move to the cities or even cannot find any off-farm jobs. Through cultivating a bigger scale of land, these left-behind farmers may have chances to earn more income. Besides, this does not exclude the transfer-in of farmland by companies. The key point here is that the individual households should be able to really participate in the transfer process, especially in the large-scale transfers.

5.7.2 A need for a legal transformation

To some extent, through the actual control over the contracted farmland under the HRS, accompanied by the protective policies and legal rules, the perceived tenure security of Chinese farmers increased with the intensification of the *de facto* tenure security. However, the legal protection for the tenure security of individual farmers is still limited, owing to the immature farmland registration and the poor enforcement of law. Under the circumstances, what the government should do first is to gradually legalize the spontaneous transfers among farmers. In addition to facilitating and safeguarding the transfer through a trustworthy and efficient land registration and certification, a contract mechanism based on farmers' own decision-making should also be in place. In terms of land registration, although overall the registration of collective land ownership has been finished, the most crucial issue is that the collective land owner — the collective farmers as a whole — can really have a say in the use and the disposition of all the collective land. As discussed in chapter 3, currently the collective land ownership is greatly restricted by public powers through public law. After the ownership is registered, the collective owner shall be endowed with enough rights to use and dispose of the collective land. In the meantime, the dysfunctional villagers' committee or villagers' groups as the current representative of the collective land owner should be further restructured, to accommodate efficient participation of individual farmers in decisions regarding the disposition of their co-owned property. As regards the following registration of the FUR of individual households, effective participation of each household is also significant, to deal with the current difficulties like the disputes as to land demarcations. Fiscal supports from the central and local governments are indispensable to the whole process, too.

In terms of the establishment of a contract mechanism, especially in the market transfers of the contracted farmland, farmers' own say in the transfer agreement is the most important issue. Accordingly, the rights to decide to transfer or not, to choose the transferee, to negotiate the contract term and the transfer price should be guaranteed, whether they are exercised by farmers themselves or through their authorization. With the development of industrialization and urbanization, farmland transfer may be more frequent. Due to the significance of farmland

resources to certain farmers' basic living and the national food security, freedom of contract is inevitably limited both in law and in practice. However, this does not mean that farmers as the real land user cannot transfer the land independently. A contractual system which can endow farmers with enough choices of making a transfer agreement shall be established in the near future. This will be discussed in detail in chapter 7.

Clearly, the main problem in the farmland transfer practice is the lack of individual participation. More importantly, there is no detailed procedure to secure this participation, either in law or in the central policies. Due to the lack of the rules for the participation of the affected farmers, individual households as the real land user cannot have an equal bargaining power concerning the decision-making in both market transfers and expropriation of farmland. Although the relevant legislation, such as the RLCL and the PL, rightly emphasizes the protection of individual farmers' rights, including the right to be involved in the transfer process, it merely focuses on the final outcome. Procedural rules which can realize a final and substantial justice are ignored. In accordance with the observation of van Rooij (2006: 44-49) on the lawmaking in China, relevant legislation on land use in China tend to emphasize the certainty and adequacy of the legal rules, instead of their adaptability and feasibility. Through the analysis of the legislation on farmland transfer in this research, relevant legal rules are also strict and increasingly specific. However, it is still not enough to protect farmers' land rights in the transfer process due to lack of certain procedural rules. As stated by the governance perspective adopted in this research (2.5), the regulation from a governance perspective does not directly intervene in party autonomy. It focuses on the design of procedural rules which may secure an equal bargaining status for both parties, and the final outcome depends on the free agreement of the parties involved. By and large, a fundamental transformation in the laws concerning farmland transfer is indispensable in order to better protect farmers' land rights in farmland transfer.

5.8 Concluding remarks

With the legalization of the central policies on farmland transfer and the rising protective policies from central agencies, the legal land tenure security of Chinese farmers is increased. In addition to the enhanced perception of tenure security generated by the legal system, the actual control over farmland also helps to raise the perceived security of individual farmers. However, this growing perceived security is being threatened by the disordered expropriation system and the large-scale transfers by industrial and commercial enterprises, both of which are dominated by village cadres and/or local governments. On the one hand, the land rights of individual farmers are increasingly strengthened in both central policies

and law; on the other hand, the implementation and enforcement of such policies and law are far from satisfactory. As argued in chapter 4, currently the government regulation of farmland transfer is unbalanced, which is characterized by excessive public power and suppressed private land rights. Therefore, in addition to further empowerment of individual farmers and securing their participation in the transfer process in law — the first dimension of the governance perspective in government regulation, procedural rules which can establish an equal bargaining power for both parties shall be designed. This concerns the second dimension of this governance perspective. In this research, equal bargaining power is especially significant to the individual households — the transferor, and it primarily means the effective participation of farmers involved. This is quite obvious in the case of the compulsory transfer/land expropriation. In the meantime, the lack of farmers' participation is increasingly noticeable in the voluntary/market transfer, especially the large-scale transfers of the contracted farmland by enterprises. In this case, experiments in securing farmers' participation in local areas may shed a light on the design of participatory rules in the transfer process, which is the topic of chapter 6.

6 Innovations in farmers' empowerment and participation in practice

Through the analysis of Chinese farmers' land tenure security, especially the perceived security, it is evident that as the main party of farmland transfer, individual farmers cannot dominate the transfer of their own property (rights). Whether in the compulsory transfer/the expropriation process or in the market/voluntary transfer process, farmers involved mostly do not have a real say in the final transfer decision. This is not conducive to the establishment of an effective, efficient and sustainable system for transferring the fragmented and dispersed farmland, and thus improving the land productivity. Although the lack of empowerment of farmers in law and the lack of participation in practice are relatively severe, certain innovations in securing individual farmers' participation and inclusion in the transfer process do exist in local areas. In order to have a more accurate examination of the current status of farmers' participation in both compulsory transfer and market transfer of farmland, five local cases are chosen and analyzed in this chapter. The first two cases relate to farmers' participation in land expropriation. The case in Tongling County reflects the willingness of local farmers to participate and the problems appeared in this third party-initiated participation program. The case in Lingshui County shows the initiative of local governments and village cadres in protecting farmers' land rights and interests through securing their participation in the whole expropriation process. The next two cases concentrate on the market transfer of farmland among private parties. The third case in Changsha City distinguishes two empirical models of market transfers of farmland — government guiding and market bargaining, in which the former model is much more common in practice. The fourth case in Wuhan City focuses on how the various collective land (use rights) including farmers' contracted farmland is transferred in a fairly independent transfer platform — the Comprehensive Agriculture Equity Exchange. The last case in Chengdu City can be regarded as an example of the complete participation of individual farmers in a whole transfer process, which begins with a participatory land registration.

6.1 The 'Sanyuesan Shopping Centre' case in Tongling County

This case is conducted by the China Society of Economic Reform in May 2013 in Tongling County (桐陵县), Anhui Province, as a pilot program of the Farmland Acquisition and Governance in China: Participatory Learning and Experimentation Project (LANGPLE).²²⁸ Its main purpose is to test how public participation can

²²⁸ For a detailed introduction and analysis of this case, please see Feng and Liu, 2014.

work under China's current land expropriation system, whether the participation of affected farmers can really ease the various conflicts, and which parts of an expropriation process need farmers' participation the most. This case can represent a general situation of land expropriation in rural China, because: first, whether in terms of the geographical position or the economic development level, Anhui Province is at a middle level nationwide. Moreover, Tongling County has a relatively higher urbanization rate than other cities in Anhui Province, which means a higher frequency of land expropriation. Second, in terms of the outcome, although the affected households are not satisfied with the compensation and resettlement, it is not so low that violence against the acquiring authority has occurred. Therefore, the participation in this Tongling case can be considered as a common example of farmers' participation in land expropriation in China.

6.1.1 Situation before farmers' participation

The 'Sanyuesan' shopping center (三月三商城) lies in Shun'an Town (顺安镇), the eastern part of the city which is planned to be expanded. More precisely, about 289 *mu*²²⁹ of land was required and 78 houses need to be demolished in this expropriation program. By the time the project team members were involved in the pilot, it was already at the end of the expropriation procedure. According to the information provided by the public authorities in Tongling County, steps such as pre-examination and approval of expropriation, expropriation announcement, compensation announcement, land surveying, and registration of compensation have been completed. 74 households of the total 78 affected households have signed the expropriation and compensation agreements, and some of them have moved into the replacement housing which have not yet been checked and accepted. Nevertheless, the team members were informed that the affected farmers or their representatives actually were not involved in the decision-making concerning the pre-approval of the expropriation and the compensation for the acquired land.

When the team members asked the local officials if they had provided chances for affected farmers to participate in the expropriation process, they said yes because they had published the relevant information on the expropriation and compensation in a timely manner in accordance with the law (the Land Administration Law and local regulations on land expropriation). When the team member asked if there were any farmers who did not agree with the expropriation decision, the responsible official explained that the reason why the remaining households did not sign the agreement is not because they were not satisfied with the expropriation. In accordance with the compensation announcement, as their

²²⁹ 1 *mu* approximately equals to 0.164 acres or 667 m².

residency is not in the acquired area, they cannot receive the same compensation and move to the replacement housing as the other households. Therefore, for these local officials, public participation in land expropriation only means the release of expropriation announcement and compensation announcement. The affected farmers are rather passive in the whole expropriation process.

As regards the reaction of the affected farmers, according to Mr. Jiang — one of the farmers who had moved to the replacement housing, he did receive brochures on the expropriation and demolition. However, no clear explanation as to the (legal) basis for land expropriation and compensation were provided. They are just vague references to documents released by local governments. For Jiang, the government should have at least discussed with them before their land was expropriated. Besides, all the affected farmers believe that the compensation standard is too low. However, according to the compensation announcement, people who sign the agreement first can be rewarded. The land compensation and resettlement plan shows that, as long as the affected farmers move to the new place within 40 days after the expropriation announcement is released, for the number of days in advance, they can receive 100 Yuan per day and per household. Thus, many people cannot wait to express their dissatisfaction, but sign the agreement first. When the team members interviewed these resettled farmers, most of them expressed dissatisfaction with the compensation. Overall, on the one hand the idea that the affected farmers should have a right to participate in the decision-making and express their demands reasonably in the expropriation process was not a part of local officials' belief. On the other hand, although the affected farmers have a strong desire to participate, due to the institutional barriers and the lack of farmers' organizations, they cannot influence the government's decision-making, but accept all decisions passively.

As mentioned above, due to the lack of public participation in early phases, lots of disputes occurred in the process of compensation and resettlement. As it is impossible to change these preliminary decisions, the focus of the participation pilot was put on the late stage of expropriation — solving the problems in the resettlement process. On 8 May 2013, a villagers' forum was convened by the team members to collect farmers' opinions on the resettlement process. 10 villagers' representatives attended the forum and two types of issues were proposed during the forum. One is about the housing quality and the environmental issues. Problems like the too short foundations, too narrow roads, inconvenience for the elderly because of no elevator, and the lack of public facilities were proposed. The other issues concern inadequate compensation and resettlement. First, all the present representatives believe that the compensation for the expropriated land is too low. The compensation for temporary dwellings (certain households have to

rent a house before the replacement housing is checked and accepted) is also too low to meet the daily expenses of most renters. Meanwhile, most affected farmers lost their farmland and cannot find jobs or other income sources to support their basic living. The team members further distinguish these problems into ones that can be resolved through public participation, and ones that for now cannot be resolved through participation because of the expropriation system and the social reality. The unresolved problems focus mainly on the compensation standard, which is decided by higher levels of governments. Besides, if the standard is changed now, it will result in new unfairness and inequality. Therefore, problems that can be solved through public participation can only be the problems appearing in the resettlement process, such as the selection of resettlement sites, the layout of the apartment, overseeing the construction quality and demands for more public facilities. Following the forum in the morning, the team members decided to hold a mediation meeting (*woxuan huiyi* 斡旋会议) to organize a dialogue between the representatives of villagers and local officials, in order to deal with those tricky problems summarized above.

6.1.2 Farmers' participation through mediation meetings

With regard to the methods of public participation commonly used in the expropriation of farmland, there are stakeholder analysis, field investigations, mediation meetings, workshops, looking to the future forum, and SWOT (strength, weakness, opportunity and threat) (Li et al., 2014). As the representatives of villagers proposed lots of issues, and some of them cannot be resolved under the current social reality, a dialogue which can improve farmers' understanding of current policies and regulations on land expropriation is considered to be the most suitable method in the Tongling County case. Thus, the mediation meeting, in which the conflicting parties reach an agreement on the basis of a mutual understanding and mutual respect under the guidance of a trusted third party, was chosen as the best method for resolving the existing problems.

On the afternoon of the same day (8 May, 2013), the project team organized a mediation meeting participated by 8 representatives of villagers, local agricultural departments, land acquiring authorities and local officials who are responsible for the 'Sanyuesan shopping center' program. The meeting was hosted by Feng Chujun, one member of the LANGPLE project team. Before the meeting started, the villagers' representatives had considerable doubts about whether the mediation meeting can help resolve the problem. Besides, most of them were afraid of being punished after attending this meeting. Accordingly, when these representatives were invited to attend the mediation, most of them said no. After the team members explained the rules and the role of the mediation meeting, and guaranteed

that the mediation has been agreed by local governments and there will be no penalty, 8 courageous villagers finally decided to attend this meeting.

As the participants are not familiar with the meeting rules, a heated debate between the representatives and local officials took place soon after the meeting started. The host explained the rules again, and after all the participants agreed on these rules, the representatives began to raise the issues mentioned in the morning forum sequentially. The relevant person in charge of the government made responses to these questions.

As regards the low compensation for the expropriated land, the deputy secretary of Shun'an Town replied that these land policies, including the compensation standard, are formulated with higher levels of governments, and the town government cannot change anything. However, the representatives apparently were not satisfied with this answer. They believed that the decision made by local governments is not based on the actual situation of the villagers. Although the compensation was improved gradually, it still cannot alleviate the plight of the villagers involved. The deputy secretary also looked a bit helpless, but at this time he could not provide a better solution himself. He had to admit that the town government can only implement these policies and regulations issued by higher levels of governments, and the problems raised by the villagers' representatives do exist. He promised that the town government would help the affected villagers reflect these problems to higher levels of governments. The Representatives of the Agricultural Bureau of Tongling County also acknowledged that the current compensation fee is really low. Not only the affected farmers complained a lot, but the officials in charge of agriculture also had many disagreements. They believe that only through raising the compensation standard and reforming the expropriation system may these kinds of problems be resolved.

Regarding the employment issue of the landless farmers, the officials above promised that they would organize more job training and try to make this training organized in the community to meet everyone's needs. In terms of the low quality of the replacement housing, as it is the responsibility of the Management Committee of the Eastern District of Tongling City, the town government would inform the Committee of this issue, and notify the feedback to villagers in a timely manner. Concerning the gas entrance fee of the replacement housing, there was a fierce disagreement between the villagers' representatives and the government officials again. According to the representatives, they had to pay 3,000 Yuan for the gas entrance per household, but residents living in the commercial housing surrounding the replacement housing only need to pay 600 Yuan for such fees. They suspected the government here has unreasonable charges. The deputy secretary responded that they have received lots of complaints about this charge.

However, the town government only collects the money, and the real receiver is Ganghua Gas Company. It is an enterprise charge, rather than an administrative fee. Other officials at the meeting also explained that as a part of the infrastructure, the gas entrance fee has been included in the price of the commercial housing nearby. When the residents bought the house, they paid this entrance fee simultaneously. As for the difference between these two types of housing, they would contact this company to find out the real reason.

During the discussion, some representatives of villagers violated the meeting rules from time to time, because of their eagerness to express their dissatisfaction. The host Feng Chujun had to repeat these rules promptly to keep the meeting in order. Attitudes of the local officials to resolve these problems also made the villagers settle down. Misunderstandings between these two parties were gradually cleared up. Through the three-hour meeting, certain consensuses were reached between the villagers' representatives and the local officials. First, problems reflected by the villagers really existed and resulted in many inconveniences to them. Second, the villagers' representatives expressed their real thoughts without any interference from local officials. Third, the local officials acknowledged the various problems in the expropriation program. For the questions that they were able to give answers, direct responses were given to the villagers. For the questions that they could not answer directly, they would inform relevant authorities of the issues concerned and publish the feedback timely. Fourth, as regards the employment of landless farmers, the officials promised that the advices of farmers would be solicited first and certain training program would be available in the community based on the real need of affected farmers.

6.1.3 Effect of farmers' participation

After the mediation meeting, the project team members had a small talk with the farmers and the government officials separately. According to one villager, although this mediation did not resolve the substantive issues, through this fair and orderly dialogue, they understood the difficulties faced by the town government. Also, they know more about the relevant policies and regulations. Another farmer said that many issues mentioned in the dialogue are caused by the uncertainty of policies and the lack of knowledge of higher level of governments to the real situation. If such kinds of dialogue were organized in the very early stage of land expropriation, misunderstandings and conflicts between the two sides would be reduced significantly. The deputy secretary of Shun'an Town also said that many problems were further confirmed by the government through this dialogue. For problems that the town government cannot solve, they will report to the higher level of governments and hope that new policies will be issued soon. In terms of

the feelings on public participation, he responded that it is a good way to protect the interests of farmers. In fact, the purpose of this expropriation program is to develop the local economy, and make the local people benefit ultimately. Therefore, public participation does not contradict with the governments' work. The mediation meeting this time was a good start for more communication of governments with the affected farmers later. However, it can only work under the auspices of a third party from the beginning.

6.1.4 Comments

Based on the introduction of this case, at least three conclusions can be drawn:

First, current rules and policies on a fair, transparent and partly participatory procedure for land expropriation are poorly implemented in practice. In addition to the lack of participation in the making of local compensation standards and the participation (through hearing) before the expropriation decision is submitted for approval, the participation of affected villagers in the making of compensation and resettlement plan is also deprived of. This can be primarily attributed to the lack of unified and clear rules for participation in both the central and the local level. In the meantime, the lack of knowledge of farmers' participation of local officials is also an important reason. For those local officials, participation is only limited to the announcement of expropriation plan and compensation plan, and the expropriation of land should be government-sponsored and public-obedient. More notably, in order to complete the expropriation project as soon as possible, the acquiring authority offered an improper economic incentive to 'force' the affected farmers to vacate the desired land and houses in the shortest time. In accordance with the ladder of citizen participation theory of Arnstein (1969), the participation understood by the local officials in Tongling County is nonparticipation or symbolic participation at best.²³⁰

Second, the affected farmers have a strong will to be involved in the expropriation process from the beginning. However, as they are not familiar with the related law and policies, they cannot find effective means to express their views on the low compensation and the low-quality resettlement. In chapter 5 (5.4), it has been argued that under the current land expropriation system, the participation of affected farmers is only limited to the late stages, such as the compensation and

²³⁰ According to Arnstein's ladder of citizen participation theory (1969), there are eight levels and three phases of participation in total. In the first two levels (the first phase) — manipulation and therapy, there is no participation or the participation is not real. In the second phase — the informing, consultation and placation, although actions like provision of information, taking advice from the affected people are available, the participation is still a tokenism. Only in the final phase, through the partnership, delegated power and citizen control, a mutual interaction and an ultimate compromise of governments can be realized. This is real participation.

resettlement. As shown in this case, as the compensation standard is set by higher levels of local governments, the acquiring authority/the township government cannot change it, even though they know that farmers are not satisfied with the low compensation. This also explains why most of the surveyed farmers mainly feel unsatisfied with the low compensation and have a high tolerance of the expropriation for various (public and private) purposes in the second report on farmers' satisfaction level with expropriation (5.4.2).

Third, the participation of the affected farmers indeed can alleviate the growing conflicts occurred in the current expropriation process, even in the last stage of implementing the expropriation plan. Although there is no fierce resistance from the farmers, zero participation in the expropriation and compensation plan and the low-level compensation and resettlement are indisputable facts. If there was no involvement of the project team in this expropriation project, farmers' appeals for a fairer compensation and more job opportunities would not have been heard. In the meantime, certain local officials think that although the participation of the affected farmers can protect farmers' rights and interests in a better way, most of the conflicts are caused by deficiencies in the expropriation system. If the system itself does not change, public participation cannot resolve these conflicts either. In my opinion, public participation is a meaningful attempt to correct the current deficiencies in the expropriation process, and narrow the divergence between the government and farmers. If the involved farmers can participate in the whole process, express their opinions effectively and can actually influence the decision-making, contradictions in land expropriation will be much less and smaller. The next case in Lingshui County further shows the significance of early participation of the affected farmers in land expropriation. Besides, although certain local officials have realized the importance of farmers' participation, they solely blamed the deficiencies in the current rules and regulations on expropriation. From my perspective, the lack of unified participatory rules in both the central and the local level is one of the main reasons for the limited participation in expropriation practice.

6.2 Farmers-led land expropriation in Lingshui County²³¹

The Dadun village (大墩村) in Li'an Town (黎安镇), Lingshui County (陵水县), Hainan Province is a very remote village. In the past, it was famous for poverty and unrest. As the local government did not deal with certain land issues properly, which aroused a strong dissatisfaction of Dadun villagers, more than 600 villagers

²³¹ Information on this case is mainly from the series of reports of the CCTV News Channel on "How to Overcome Difficulties in Land Expropriation (如何破解'征地难')" on 23 February, 2012.

petitioned to the county government. It is estimated that from 2002 to 2004, more than 100 petitions happened due to land issues and land ownership disputes in Lingshui County. This case is also typical as it provides a brand-new procedure for land expropriation in China. It is primarily carried out by the collective itself, which is different from the situation in Tongling County above.

6.2.1 Background of the expropriation case in Lingshui County

The case analyzed here starts with the approval of the State Council for the construction of the Hainan International Tourism Island in January 2010, in accordance with the Several Opinions of the State Council on Promoting the Construction and Development of Hainan International Tourism Island (*guowuyuan guanyu tuijin Hainan guoji lvyoudao jianshe fazhan de ruogan yijian* 国务院关于推进海南国际旅游岛建设发展的若干意见) issued on 31 December, 2009. Then in September 2010, the Hainan provincial government decided that a marine theme park project will be located in Lingshui County, and Dadun village is the focus of land expropriation. Strictly speaking, this project does not belong to the normal construction for public purposes like public facilities or other infrastructures. However, as it was implemented as a national strategy aiming for promoting the development of local economy and benefiting the whole country, the constructions involved and the expropriation of land are in the public interest to a large extent.

According to the Development Plan of Hainan International Tourism Island (2010-2020) (*Hainan guoji lvyoudao jianshe fazhan guihua gangyao* 海南国际旅游岛建设发展规划纲要), at least three principles have to be applied when collective land which includes farmland is expropriated. First, the affected collective and farmers should be paid a full and prompt compensation for the expropriated land. A principle of the same price for the same type of land (*tongdi tongjia* 同地同价) shall be applied. This means the compensation should be based on the market price of the collective land expropriated. Second, when compensating the acquired land, the new land user shall pay certain social security funds separately. The proportion of the social security funds for landless farmers in the land revenue of local governments is supposed to be increased. Other social securities like securities for employment and housing security should also be available to the affected farmers. Third, compensation with a development right return for landless farmers, more precisely, compensation with retained land (*liuyongdi anzhi* 留用地安置) is promoted, which endows the affected collective and farmers with more autonomy in the resettlement process. Next, through the analysis of the land expropriation in Dadun village in Lingshui County, the

increased autonomy and participation of the village collective and villagers will be examined.

6.2.2 Land expropriation in Dadun Village with farmers' participation

The whole expropriation procedure in Dadun village is characterized by three features: First of all, it is the sufficient disclosure of information on expropriation. The land expropriation in Dadun village is a quite large-scale expropriation program, in which 8 villagers' groups, 826 households and 11,670 *mu* (≈ 781.89 ha) of land is involved. All the land in Dadun village, including farmland, the homestead of every household and other collective construction land is expropriated by the county government. Due to the significance of this expropriation to all villagers, their involvement in the process is pretty obvious from the start. In terms of the notification of the expropriation plan, officials from the county government and village cadres went to every household concerned to explain the positive impact of the plan on the future economic development and the living environment, so that the villagers can truly understand the revenue brought by the implementation of this plan.

Second, functions of the local governments in land expropriation are changed. In order to guarantee farmers' participation in the expropriation process to a maximum extent, the Lingshui county government modified the land development model. In the past, usually a big company as the land developer and the payer for compensation should be in place first before the government starts the expropriation process. However, in this new model, although the local government still plays a dominant role, it did not keep everything in its own hands. Functions like guidance, supervision, advocacy and coordination are the main role of local governments in expropriation projects.

Third, the collective is reorganized in accordance with a joint-stock cooperative system, with the aim of better protecting the land interests of individual households. Regarding the distribution of compensation for expropriated land, there is no unified rule in current laws and regulations. In the case of Dadun village, instead of compensating the acquired land from house to house, lump sum compensation is paid to the affected collective, namely the Dadun Villagers' Committee (the Dadun VC), on the basis of the highest standards in Hainan Province. Before that, the Dadun VC established a village collective stock company in March 2010, who signed a framework agreement of the lump sum compensation with the county government. That is, with the transformation of the village collective into a stock company, the collective itself became the implementing body of the land expropriation program. In addition to the highest standard compensation for the expropriated land, the Dadun VC also received two additional funding from the

county government for the expropriation costs. One is the funding for the expropriation expenses, and the other one is for the unforeseen costs. Both of them are 10% of the land compensation fee. In the meantime, with the aim of securing the future development of Dadun village and the long-term livelihood of villagers, on 5 June the Dadun VC established the first company in Lingshui County — Dadun Minxing Industrial Cooperation (Ltd.), in which each villager is one shareholder. It is based on the collective stock company established in March above, and received a preliminary support of 2 million Yuan from the county government as start-up capital of the company. The compensation agreement thus was signed by the company in the name of all the villagers rather than each of them.²³² This avoids lots of conflicts and saves a lot of time. With the funding and the support of the county government, the Dadun VC can measure the area of the acquired land and calculate the actual amount of compensation for each household.

In order to avoid disputes concerning the distribution of land compensation between the village collective and individual households, and the distribution among individual households, the Dadun VC only gave out half of the compensation. The left half and the remaining funding from the county government — around 70 million Yuan — was transferred to the Minxing Company (managed by the VC) in a form of entrusted operation. With this money, the Dadun VC set up certain industries, such as the Concrete Mixing Plant and the Green Brick Factory to provide jobs for landless villagers. Therefore, for farmers who work for these village industries, in addition to the wage income, they can also receive an annual dividend on their shares in the company.

6.2.3 Compensation with a return of land development rights to landless farmers

Another noteworthy innovation of the land expropriation in Lingshui County concerns the application of compensation with development right return for landless farmers, which seeks to provide a long-term guarantee for the basic living of landless farmers.²³³ In the case of Dadun village, as the construction of the

²³² According to the information published by the Lingshui county government, on 8 June, 2010, the Framework Agreement (on land expropriation and compensation) signed by the Dadun VC with the county government was submitted to the Villagers' Assembly for approval. Finally, the agreement was approved by the total 74 villagers' representatives unanimously. This information is available at: <http://www.lingshui.gov.cn/Government/PublicInfoShow.aspx?ID=2856>.

²³³ According to the Administrative Measures of Hainan Province on Retained Land in Land Expropriation and Resettlement (*Hainansheng zhengdi anzhi liuyongdi guanli banfa* 海南省征地安置留用地管理办法), retained land refers to the construction land accounting for a certain proportion of the area of expropriated land, which is arranged for the affected collective in order to secure the livelihood of landless farmers (Article 2). The area of retained land shall not exceed 8% of the total expropriated land area. The city, county or autonomous county government may provide specific ratios based on the actual situation. Retained land is

marine theme park project occupied 3,108.56 *mu* of land in the village, 8% of this area, namely 248.68 *mu* of land, was retained in the village. This retained land lies in the most privileged location, and is planned as plots combining commercial use with residential use according to the construction planning of the marine theme park. Dadun village was given a priority to use this piece of land to develop the tourism industry, and a five-star hotel has been established based on the cooperation between Dadun village and outside investors. It is worth noting that the retained land here is still owned by the collective, and individual villagers can receive certain dividends from the profits of the hotel based on their shares in Minxing Company.

In addition to the innovation in the retained land, the Lingshui county government also gave local farmers considerable autonomy regarding the use and disposition of their homestead. There were 878 *mu* of homestead in Dadun village originally. After concentrating the dispersed homestead together, the construction of a new Dadun Village only needs 489 *mu* of land. It is notable that the original 878 *mu* of the homestead was collective land, which was transformed into state-owned land through expropriation. Through a so-called ‘exchange of land in space’, the county government swapped this 878 *mu* of collective construction land with two pieces of state-owned residential land. Specifically, the Dadun villagers received a new piece of land with an area of 489 *mu* as their homestead in a new location, which was converted into collective land from state-owned land. For the saved 389 *mu* of land, more precisely, 389 *mu* of land area, the county government allocated another piece of 389 *mu* of state-owned land to the village. It is still owned by the state and registered in the name of Hainan Jinjun Real Estate Company (Ltd.) — a village enterprise owned and funded by the Minxing Company.²³⁴ As it is a piece of state-owned land, according to the Property Law, the landholder has a land use right for 70 years. Through transferring part of the equity of Jinjun Company to Logan Real Estate Cooperation (Ltd.), the village received a fund of 614 million Yuan for the construction of the new village (Y. Ma, 2013). In short, although the collective lost its ownership to a piece of 389 *mu* area

not included in the total area of expropriated land (Article 6). With the retained land, the collective can develop industry and tertiary industries. Through those developments, stable jobs and incomes may be secured for landless farmers.

²³⁴ According to the approval document on this land replacement from the town government — the Official Reply of the Lingshui County Government concerning the Consent of the Land Consolidation and Replacement in Dadun Village for the Construction of Socialist New Countryside (*Lingshui lizu zizhixian renmin zhengfu guanyu tongyi li'an zhen daduncun shehuizhuyi xinnongcun jianshe tudi zhenghe zhihuan de pifu* 陵水黎族自治县人民政府关于同意黎安镇大墩村社会主义新农村建设土地整合置换的批复), the 489 *mu* of land is used for farmers' new homestead. However, the 389 *mu* of land is state-owned land and used for residential purpose. The Jinjun Company has a land use right over this land for 70 years.

of allocated land in the expropriation program, it received the whole land revenue through a direct transfer of the land use right in an open land market.

6.2.4 Effect of the farmers-led land expropriation model in practice

It is obvious that this farmers-led land expropriation model in Lingshui County is accompanied by a joint-stock system reform of the collective from the outset. Through the reformed village collective, all the farmers involved as shareholders of the joint-stock company may have a chance to participate in the expropriation process and influence various decisions concerning the expropriated land and its compensation. This joint-stock company not only leads farmers to complete the expropriation work, but also provides an effective way of distributing the added value of the expropriated land. This farmers-led model has more advantages over a government-controlled expropriation process.

First, the Minxing Company — the reformed collective land owner — did not hire any appraisal company to assess the expropriated land (homestead and the contracted farmland) and its appendages of individual households, but organized farmers to assess all the involved property themselves through the Villagers' Assembly. This saved nearly 1 million Yuan for the company. Besides, in the government-led expropriation process, in order to get more compensation, the affected farmers usually choose to rush-plant crops and rush-construct buildings. However, under the model of lump sum compensation to the collective, if someone wants to get higher compensation through rush-plantings and rush-construction, it means the compensation for other farmers will be less. Thus, a driving force for mutual supervision among villagers can be established to stop these illegal acts. This can also save lots of money for the whole collective (members) or the company (shareholders).

Second, in addition to keeping the distribution of land compensation fee in order, the Dadun VC (as the real manager of Minxing Company) also invested the remaining assets of the Minxing Company in establishing two village enterprises, to provide more income sources for individual villagers. It is noteworthy that this increased participation of villagers enjoyed a considerable support from local governments. For instance, a right to develop both the 248.68 *mu* of retained land from the county government — a piece of collective land — and the saved 389 *mu* area of the homestead which was replaced by a piece of state-owned land was given to the collective by the local government. In other words, farmers in Dadun village as a whole were endowed with a high degree of autonomy in the whole expropriation process, guaranteed by the reformed collective and the complete use rights and disposition rights to the retained land and the saved land. More importantly, individual villagers can receive certain income from all these

investments of Minxing Company based on their shares. The composition of the benefits that can be received by Dadun villagers together is displayed in Figure 6.1.

Figure 6.1 Composition of the benefits that can be received by Dadun villagers

<p>Land compensation fee and two 10% of the land compensation fee for expropriation expenses</p>	<p>A five-star hotel built on the retained land and owned by Minxing Company</p>	<p>A 70-year land use right to the replaced 389 <i>mu</i> area of state-owned land</p>
<ul style="list-style-type: none"> • half was distributed to individual households • the left half was transferred to Minxing Company and used for establishing two collective enterprises, where farmers can find jobs and receive an annual dividend on their shares in the company 	<ul style="list-style-type: none"> • the retained land is still owned by the collective, and the hotel is established based on cooperation with outside investors • as shareholders of Minxing Company, individual villagers can receive dividends from the profits of the hotel based on their shares in Minxing Company 	<ul style="list-style-type: none"> • after received the 389 <i>mu</i> area of state-owned construction land use right, Hainan Jinjun Real Estate Company (Ltd.) — a village enterprise owned and funded by Minxing Company — is established • through transferring part of the land use right in the open market, the collective received a fund of 614 million Yuan for the construction of the new village

Third, although the local governments lost certain land revenue from transferring the expropriated collective land in open markets, more benefits are actually available for them from this farmers-led expropriation model. Firstly, the efficiency of land expropriation is greatly improved. According to the deputy director of the Land Bureau of Lingshui County, in the past it took at least 10 years for them to finish such a big scale of expropriation program (more than 10 thousand *mu* of land); however, under this new model, it only took four months in total. This undoubtedly saved lots of time and money for the government. Secondly, with the construction of a series of projects, the government also received income from land use fees and taxes on land transactions. In essence, the implementation of this farmers-led expropriation model brought about a win-win result.

Nevertheless, with the appreciation of the land held by the collective, the assets of the Minxing Company are expected to be much more valuable. In other words, the fund controlled by the Dadun VC as the real manager of the Minxing Company will be increasingly larger. Questions like whether this farmer's company can manage hundreds of millions of money successfully in the near future, how to make sure that the financial management of this joint-stock company is transparent, and individual farmers or shareholders can receive the dividends they deserved periodically and promptly are inevitable for such collective stock companies. Besides, even though the share of the Minxing Company is only allocated to villagers of Dadun Village, it is not fixed. It is adjusted annually in order to cover

all the villagers, which means that these newborn villagers each year may receive a share from the company and the shares of the dead villagers will be cancelled accordingly. This actually is a continuation of the land reallocation policy which shall be abandoned gradually as argued in chapter 3 (3.4.2). All these issues concern a reform in the management structure of these collective companies and enterprises mentioned above. In my opinion, a corporate governance structure involving a Board of Directors, a Board of Shareholders and a Board of Supervisors — a mutual balance between the owners and the managers of the company — ought to be in place in a timely manner.

6.2.5 Comparison with the Tongling case

Compared with the case in Tongling County, the affected farmers in Lingshui County enjoyed a higher degree of autonomy in the whole process. Although the final compensation fee paid by Lingshui county government is just one-third of the one paid by neighboring county governments, the affected farmers were satisfied with the compensation and assisted the government to complete the expropriation program actively. The secret weapon lay in the empowerment of affected farmers in terms of the right to develop land. Specifically, although farmers lost their original land, a certain area of expropriated land was retained in the collective, and the farmers have a relatively complete right to develop the retained land. It is also the same for the saved 389 *mu* area of homestead. Based on the replaced land development right, farmers' participation in land expropriation and their land interests are better guaranteed than the Tongling case. A detailed comparison between these two cases can be found in Table 6.1.

As a matter of fact, the retained land or the compensation with a return of land development rights to landless farmers is one type of compensation which may provide a more stable and higher income for the landless farmers. Although there are disparities in the specific situation of local areas, in accordance with a special investigation conducted in May and June of 2013 concerning the compensation with retained land, 17 out of 32 provinces in (the mainland) China have implemented such a compensation method (Yan, 2013). Also, certain supporting policies and management systems have been established by those local governments to guarantee a steady income source and a long-term livelihood of landless farmers, like the companies and enterprises established in the Dadun Village. This proves the feasibility of this new expropriation method in practice. To sum up, through empowerment of the affected farmers with a development right to a certain part of the expropriated land, combined with a sound structure of the collective organization, full participation of individual farmers in land expropriation can be realized.

Table 6.1 A comparison between the Tongling case and the Lingshui case

	Tongling case	Lingshui case
The expropriation project involved	A part of the expansion plan of the eastern part of Tongling County	A part of the Construction and Development of Hainan International Tourism Island
The affected farmers	78 households from the total 902 households, and the compensation fee is directly distributed to those affected households	All the households in Dadun village are involved and a joint-stock company was established by the Dadun VC to represent the whole villagers
Purpose of the expropriation	Local economic development	To implement a national strategy for the development of Hainan Island
Participation of the affected farmers	Limited to the expropriation announcement and compensation announcement	<ul style="list-style-type: none"> ▶ A detailed and direct explanation of the positive impact of the expropriation plan on local economic development to the farmers ▶ A farmers-led expropriation process
The form of compensation used	<ul style="list-style-type: none"> ▶ For the expropriated farmland, the compensation standard is set by local governments ▶ For the expropriated houses, resettlement housing 	<ul style="list-style-type: none"> ▶ For the expropriated farmland, the highest compensation standard set by local governments ▶ For the expropriated (878 <i>mu</i>) homestead, 489 <i>mu</i> of new homestead and the replaced 389 <i>mu</i> area of state-owned land use right (70 years) from the saved area of the old homestead ▶ 8% of the expropriated land as retained land for the collective to develop
Benefits received by the affected collective and farmers	Land compensation fee and the resettlement housing	<ul style="list-style-type: none"> ▶ A lump sum compensation fee with two 10% of the land compensation fee (half was distributed to individual households and the left half was used for establishing two collective enterprises) ▶ A five-star hotel built on the retained land and owned by the collective in the form of joint-stock company ▶ A 70 years land use right to the replaced 389 <i>mu</i> of state-owned land
Benefits received by local governments	Land transfer fee; taxes and fees collected from the shopping center after it is completed	<ul style="list-style-type: none"> ▶ Land transfer fee (except the transfer fee for the 289 <i>mu</i> area of retained land and the replaced 389 <i>mu</i> area of state-owned land) ▶ taxes and fees collected from the various developments of the expropriated land afterwards ▶ the time efficiency of the whole program

6.3 Farmers' participation in market transfers of farmland

These two cases above concern farmers' participation in the compulsory transfer of collective land, including the farmland use right (FUR). Due to the obvious intervention of public powers in private autonomy, the participation of affected farmers in land expropriation receives more attention in both the legal research and the practice than the 'participation' of individual farmers in market transfers of farmland. Theoretically, as individual households are endowed with a relatively strong right to use and manage their contracted farmland — a quasi-private FUR, they should be able to decide whether and how to transfer their rights freely, except in the case of expropriation. However, as discussed in chapter 5, the transfer practice is very different from how it is regulated in the legal framework and what the legislators expect. At this time, most farmers are not willing to transfer out their land, and even for those who needs to transfer, a temporary and informal transfer is the first choice. The reasons behind this phenomenon are complex, yet farmers' dependence on the income from land is common in most cases. Generally speaking, there are two tendencies in practice in terms of the market transfer of farmland. First, with the aim of expanding the transfer scale and promoting scale farming, local governments usually encourage the whole farmers within one collective to transfer their land to local large-growers or outside investors. Certain mandatory factors are usually involved in such transfer programs, which can be regarded as government-led transfers. Second, in order to facilitate the farmland transfer and develop a formal transfer market, some intermediary organizations organized mostly by local governments appeared in local areas. Emergence of the Agriculture Equity Exchange in practice is currently the most noticeable one. This can be regarded as a market-led transfer. The third case study in Changsha City below will display how these two directions evolved and worked in local areas. The fourth case in Wuhan will focus on the function of the Rural Equity Exchange. The purpose of these two case studies is to identify whether and how individual farmers can really participate in the market transfers of their contracted farmland.

6.3.1 The government-guiding mode of farmland transfer in Changsha County²³⁵

The government-guiding transfer of farmland introduced here happened in Shuanghe Village (双河村), Changsha County (长沙县) in Changsha City, Hunan Province. With the aim of promoting the rural economic development, a Management Committee of Modern Agricultural Innovation Demonstration Zone (长沙县现代农业创新示范区管理委员会, hereinafter the Management Committee) was established by the Changsha county government in 2009 to manage and guide the development of modern agriculture in the local area. More importantly, a series of policies were made to encourage farmland transfer. For instance, for such modern agricultural production bases that comply with the development direction of the agriculture in Changsha county and were approved by competent authorities, if the cultivated farmland is contiguous and the scale is above 100 *mu*, the government will award 200 Yuan per *mu* to investors and 100 Yuan per *mu* to the farmer transferor in the first three years. For the new modern farms, a certain percentage of supporting production and living space can be allocated, as long as it is less than 7% of the total area of the transferred farmland and will not occupy the basic farmland. Besides, the approved land use rights of the modern farms can be transferred through leasing, contributing as shares, assigning or even mortgaging both within and outside the village collective. In the case of Shuanghe Village, with certain advantages in nature, history and culture over neighboring villagers, it was chosen as the main part of an ‘eco-town’ project. That is, the farmland transfer in Shuanghe Village mainly concerns two projects — the modern farms of Xunlong River and the eco-town of Xunlong River. The former focuses on the transfer of farmland and forest land. In addition to the land transfer, the latter project also involves the replacement of certain homestead. As both of the main parts of the two projects are undertaken by Hunan Xunlong River Agricultural Investment and Development Company, it is collectively referred to as ‘Xunlong River Program’. Meanwhile, in this program, the government not only provided huge economic benefits and rewards for the invested enterprises, but also

²³⁵ There are mainly three reasons for choosing this case study in Changsha City (including Changsha County): first, an obvious trend in market transfers of farmland is the emerging market-led transfer with the assistance of local intermediary organizations. The case in Changsha City reflects this trend. Second, compared with other local areas, the situation in Changsha City is relatively better, whether in terms of the design of transfer systems or the protection of local farmers. Third, as the economic development in Changsha City is at a middle level nationwide, the local development of farmland transfer may reflect the need for a farmland transfer market across the country. For more information of this government guiding mode of farmland transfer in Changsha County and the market bargaining mode of farmland transfer in Changsha City, please see Tian, 2014.

arranged special staff in order to ensure a stable operation of the project. The local government is obviously biased towards the investors.

Solicitation of public opinions in government-supported 'Xunlong River Program'

With the great support of the county government, planning of the 'Xunlong River Program' was started in 2008 and completed at the end of 2010. In detail, in October 2008, Plan of the Modern Farm Construction Project in Hunan Xunlong River (*Hunan xunlonghe xiandai nongzhuang jianshe xiangmu guihua sheji fang'an* 湖南浔龙河现代农庄建设项目规划设计方案) was approved by the Orchard Town (果园镇) government, which is followed by the signing of the Project Book of Modern Farm in Hunan Xunlong River. Based on this Project Book, the Villagers' Committee of Shuanghe Village or the Grape Cooperative will obtain all the involved farmland use rights first and transfer them to the investors.²³⁶ In March 2009, the Hunan Xunlong River Agricultural Investment and Development Company (湖南浔龙河农业投资综合开发有限公司, hereinafter the Xunlong River Company)²³⁷ was established. Then, the modern farm project was approved by the Management Committee and the Development and Reform Bureau of Changsha County respectively in August 2009 and January 2010. Planning of the 'eco-town' project, which began in March 2010, experienced a similar process. In October 2010, a contract for the 'eco-town' project was finally signed by the Xunlong River Company and the Orchard town government. Overall, within two years, the planning and project approval of the 'Xunlong River Program', including both the modern farm project and the eco-town project, were completed and got ready for implementation under a strong push of local governments. In the meantime, a series of preparatory work involving land registration, solicitation of farmers' views, and referendum on major issues in these two projects were conducted in Shuanghe Village.²³⁸

Regarding the solicitation procedure of public opinions, in December 2008, the Xunlong River Modern Farm drafted a letter of commitment for the involved

²³⁶ Here the Grape Cooperative is not a real cooperative organization composed of Shuanghe villagers. It actually equals to an intermediary organization, which transfers in the farmland of individual households first and then transfers it out to the investors. The villagers involved are not cooperative members, but its trade partners in market transactions, who cannot receive any dividends or income from it.

²³⁷ The Xunlong River Company is subordinate to the Hunan Shengli Group (Corporation). Its Chairman of the Board — Liu Zhonghui — was born in Shuanghe Village. He is also the Chairman of the Xunlong River Company, who is in charge of the two projects in Shuanghe Village. With the construction of the project, he was nominated as the first secretary of the Party Branch in Shuanghe Village on 8 March, 2010, the highest leader of the village. This will be further discussed later.

²³⁸ Most of the statistics here and below is from the Memorabilia of Xunlong River Project (*xunlonghe xiangmu dashiji* 浔龙河项目大事记), which is available at the website of Shuanghe Village (双河村村务公开网): http://shc.csx.cn/zdxm/201012/t20101225_47516.html.

farmers in 9 villagers' groups and 344 households, promising that they will support the development of the modern farm project. In February 2009, a template for the rural land transfer contract with Shuanghe Village was issued on the Villagers' Assembly. A meeting of villagers' representatives was also held, discussing issues on the transfer of the contracted farmland. On 8 September 2010, 163 representatives of Shuanghe villagers went to the Xunlong River Company to listen to the report on the implementation of the modern farm project. More notably, on 15 September, 2010, a referendum conference on the application for a pilot of the development and construction of a Xunlong River Eco-town was organized by the Villagers' Committee of Shuanghe Village (Shuanghe VC) in 13 villagers' groups, and 1,360 villagers with voting eligibility participated in the vote. At the conference, Liu — the first secretary of Shuanghe Village and the Chairman of Hunan Shengli Group — reviewed the application process of the project, introduced the development and construction planning of the Xunlong River Eco-town project, explained the purpose and the significance of the referendum conference, and looked ahead at what might happen after the completion of the projects to all present villagers. According to the final voting results on 20 September, the average supporting rate is 97.2%.²³⁹ Besides, on 23 December, 2010, the first public open day of the Orchard town government, a solicitation of public opinions concerning the choice of the location of the eco-town centralized residence was held in the Shuanghe VC. 263 villagers' representatives from the total 13 villagers' groups in the village participated in the vote, and the support rate is 98%. In short, means of soliciting public opinions in the Xunlong River Program in Shuanghe Village include a letter of commitment, Villagers' Assembly, meetings of villagers' representatives, reports of the investors and referendum conferences.

Assistance of the Villagers' Committee

In the meantime, the Shuanghe VC plays a key role in the implementation of the Xunlong River Program. It includes the assistance in transferring the farmland of individual villagers' groups and the land ownership survey. First, in accordance with the Project Book of Modern Farm in Hunan Xunlong River, the Shuanghe VC or the Grape Cooperative is in charge of transferring the farmland of individual villagers' groups to Xunlong River Company. It is worth noting that in Shuanghe Village, the 13 villagers' groups are the real representatives of the collective land

²³⁹ The Construction of Xunlong River Eco-town is Supported by Villagers with 9 100% (9 个 100% 浔龙河生态小镇开发建设获得村民绝对支持), which is available at: http://shc.csx.cn/zdxm/201010/t20101025_41674.html.

in separate groups.²⁴⁰ In other words, each villager's group is entitled to transfer its own land to the investor directly. Nevertheless, in this program, it is through the Grape Cooperative — an intermediary organization — that the land needed by the project is transferred. From February to September of 2009, the Grape Cooperative signed a series of land transfer contracts with the villagers' groups in Shuanghe Village concerning the desired land. Second, a preliminary plan to investigate the collective land ownership was issued at the meeting of the Shuanghe VC in February 2010, which was approved by the town government later in March. From 21 March to 16 May, an investigation into the ownership of the farmland, forest land, homestead and other collective land within Shuanghe Village was organized by the VC, and a Survey Report on the Land Ownership in Shuanghe Village was issued. Based on this report, applications for certain relocations involved in the project were submitted to higher levels of governments.

More notably, the Grape Cooperative later is replaced by the Xunlong River Specialized Land Cooperative (hereinafter the Land Cooperative), in which all the villagers become its shareholders.²⁴¹ The contribution of each household is its contracted farmland from the villagers' group. According to the Implementation Plan of the Development and Construction of Xunlong River Eco-town (*xunlonghe shengtai xiaozhen kaifa jianshe shishi fang'an* 浚龙河生态小镇开发建设实施方案), the Land Cooperative represents the interests of all the farmers involved in Shuanghe Village. The investor should sign contracts with the Land Cooperative, develop the collective land in accordance with the provisions of the contract, and distribute the appreciation of the transferred collective land. Besides, with the aim of acquiring contiguous land, only the individual villagers' group may carry out transactions directly with the Land Cooperative, but not the individual households.

²⁴⁰ According to Article 10 of the Land Administration Law (LAL) and Article 12 of Rural Land Contracting Law (RLCL), in addition to the villagers' committee and the township collective organizations, the villagers' group can also be the representative of collective land owner, if the land has been allocated and managed by it. The full text of the 1998 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7125&CGid=>; and the full text of the RLCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm.

²⁴¹ On 24 April, 2012, a meeting of villagers' representatives was held to decide a referendum on the establishment of a specialized land cooperative in Shuanghe Village. An analysis of future changes in the management mode of the village, a report on the preparations for the cooperative and villagers' views on it, as well as the purpose, nature and structure of the cooperative were provided by relevant person in charge on this meeting. Through further villagers' meetings in different villagers' groups, certain representatives for cooperative members were elected and the Xunlong River Specialized Land Cooperative was finally established. In the first Shareholders' Representative Assembly of this specialized land cooperative on 8 May, rules of the cooperative were passed and a board of directors and a board of supervisors were elected. See Shuanghe Village Intends to Establish a Specialized Land Cooperative through Referendum (*shuanghecun nitongguo cumin gongtuo chengli tudi zhuan ye hezuoshe* 双河村拟通过村民公投成立土地专业合作社), which is available at: http://shc.csx.cn/gzdt/201204/t20120427_103140.html.

In addition to the land transfer fee, each household as a cooperative member can also receive certain dividends on its shares in the Land Cooperative from the appreciation of the collective land.

Compared with the Grape Cooperative, all the collective farmers/villagers become the shareholders of this Land Cooperative, which is represented by 50 villagers' representatives. However, it is not a mutual-aid economic organization which is regulated by the Law on Farmers' Professional Cooperatives (LFPC), but an economic organization focusing on the management of the collective land. Moreover, according to a published list of members of the board of directors, at least 4 out of 7 members are village cadres. This means the Villagers' Committee actually controls this Land Cooperative.²⁴² In particular, as the Chairman of the Xunlong River Company — the investor of the project — was appointed as the first secretary (the highest position in villagers' committee) of Shuanghe Village, status of the VC as the representative of the interests of collective farmers is questionable. It can be said that major decisions in the village are dominated by the investor, even though he was one of the collective members before. Individual households are in a relatively passive position. It is hard to say that this Land Cooperative can really protect the land rights and interests of individual households, when there are conflicts with the investor.

Farmers' participation in signing transfer contracts

The process of signing the land transfer contract may directly reflect the level of individual farmers' participation in the transfer process. As mentioned above, the Shuanghe VC, more precisely, the Grape Cooperative or the later Land Cooperative, was in charge of transferring the farmland of different villagers' groups to the investor. The transfer contract between the villagers' groups and the Grape Cooperative/the Land Cooperative is thus the main form of farmland transfer contracts in the Xunlong River Program. Besides, transfer contracts between villagers' groups and the investor also exist. As the Program is a large and systematic project, which contains lots of sub-projects that can be split and implemented step by step, contracts for various small-scale land transfers are also needed. For example, on 10 May, 2011, the contract signed by Jinfeng villagers' group with the Xunlong River Company only involves 100 *mu* of land. To some extent, this direct transaction between villagers' groups and the investor can better reflect the real wishes of involved farmers to (or not to) transfer out their contracted farmland.

²⁴² This list is from the Meeting Minutes of the Party Committee of Shuanghe Village (*shuanghecun zhiwei kuoda huiyi huiyi jiyao* 双河村支委(扩大)会议会议纪要), which is available at: http://shc.csx.cn/gzdt/201401/t20140106_272398.html.

As regards the relationship between the individual household and the villagers' group to which it belongs in the transfer process, a general power of attorney of all farmers in the group is provided. That is, the specific villagers' group or the VC was given a *carte blanche* in transferring individual households' contracted farmland. Once the head of a household signed the power of attorney, he could not quit the transfer of his land. In terms of the form of the transfer contract, a model text was passed by the Villagers' Assembly in February 2009. In addition to the articles concerning the transfer duration and the payment of the rent, the establishment of pension insurance for farmers who transferred their land and certain arrangements for the re-employment of those farmers are provided. It seems that farmers' participation in the planning and the implementation process of Xunlong River Program is secured through a series of meetings, referendums and the reports from the investor. However, as shown in Table 6.2, the free will of the individual households involved to transfer the land was not well respected. The government control over the whole transfer process is still obvious. Different from this government-guiding mode in Changsha County, the market-bargaining mode of farmland transfer in Changsha City represented by the Trading Center of Rural Land is more participatory.

6.3.2 The market-bargaining mode of farmland transfer in Changsha City

The Trading Center of Rural Land in Changsha City (*Changsha nongcun tudi liuzhuan jiaoyi zhongxin* 长沙农村土地流转交易中心) was established in June 2009, and started working in May 2010. Before this, the Interim Rules on Rural Land Transactions in Changsha City (*Changshashi nongcun tudi liuzhuan jiaoyi zanxing guize* 长沙市农村土地流转交易暂行规则) and a series of regulations on the transfer of collective land, including collective construction land and farmland, were issued to provide guidance for transactions in the center. Here only the rules on the transaction of farmland will be discussed.

Restrictions on the transfer scale and parties to transfer

In terms of the scope of the transactions, according to the Interim Measures on the Transfer of the Right to Contract and Manage Land in Changsha City (*Changshashi nongcun tudi chengbao jingyingquan liuzhuan guanli zanxing banfa* 长沙市农村土地承包经营权流转管理暂行办法), transfer projects involving more than 500 *mu* of land in the 5 municipal districts *must* be carried out in the Trading Center; such projects involving more than 500 *mu* of land in the other 4 counties outside the municipal districts *can* be conducted at the Center through applications. That is, for projects involving less than 500 *mu* of land in the 5 municipal districts, projects involving more than 500 *mu* of land in the other 4

counties that do not apply for a transfer in the Center, and projects involving less than 500 *mu* of land in the other 4 counties, transactions can be conducted outside this Trading Center. Meanwhile, in order to reduce the intervention of local governments and village cadres in the transfer process, certain restrictions are imposed on the qualification of transaction subjects. As a land transaction mainly concerns a transferor and a transferee, a Purchaser Membership and a Seller Membership are established in the Center. The seller member/the land transferor can only be farmers' cooperatives registered by local industry and commerce departments, and will transfer more than 500 *mu* of land. The cooperative shall meet the requirements in the LFPC, and be registered and obtain the qualification of a legal person.²⁴³ The transferee can only be a legal corporation²⁴⁴ registered by local industry and commerce departments with a registered capital of no less than one million Yuan (\approx \$157,900). Its operation must include agricultural production and the processing, storage, marketing of agricultural products. That is, both of the traders are legal persons, although the farmers' cooperative is not a legal corporation.

Farmers' participation in farmland transfers in the Trading Center

As the farmers' cooperative is the only qualified transferor in the Trading Center, individual farmers that are willing to transfer out their land should establish a professional cooperative according to the law first. After verifying the assets and capitals, quantifying the shares, making the articles of association of the cooperative and registering it with the competent department as a legal person, a membership of the Trading Center may be acquired. In order to protect the real willingness of each farmer in the transfer process, two occasions of deliberation and voting are required for the proposed land transfer project of the cooperative. First, the agreement on the land transfer plan is subject to the consent of more than two thirds of the collective members or two-thirds of the villagers' representatives. A registration form about the voting of villagers' assembly or villagers' representatives' meeting should be filled in as an essential material for the entrusted transaction.²⁴⁵ Under the current legislation, only the assignment (permanent transfer) of the farmland use right (FUR) of individual households is subject to the consent of the contract-issuing party — representatives of the

²⁴³ The LFPC, Article 2 and 4. That is, the cooperative shall be a mutual-aid economic organization, which is voluntarily formed by production and business operators of similar agricultural products or by providers or users of similar agricultural production and business operation services. The full text of this law (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=5614&CGid=>

²⁴⁴ The Interim Measures on the Transfer of the Right to Contract and Manage Land in Changsha City, Article 11.

²⁴⁵ The Interim Rules on Rural Land Transactions in Changsha City, Article 9.

collective land ownership. For subcontract, lease and exchange (temporary transfer) of the *FUR*, a record of the contract-issuing party is enough.²⁴⁶ However, the scale of the transfer required by the Trading Center is above 500 *mu*, which involves a large part, even all of the farmland within a certain collective. In my opinion, whether it is a temporary transfer or a long-term transfer, the previous consent of the collective owner — the collective farmers as a whole — is necessary. Second, the transfer plan should be permitted by the General Meeting of Cooperative Members through discussion and voting. A registration form about the voting of the General Meeting of Cooperative Members should be filled in as an essential material for the entrusted transaction.²⁴⁷ This is based on the power of the General Meeting of Cooperative Members given by the LFPC.²⁴⁸

In addition to the previous deliberation and voting on the transferor's land transfer plan, certain administrative examination of the land transfer also exists to guarantee a legal transaction. For instance, the land transfer plan agreed by both the collective farmers and the cooperative members should be submitted to the town government and the county government successively for a record and a preliminary examination. It is the city government that gives the final approval for the transfer based on the preliminary opinion of the county government. It is worth noting that the examination here is only limited to the formalities, instead of a substantial examination. With the approval, the cooperative may apply for a transaction in the Trading Center. Through publicity, listing and final confirmation of a transaction by the transferor and the interested transferee, a formal transfer contract will be signed by both parties. This is a completely market transfer process, which is different from the government-guiding mode of Changsha County.

6.3.3 Comparison between these two modes

As discussed above, through planning, solicitation of public opinions, assistance of the VC in transferring the desired farmland and land ownership survey, the Xunlong River Program in Shuanghe Village, Changsha County is progressing smoothly. However, government guidance, or more accurately, government intervention is rather obvious in the whole process. In order to attract investments, local governments provided a series of subsidies for the investors, who were chosen by the government, instead of the collective and villagers. Individual households can only transfer their own contracted land to the investor through the villagers' group to which they belong, on the basis of a general power of attorney.

²⁴⁶ The RLCL, Article 37.

²⁴⁷ The Interim Rules on Rural Land Transactions in Changsha City, Article 27 and 28.

²⁴⁸ Article 22 of the LFPC provides that, the General Meeting of Cooperative Members has the power to make decisions on the disposal of important property, investments to outsiders, guaranties to outsiders, and other important matters in the production and business operations.

Besides, as an intermediary organization of land transfer — the Grape Cooperative and the later Land Cooperative — are actually controlled by the villagers' committee, which is surprisingly led by (the chairman of) the investor. Although this investor (also the first leader of the VC) was a member of the Shuanghe village, the concentration of both administrative powers and economic interests in the hands of the same person is not a good governance structure. In the long run, the participation of individual villagers in such government-led programs is not well secured.

Compared with the government-guiding mode in Changsha County, the market-bargaining mode in Changsha City mainly focuses on the provision of transaction rules and the supervision over the qualifications of the traders. As the farmers' professional cooperative — a mutual-aid economic organization voluntarily formed by certain farmers — is the only eligible transferor of the collective land in the Trading Center, administrative (collective) organizations like villagers' committee are excluded from direct land transactions. Farmers themselves are supposed to take the initiative in establishing the cooperative and transferring the land concerned, rather than the village cadres or local officials. As the farmland transfer in the Trading Center is limited to large-scale transfers, a requirement for the permission of both the collective land owner and the cooperative members is reasonable. Together with the formality examination by local governments, a legal and qualified transferor composed of individual farmers can be established. In the meantime, the transferee is limited to certain agricultural enterprises. On the one hand, these requirements for the qualification of both parties may formalize the transfer process. Moreover, rules and experience from the Trading Center can provide important references for transactions outside the Center, if it is well-functioning. On the other hand, as transactions in the Trading Center are only compulsory for transfer projects involving more than 500 *mu* of land in the 5 municipal districts of Changsha City, farmer transferors are given more freedom in terms of choosing transferees, compared to the government-guiding mode in Changsha County.

Even though there are differences in several aspects of the transfer process, especially the transfer freedom of individual farmers involved, some common issues do exist in both modes. First, the preference for large-scale transfers of governments in both modes is obvious. In other words, the scale farming continuously supported by the central government is the first concern of local governments in promoting agriculture development.²⁴⁹ However, this does not

²⁴⁹ For the central government, scale-farming of agricultural land is always a significant objective of various agricultural land policies since the adoption of the Household Responsibility System (HRS) in the early 1980s. The ultimate purpose is higher land use efficiency and productivity, as well as the modernization of

Table 6.2 Comparison between the government-guiding mode and the market-bargaining mode of farmland transfer in Changsha City

	The government-guiding mode in Changsha County	The market-bargaining mode in Changsha City
The (real) transferor	As the legal land owner, the 13 villagers' groups are the transferor. Through a general power of attorney issued by the Villagers' Committee, only the villagers' group can sign contracts with the investor, not individual households	Only farmer's professional cooperatives are eligible to be the transferor in the Trading Center
Determination of the transferee	With the local governments' preferential policies for investments, the transferee is finally determined by the government	The transferor is free to choose the transferee
Nature of the cooperatives involved	The first Grape Cooperative is just an intermediary organization to collect the desired land for the investor; the later Land Cooperative focuses on the management of collective land in the name of all collective members, yet it is actually controlled by the Villagers' Committee	In accordance with the law, the farmer's professional cooperative is a mutual-aid economic organization voluntarily formed by certain farmers, which shall be a legal person
Forms of individual farmers' participation	Major decisions are mainly made through referendum, instead of a considerable deliberation of individual households	The transfer plan has to be approved by both the Villagers' Assembly and the General Meeting of Cooperative Members through discussion and voting (a deliberation process)
Administrative control over the transfer process	In addition to the government support in the planning and implementation of the program, the management of collective land is actually controlled by the Villagers' Committee through the Land Cooperative	The examination of the transfer plan by local governments is only limited to the formalities. After the plan is approved by city governments, the land involved can be transferred in the Trading Center according to market rules
Popularity of two modes in practice	The government-guiding mode is more common than the market-bargaining mode in practice. In most cases, local cadres and/or local officials dominates the transfer of collective land, without any involvement of individual households	The market-bargaining mode supported by various trading platforms, such as the Trading Center in this case and the Agriculture Equity Exchange below is emerging

agriculture. Yet, for the local government, in addition to the modernization of local agriculture, a more important reason lies in attracting more investments in local areas.

mean that farmers themselves cannot transfer their own contracted farmland individually in such trading centers. Second, the collective land ownership still has a big impact on the exercise of individual farmers' collective land use rights. It is obvious that in both modes, the transfer of collective land must be permitted by the whole farmers in the collective concerned through Villagers' Assembly or the meeting of villagers' representatives. In particular, in the market-bargaining mode, a previous permission of the collective land owner is compulsory, whether the transfer involves all of the collective members or just part of them. That is, farmers' individual land use rights are still subordinate to the collective ownership in practice, even though it is increasingly strengthened in the central policies and the law. Third, deficiencies in the participation form of individual households in the transfer process are noteworthy in both modes. Furthermore, the lack of effective governance structures of collective organizations such as the villagers' committee, villagers' groups and farmers' cooperatives directly affects the quality of farmers' participation. The design of more effective governance structures for such organizations is thus significant to the protection of individual farmers' land use rights.

6.4 Farmland transfer in Wuhan Comprehensive Agriculture Equity Exchange

In fact, the Rural Land Trading Center in Changsha City and other trading platforms such as the Rural Equity Exchange are intermediary organizations for farmland transfer. With the aim of reducing unnecessary administrative interventions from local governments and village cadres in the transfer process, various organizations are established to facilitate the market transactions of farmland. Although the development of these organizations is still in its infancy, practices in some areas have shown its positive function in promoting farmland transfer. As a ministerial regulation of the Ministry of Agriculture (the MOA), the Measures for the Administration of Transfer of the Right to Contract and Manage Rural Land (2005 Measures of the MOA) recognizes the status of the intermediary organization and its function in farmland transfer, but does not provide a clear definition of it. Meanwhile, with the promotion of farmland transfer nationwide, the transfer scale is increasingly larger. However, the growth of intermediary organizations for the transfer has lagged far behind. In addition to a rapid development of intermediary organizations in certain areas, the development in most local areas is rather slow (Liu, 2015).

6.4.1 Legal status of the intermediary organizations for farmland transfer

Since the issuance of the Notice of the CCCPC about Bettering the Work of Transferring the Farmers' Rights to Use the Contracted Land (*zhonggong zhongyang guanyu zuohao nonghu chengbaodi shiyongquan liuzhuan gongzuo de tongzhi* 中共中央关于做好农户承包地使用权流转工作的通知) in 2001, certain agricultural administration departments in local governments are responsible for the instruction and management of farmland transfer. Usually, a land transfer service center is available in the township and/or county governments. Based on the requirements in the 2009 No.1 Document, services such as the provision of transfer information for the parties concerned, regulatory consulting, land price assessment, conclusion of transfer contracts, mediation of disputes and other services are supposed to be the responsibilities of these intermediary organizations (Damm-Luhr, 2009). It is notable that its main purpose is to provide information and coordination services for the transfer parties as a service organization, who is not directly involved in land transactions. However, in the case that the contractor transfers its contracted land by *entrusting* the contract-issuing party or an intermediary organization voluntarily, the contractor shall issue a power of attorney for the land transfer.²⁵⁰ Thus, intermediary organizations can also participate in the transfer of the FUR on behalf of the farmer contractors. Meanwhile, any intermediary organization that undertakes the service for farmland transfer shall register with the administrative department of agriculture of local governments at or above the county level and accept their guidance.²⁵¹ That is, all intermediary organizations concerning farmland transfer must be registered and guided by local governments.

In order to promote the transfer of farmland, more precisely the transfer of the FUR, the Chengdu Agriculture Equity Exchange was created in October 2008 as the first Exchange for rural land transactions — a nonprofit service agency across China.²⁵² More such Exchanges were found in other areas like Wuhan (in Hubei

²⁵⁰ The 2005 Measures of the MOA, Article 8. The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3933&CGid=>

²⁵¹ Ibid, Article 30.

²⁵² At the beginning, it was established inside the former Chengdu Union Equity Exchange and focused on the transfer of various collective land use rights, like the right to contract and manage land (RCML, including the FUR), the collective construction land use right, and the collective forest land use right. Then, in July 2010, the Chengdu Agriculture Equity Exchange Limited Liability Company was officially formed, while it is still called the Chengdu Agriculture Equity Exchange (CDAEE) to the public. That is, it is actually one unit/group of people, but has two names (*yitao banzi*, *liangkuai paizi*). In addition to the transactions of various collective land use rights, now it also deals with transactions of new found collective construction land from the land consolidation program, and the disposal of collective assets. On 31 December, 2009, the Southwest Union Equity Exchange (SWUEE) was created based on the former Chengdu Union Equity Exchange and the former State Investment Equity Exchange Center in Sichuan Province. It is an

Province), Shanghai and Beijing. Different from the intermediary organizations above, which mainly handle the transfer of the contracted farmland, the Agriculture Equity Exchange provides a broader service. With the increasing marketization of collective land use rights in recent years, especially the collective construction land use right, a more comprehensive transaction platform is ever more needed in practice. Besides, as the Agriculture Equity Exchanges are established through different means, different forms of Exchanges exist consequently in practice.²⁵³ Moreover, there must be an overlap between the functions of the land transfer service center and the later Agriculture Equity Exchange, if both of them are available in local areas.²⁵⁴ However, currently the land transfer service center still plays a bigger role in most local areas, as the creation of an Agriculture Equity Exchange is not common in practice yet. In areas where both agencies exist, the coordination and harmonization of related functions should be emphasized.

Specific to the Wuhan Comprehensive Agriculture Equity Exchange, it was founded by the Agriculture Bureau of Wuhan City in April 2009 as a state-owned and non-profit company. According to the Trading Rules on the Transfer of the Right to Contract and Manage Land in Wuhan Comprehensive Agriculture Equity Exchange (For Trial Implementation) (*Wuhanshi nongcun zonghe chanquan jiaoyisuo nongcun tudi chengbao jingyingquan liuzhuan jiaoyi guize* 武汉农村综合产权交易所农村土地承包经营权流转交易规则(试行)), apart from the transfer (including assignment, lease, exchange and subcontract) of the farmland of farmers from the same collective and less than one year period, transfers among farmers from the same collective that more than a year, transfers (including assignment, lease, exchange, subcontract and contribution as a share) between collectives, organizations for agricultural production or legal corporations and individual farmers, and the re-transfer of farmland (use rights) should be conducted in the Wuhan Exchange (Article 3). That is, transferors including individual farmers are

inter-regional equity transaction institution (across Sichuan and Xizang Province), which concentrates on the transfer of state-owned property. Therefore, transactions concerning farmland use rights in Chengdu are encouraged and should be conducted in the CDAEE. See <http://www.cdsee.com/about/index.php?cid=7>.

²⁵³ There are four modes of establishing such an Exchange for rural equities in practice. First, it is attached to the existing Exchange for the transactions of state-owned equities. Second, it can be established inside the local agriculture departments. Third, it can be created through the investment of state company. Lastly, it can be established by sponsorship like a company. For example, the Wuhan Comprehensive Agriculture Equity Exchange was founded by the Agriculture Bureau of Wuhan City as a state-owned company. The Beijing Rural Area Equity Exchange was established and founded by the Beijing Agricultural Investment Co., Ltd. as a transaction platform and service agency. See <http://www.whnccq.com/> and <http://www.bjraee.com/>, respectively.

²⁵⁴ For instance, the Rural Land Transfer Service Center in Chengdu City is established on 14 March, 2006. In the meantime, certain service centers are also established at the county and township level of governments. In addition to the collection and publish of relevant information on farmland transfer, it is also responsible for the recording of land transfer and an archive system for such transfers.

encouraged to transfer their farmland (use rights) in the Exchange, regardless of the specific scales of the farmland concerned.

6.4.2 Protection for individual farmers' participation in the Wuhan Exchange

The protection for the participation of individual farmers in farmland transfer by the Exchange is mainly reflected in four aspects:

First, it is the establishment of a sound service delivery system. In order to attract farmers to transfer their contracted farmland in the Exchange, a three-level trading platform covering the city, districts and towns, and a four-level trading information network extending to villages were established. Besides, a vertical management of these different levels based on unified supervision and management, unified trading rules, unified dissemination of information, unified authentication (*jianzheng* 鉴证) of transactions, unified charging standards and unified management of the platform is applied. In addition to the detailed trading rules for both transferors and transferees provided by the Exchange, a supervision and administration commission for rural property transactions was set up to supervise the transfer market. As most farmers and other market players are not familiar with the function of this Exchange, certain benefits and convenience of transactions in the Exchange have to be available for them. A low or even zero transaction cost is the most noticeable attraction to the economically disadvantaged farmers. For individual households, farmers' professional cooperatives and companies owned by individual farmers, there is no transaction fee when they transfer (out) their land.²⁵⁵ More importantly, as the transfer of agriculture equities concerns many government departments, under the coordination of the supervision and administration commission, a series of windows for departments involving city planning, housing, water, agriculture, forestry and other rural property management were set up in the Exchange to facilitate the transactions. That is, a 'one-stop' service, including the pre-approval, the organization and the authentication of transactions, and the registration of the change in land rights, is available for all participating traders (Figure 6.2).

Second, in addition to strengthening the delivery of its own service, the Exchange also sifted and chose 17 qualified and honest intermediary organizations concerning the asset evaluation, bidding, auctions and legal advices to assist its market service. More remarkably, through cooperation with the Bank of China,

²⁵⁵ See Article 21 of the Measures for the Administration of the Transactions of Rural Equity in Wuhan City (For Trial Implementation) (*Wuhanshi nongcun chanquan jiaoyi guanli banfa* 武汉市农村产权交易管理办法(试行)) and Article 17 of the Trading Rules on the Transfer of the Right to Contract and Manage Land in Wuhan Comprehensive Agriculture Equity Exchange (For Trial Implementation) Technically, no transaction cost is zero. Even though the transferor does not need to pay the transaction fee, he still has to pay certain fees, such as transportation fees and printing fees.

Wuhan Rural Commercial Bank, Hankou Bank and Minsheng Rural Bank, the Exchange can assist the transferee in getting financing through mortgaging the transferred rural property. With the marketization of rural property including the farmland use right (FUR), the risk of losing such rights also increases. Therefore, whether in the transfer of land rights of individual farmers or the transfer of (certain parts of) the whole collective farmland — the group transfer, farmers themselves should make the final decision.

Third, in order to examine the real wishes of farmers involved in the transfer, especially in the group transfer, transactions concerned must be conducted publicly in the Exchange. A real-time price of the transferred land will be provided to ensure farmers' rights to know. Meanwhile, the transferor should submit the land use certificates and the proof of identities of every household involved. If the transferor is a certain collective, the resolution of more than two-thirds of collective members or their representatives should be submitted. With regard to the interested transferee, a transferee application, a proof of its identity and its credibility letter should be submitted to and examined by the Exchange. After a deal is reached through a negotiation, bidding or an auction, signing of a formal contract by the transferor and transferee is followed. It is noteworthy that all these steps and requirements above are for an authentication certificate for property transactions issued by the Exchange.²⁵⁶ Here certain confusion about the effect of the transfer contract signed by two parties and the effect of this authentication certificate issued by the Exchange appears. Based on the trading rules of the Exchange, only with the authentication certificate for property transactions, parties to the transaction can apply for a registration of the changes in the land rights to the original certificate-issuing authority. Moreover, with such an authentication certificate for property transactions, the transferee may apply for a mortgage to certain banks. That is, the transfer contract between transferors and transferees alone cannot realize a valid and final transfer of the land rights concerned, even though it has been verified by certain (local) government departments beforehand.²⁵⁷ It is the authentication certificate for property transactions of the

²⁵⁶ The Transaction Rules on the Transfer of the Right to Contract and Manage Land in the Wuhan Exchange (For Trial Implementation), Article 8, 13, 15 and 18.

²⁵⁷ According to Article 24 of the 2005 Measurements of the MOA, the parties to the transfer of farmland use rights may apply for verification of a contract to the department of rural land contracting management of township governments. The department cannot force the parties to accept verification of a contract. However, as stated by the Notice for the Application for Authentication of Transactions of the Right to Contract and Manage Rural Land (*banli nongcun tudi jingyingquan liuzhuan jiaoyi jianzheng xiangmu gaozhishu* 办理农村土地经营权流转交易鉴证项目告知书) and the List of Required Materials for Handling the Authentication of Rural Property Transactions (*banli nongcun chanquan liuzhuan jiaoyi jianzheng suoxu ziliao qingdan* 办理农村产权流转交易项目鉴证所需资料清单) released by the Exchange, the submitted transfer contract must be verified by local Operation and Management Stations of Rural Economy (the

Exchange that means a final transfer of the land rights. In addition to a previous verification of local departments of the transfer contract to ensure the authenticity of the information on the contract, examination of the qualifications of both transferors and transferees, especially the proof of farmers' real willingness to transfer their land (in group transfers) is also compulsory for the authentication certificate issued by the Exchange. When the transferred land right is going to be mortgaged by the transferee guaranteed by the authentication certificate, a prior permission of the transferor is also needed.

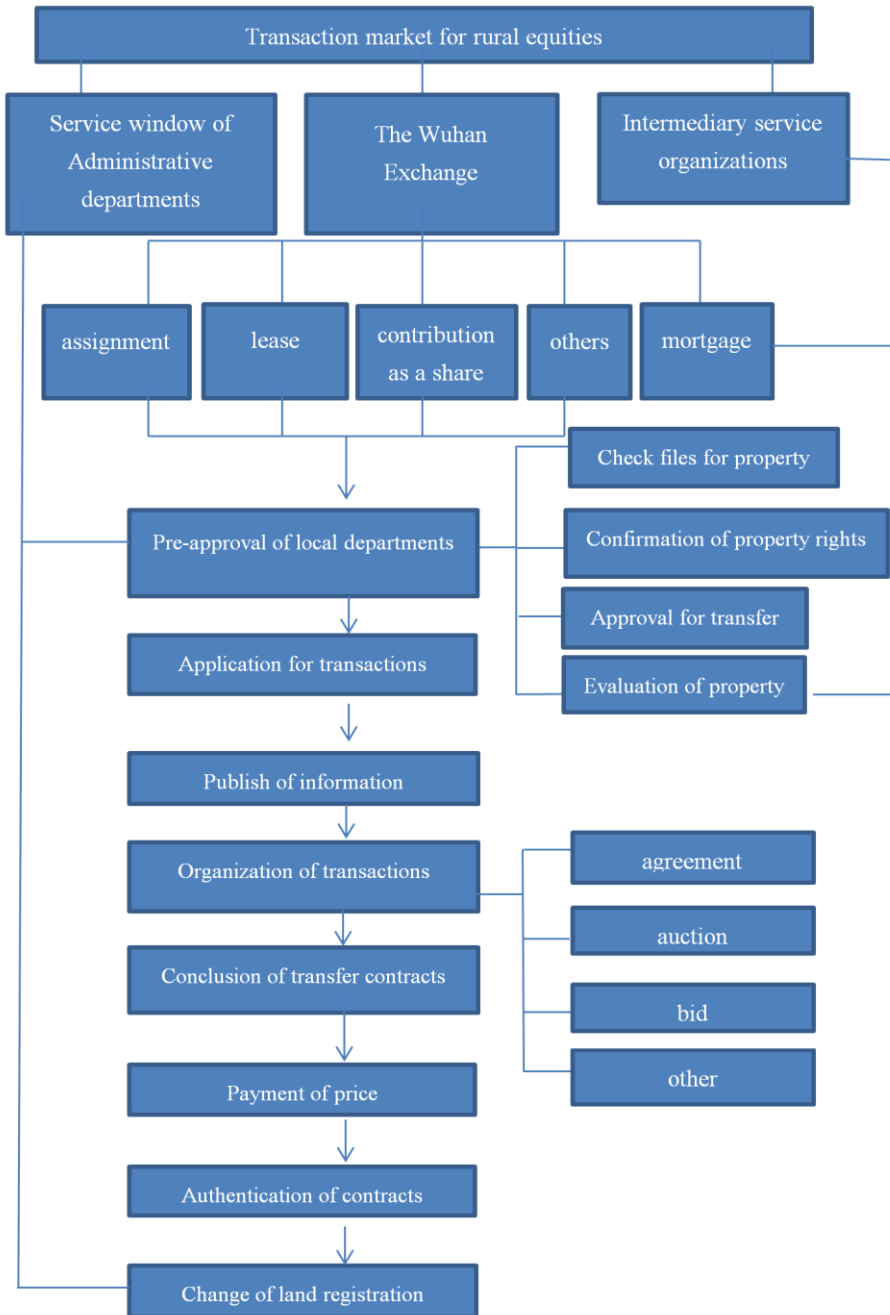
Fourth, special measures for protecting farmers' land rights and interests in large-scale transfer programs involving commercial investments are introduced in the trading rules of the Exchange. Issues concerning whether the transfer program is in line with national laws and regulations, environmental assessment, land use planning and industry development plans; the qualifications, operating capacities and credit certificates of the transferee; and operational risks of the program will be reviewed and evaluated rigorously. Meanwhile, a 'risk deposit' should be paid by these commercial capitals involved in land transfers, which is generally 1 to 3 times of the annual rent of the transferred land. On the one hand, the deposit may prevent companies from runaway because of poor management, which may affect the rental income of farmers. On the other hand, it may prevent companies from predatorily exploiting the land and damaging the geology, and if it happened, the deposit can be used as a land rehabilitation fee. The deposit is held in trust by the local operation and management stations of rural economy for the company. If it did not violate the relevant regulations, the deposit will be returned year after year after five years (since the land is successfully transferred) and a full refund will be paid when the contract expires (Li, 2013).

Last but not least, on the basis of a separation of the FUR into a right to contract land and a right to manage land, certain measures are introduced by the Exchange to fully develop the financing function of the land management right.²⁵⁸ As a matter of fact, in the Regulations of Hubei Province on Rural Land Contract and Management (*Hubeisheng nongcun tudi chengbao jingying tiaoli* 湖北省农村土

contract should be stamped with the official seal of the station and signed by the responsible person of the station). Although the requirement of the Exchange is stricter than the legal rules, it may better guarantee a secured transfer of land rights. To some extent, the verification of the local department is simpler than the authentication of the Exchange.

²⁵⁸ As discussed in chapter 4, in the 2014 No. 1 Document, the right to contract and manage land (the RCML) including the FUR is divided into a right to contract land and a right to manage land. In the transfer of the FUR, except assignment — a permanent transfer, only the land management right is transferred to the transferee. The transferor still holds the right to contract land. That is, even the transferee goes bankrupt and cannot return the loan to the bank or repay its creditors, the involved land rights cannot be transferred to the bank or other creditors. This may inhibit bank's enthusiasm for offering mortgages to landholders.

Figure 6.2 Service Process of the Wuhan Comprehensive Agriculture Equity Exchange



Source: the website of the Wuhan Comprehensive Agriculture Equity Exchange, available at: <http://www.whnccq.com/html/jiaoyiguize/2011/0914/87.html>

地承包经营条例) (Article 4) promulgated in 2012, a differentiation between (clearly-defined) collective land ownership, a (stabilized) right to contract land and a (liberalized) right to manage land has been introduced before the 2014 No. 1 Document. Based on this differentiation, a transaction mode of rural property including 'transaction — authentication — mortgage' appeared in the Wuhan Exchange. As mentioned above, in cooperation with certain assets-evaluation companies and financial institutions, the transferee, especially the agricultural enterprises lacking of funds and collateral can mortgage the transferred farmland use rights with the authentication of the Exchange. This can attract more agricultural enterprises to invest in agriculture to a certain extent. Besides, the Wuhan city government provides a 2 million Yuan subsidy for such enterprises each year. If the enterprise — the mortgagor — cannot repay the loan, the bank — the mortgagee — may commission the Exchange again to transfer the land rights — the collateral — on the market, in order to protect the interests of the bank and the farmers involved. Until now, there is no such case happened in the Exchange (Li, 2013).

6.4.3 Effect of farmers' participation in farmland transfer in the Wuhan Exchange

Through a rigorous transaction process and a series of protective measures, a greater freedom of farmland transfer is given to individual farmers, compared to the Rural Land Trading Center in Changsha City. More importantly, through a series of procedural requirements, farmer's participation in farmland transfer is improved. According to the listed projects published on the website of the Exchange, among all the 384 projects, 288 projects concern the transfer of farmland, 95 projects concern the transfer of barren mountains, deserted ditches, barren hills and wasteland, and the last one is the transfer of water surfaces for breeding.²⁵⁹ That is, although transactions in the Exchange cover up to 10 different rural property, transfer of the farmland use right (FUR) is the main business. Moreover, the transfer scale varies from 12.29 *mu* (\approx 0.8193 ha) of farmland (involving 14 households) to 2,230.25 *mu* (\approx 148.683 ha) of farmland (involving all the farmland in a collective). The duration is generally above 10 years, which provides a relatively stable right to manage the transferred land for the transferees. It can be said that the Exchange does meet the needs of various transfers of farmland in practice, on the basis of an open trading platform. Nevertheless, in terms of the transfer price, as stated by the average price of farmland transfer in the

²⁵⁹ The website of the Wuhan Exchange, which is available at: http://www.whnccq.com/php/xm_list.php.

districts of Wuhan City, it is less than 500 Yuan per mu per year — a rather low profit for individual households.²⁶⁰

As there is no information about the transferee in these listed projects online, it is hard to determine what is the transferred farmland used for. Reportedly, in larger-scale transfer projects, it is certain agricultural companies that transferred in large piece of farmland, which is mainly used for agricultural production. In addition to the rental income, farmers who transferred their land can choose to work for the company and obtain certain salary. Moreover, the rent paid by the transferee will increase 10% every 5 years to safeguard the farmers' land interests (Gu and Fu, 2013). This gradually increased rent may somewhat secure farmers' land interests, yet it cannot change the fact that the value of farmland is much lower compared to the construction land. That is why a so-called 'Farmland Protection Fund (*gengdi baohu jijin* 耕地保护基金)' is established in certain local areas such as Chengdu City, in order to encourage farmers to continue farming on their land. Overall, the trading rules of the Wuhan Exchange provide a relatively detailed and standard procedure for the market transfer of farmland. More importantly, individual farmers' participation is properly secured through these procedural requirements. In addition to the transfer of the contracted farmland/the FUR, other rights concerning rural land may also be transferred in such Exchanges. The one in Chengdu City below provides a typical example.

6.5 Broader participation of individual farmers in farmland transfer in Chengdu City

The reform in the farmland transfer system in Chengdu City is included in a coordinated reform concerning both urban areas and rural areas, which was permitted by the central government in 2007. In terms of the land reform involved, it is generally characterized by 'Returning Rights and Endowing Farmers with Transfer Rights (*huanquan fu'neng* 还权赋能)'. Specifically, it is mainly reflected in three aspects: first, a formal and participatory registration of all collective land rights, including the farmland contracted by individual households, is greatly supported by the government. Based on the systematic registration and certification of the collective and individual land rights, farmers' land rights can be stabilized. This provides a necessary prerequisite for various land transfer. Second, regarding the market transfer of the collective land including farmland, a trading platform is

²⁶⁰ For example, in the transfer of 12.29 *mu* of farmland involving 14 households, the land is leased out for 16 years and the total rent is 8,000 Yuan per mu, namely 500 Yuan (about \$ 81) per mu per year. For more information, please see the website of the Wuhan Exchange, which is available at: <http://www.whnccq.com/php/jyxm.php?id=12A0000306>.

secured by the establishment of the Chengdu Agriculture Equity Exchange in 2008. What is more notable is that in addition to the rules for the transfer of the FUR, which is similar to the Wuhan Exchange, rules on the transfer of certain 'land quotas' are also provided. This concerns the third aspect — a reform in the current land use control system through the transfer market for land quotas. In short, in the Chengdu experiment of farmland transfer, broader participation of individual farmers based on a complete right to use and dispose of the collective land is secured.

6.5.1 A participatory registration of farmland in Chengdu City

As the comprehensive reform for a balanced urban-rural development in Chengdu City focuses on realizing a market transaction of collective land rights, an efficient and effective land titling unquestionably is a necessary prerequisite for such a reform. In accordance with a series of research, the registration of collective land in village collectives in Chengdu City is systematic, highly participatory and thus relatively effective.²⁶¹ As discussed in Chapter 5 (5.3.2), in most local areas neither local governments nor villagers are enthusiastic about the registration of collective land. Moreover, a series of problems appeared in practice, which hinders the process of registration. In the case of the Wayao Village (瓦窑村) below, conflicts involved in the registration process and effective resolutions based on broad participation of individual farmers will be discussed.

With the aim of summoning up the farmers' enthusiasm for farmland registration and certification, the city government created a direct grain-subsidy and a 'Farmland Protection Fund' for farmers contracting farmland from the collective. Their payments are based on a clearly defined land use right of each household. Although with this incentive, lots of difficulties still appeared in the course of the actual measurement of the contracted farmland. The biggest difficulty concerns a perpetuation of farmland use rights of individual households. In the past,

²⁶¹ Overall, the registration of collective land in Chengdu is characterized by its comprehensiveness, grassroots participation and transparency. All kinds of collective land and attached buildings are included, and a variety of organizations were created at the grassroots to resolve disputes. This was based on a secured publicity of all relevant information. More importantly, the high degree of participation of all stakeholders, especially individual farmers also makes the registration low cost although low-tech. In detail, 9 broad steps are involved in the registration process: formation of a lead team, a technical committee and a supervision committee; outreach activities and training including on tape measurement and demarcation between parcels; establishing an inventory of land in each group; elaboration and publication of a specific implementation plan at the villagers' group level; systematic measurement and adjudication of land parcels; publicizing survey results and correction of any errors to make the process as transparent, fair and just as possible; conflict resolution involving elders and respected people in the village; issuance of certificates, contracts and card; formal registration of rights with government. In total, 256 townships, 2,736 villages, 35,970 village groups and 1.8 million households participated in the land titling project (Deining et al., 2013).

all the farmland in Wayao Village had to be reallocated on 30 September each year, in accordance with the change of population inside specific households. However, in order to facilitate the transfer of farmland, the 30-year contract for contracting farmland was extended to forever, and there should be no land reallocation anymore. This means households with coming family members may oppose such a stabilization of their land rights through registration. Besides, for parcels abandoned before the cancelation of agricultural taxes and fees, a considerable controversy exists between the original contractors and the current users of land (5.5.1). Instead of being directly involved in handling such disputes, the local government encourages an independent resolution of farmers themselves. In most villages including the Wayao Village, a Village Council — a villagers' autonomous organization — was established to deal with the disputes happened during land registration. More notably, decisions made by this Council, such as the perpetual FUR and the ownership right of villagers' groups, were all supported and approved by local governments.²⁶²

In terms of the establishment of a Village Council, those people doing things fair and highly respected in the village were elected to create a Council and a Board of Supervisors through a secret ballot. In the measurement process of the contracted farmland, members of the Board of Supervisors are always present and the final result has to be confirmed by the head or other representatives of the household. All the measurement results should be publicized and recognized by each household through signing a no-objection statement. In the registration process, any issues involving the vital interests of the villagers are discussed first through the Council. The entire process will be overseen by the Board of Supervisors to ensure the openness, fairness and impartiality of each decision (Zhang et al., 2012).

Meanwhile, in order to stabilize the farmland contractual relationship, the collective membership in Wayao Village is solidified forever. To be specific, the acquirement of a collective membership is based on the original 11 economic cooperatives in the village. Only the living collective member at the time of the registration in 2008 can be regarded as an original member, who enjoys a FUR together with other qualified family members. Members born between 2008 (when the land is registered) and 31 May, 2009 are special members, who do not have a FUR like the original members. Yet, they are entitled to receive the distribution of collective assets. Villagers who were born after 1 June, 2009 cannot be a member of a specific economic cooperative and thus receive the distribution of collective

²⁶² As a matter of fact, certain bases can be found for both two decisions in the current central policies. As discussed in chapter 4, a perpetual FUR has been proposed and supported by the central government since the 2008 Decision. However, as it is not confirmed by the legislation, in most villages it is still registered as a 30-year land use right. Besides, due to the administrative nature of the villagers' committee, it is usually regarded as the real owner of collective land. The ownership right of villagers' groups is thus ignored in practice.

assets. In other words, within a certain household, only the original member and the special member are given a share of the collective assets, which can be transferred to or inherited by other family members — usually their future generations (Liu, 2013). This also means there will be no reallocation of the FUR of individual households after it was registered in 2008. The stabilized and fixed land use rights and collective membership facilitate the transfer of the collective farmland on the one hand; on the other hand, an equal distribution of other collective assets is secured on the basis of a joint-stock system reform of the collective.²⁶³ Although there are no clear rules on the identification of the collective membership nationwide, it is significant to further reforms in both market transfers and the expropriation of farmland.²⁶⁴

It is worth noting that the land registration promoted in the rural area of Chengdu City is a comprehensive registration, which involves all kinds of collective land. In addition to facilitating the market transfer of farmland, it also lays a foundation for the transfer of certain collective construction land, including farmers' homestead. Together with the special permission for the transfer of such collective construction land, a breakthrough in the current land expropriation system is achieved. This will be discussed further in 6.5.3.

6.5.2 Transfer of 'land quotas' in Chengdu Agriculture Equity Exchange

As mentioned above, the Chengdu Agriculture Equity Exchange is the first Exchange for rural land transactions in China. In addition to the rules on the market transfer of farmland which are similar to the rules in the Wuhan Exchange,²⁶⁵ it

²⁶³ Regarding the first aspect, after the 2,000 *mu* of the collective farmland is rented out to an agriculture company to develop modern agriculture, each household can receive the market price of 500 kg of rice per *mu* of its contracted farmland. It is higher than the income that can be earned by individual households through farming. Farmers may also have extra income from off-farm jobs. As regards the second aspect, the fixed collective membership and the fixed shares of each household lays a foundation for an equal distribution of the collective/cooperative assets among cooperative members (Liu, 2013).

²⁶⁴ With regard to the identification of the collective membership, there are still no rules in current laws, administrative regulations, ministerial rules or judicial interpretations. As there is a direct link between the collective membership and the right to contract collective farmland, the obtaining of collective membership means a right to contract a piece of farmland from the collective. The stabilization of such membership thus means that the right to contract land of the new collective members is denied. In accordance with the Law on Legislation of the PRC, issues concerning the basic civil rights of citizens shall only be governed by law (Article 8). That is, only the National People's Congress has the power to make laws relating to this issue. Until now, no such law is available. The full text of the Law on Legislation is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm.

²⁶⁵ In accordance with the Trading Rules on the Transfer of the Right to Contract and Manage Land in Chengdu City (For Trial Implementation) (*Chengdushi nongcun tudi chengbao jingyingquan liuzhuan shichang jiaoyi guize* 成都市农村土地承包经营权流转市场交易规则(试行)), in addition to the transfer of the contracted farmland between households from the same collective, other transfers of farmland shall be conducted in the Exchange (Article 5). According to its Article 8, a procedure for the transaction of farmland,

also provides detailed guidance on the transfer of collective construction land use rights and the transfer of certain land quotas. Moreover, on the basis of the transfer market for such land quotas, another type of right to farmland — a land development right can be transferred in the Exchange.

Evolution of the Linking-up Policy

The emergence of the transfers of land quotas (TLQ) is closely related to a policy called ‘linking up the increase in urban construction land and the decrease in rural construction land’ (*chengxiang jianshe yongdi zengjian guagou* 城乡建设用地增减挂钩) (hereinafter the Linking-up Policy), which is permitted to be experimented in certain local areas since 2004. It originates from a land replacement policy in the promotion of rural land consolidation and reclamation programs, established by the Ministry of Land and Resources (MLR) in 1999.²⁶⁶ With the aim of ensuring the required land for urban development, while maintaining the total area of farmland is not reduced, the Linking-up Policy was formulated by the State Council in 2004 based on the land replacement policy of the MLR.²⁶⁷ On the one hand, as it concerns the lessening of collective construction land in certain rural areas (mainly rural homestead), it is also called ‘merging villages into planned neighborhoods’. More bluntly, it is known as ‘farmers’ forced move to (multi-story) residential buildings’ in practice. On the other hand, the saved quotas for construction land in rural areas can be used in urban areas where needs more construction land for local economic development. To some extent, the application of this Linking-up Policy is deeply tied up with the planned land use control system, which is characterized by a series of land quotas in China.

Overall, China adopts a highly centralized land use control system in order to preserve the farmland resources. As a result, three sets of quota system were developed, which

which includes nine steps (power of attorney — formal examination — publishing of information — collection of transferees — organization of transactions — conclusion of contracts — payment and delivery — issuance of a verification letter — change of registration and recording), is provided. It is similar to the procedure provided in the Wuhan Exchange.

²⁶⁶ See the Notice of the MLR on Relevant Issues concerning Land Development and Consolidation (*guotu ziyuanbu guanyu tudi kaifa zhengli gongzuo youguan wenti de tongzhi* 国土资源部关于土地开发整理工作有关问题的通知) issued on 18 October, 1999.

²⁶⁷ See the Decision of the State Council on Deepening the Reform in Land Administration (*guowuyuan guanyu shenhua gaige yan'ge tudi guanli de jue ding* 国务院关于深化改革严格土地管理的决定) issued on 21 October, 2004. In fact, in addition to the Linking-up policy, other measures which aimed at increasing the construction land area without a decrease of the total amount of farmland, such as the creation of new land use quotas through land consolidation and reclamation (*zhibiao zhedi* 指标折抵), designation of potential conversion zones (*jiben nongtian yidi daibao* 基本农田异地代保) and collective relocation of basic farmland (*jiben nongtian jizhong zhihuan* 基本农田集中置换) were also created. However, as they may result in an actual increase of construction land and a fake amount of farmland, the central government forbade these practices gradually. Now, only the transfer of land quotas is allowed (Wang et al., 2010).

are the 'farmland conversion quota' (*nongyongdi zhuanrong guihua zhibiao* 农用地转用规划指标), the 'farmland supplement quota' (*buchong gengdi liang* 补充耕地量) and the 'basic farmland preservation quota' (*jiben nongtian baohu lv* 基本农田保护率) respectively. They are all decided by the land use planning of the central government and higher levels of local governments. A remarkable disparity between the assigned quota from higher levels of governments and the real local needs of the land may emerge, due to the different amount of farmland resources and the uneven economic development in local areas. In Zhejiang Province, with the aim of achieving both objectives of farmland preservation and land use efficiency, the land-rich area is stimulated to transfer out its remaining construction land quotas (i.e. the remaining area of farmland that can be converted into construction land) to areas with a shortage of farmland resources. It proves that the poor but land-rich area can make more profits from the transaction of such quotas. Meanwhile, the rich yet land-short area can obtain more development chances with the transferred land use quotas, which creates more off-farm jobs for farmers from not only local areas, but also the whole province or even the other provinces. Although there is a change in the specific location of farmland within certain cities, the total amount of the basic (and also the regular) farmland within the whole province is unaffected. This is an early and relatively successful experiment of the Linking-up Policy, which is named as a 'Zhejiang Model' by several scholars (Wang et al., 2009). To some extent, the Linking-up Policy can be regarded as a breakthrough in the planned land use control system.

The Linking-up Policy also has a close relationship with the land expropriation system. Under the current legal system, collective land can only be transacted directly in the land market after it is expropriated and turned into state-owned land.²⁶⁸ As shown above, land expropriation is constrained by various land quotas allocated to local governments level by level. The inflexibility of this planned land quota system necessitates the TLQ. In accordance with the original meaning of this policy, the old demolition area should be pre-determined and matched with the new urban construction area. The use of the saved construction land quotas (in the old demolition area) in urban areas (the new construction area) should be approved by local land and resource departments, who control the overall quotas for construction land in the city concerned. Moreover, the transfer scope of the saved land quotas is limited to the same county. In other words, it is still an administrative allocation of land resources controlled by the county government like the first case below.²⁶⁹ Two particular pilots in Chengdu and Chongqing City

²⁶⁸ The Law on the Administration of the Urban Real Estate (LAURE), Article 9 and the Land Administration Law (LAL), Article 43 and 63. The full text of the LAURE (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383755.htm.

²⁶⁹ According to the Administrative Measures of the MLR on the Pilots of Linking Urban and Rural Construction Land (*chengxiang jianshe yongdi zengjian guagou shidian guanli banfa* 城乡建设用地增减挂钩试点管理办法) in 2008, in a specific linking-up program, the old demolition area must be matched with the new construction area. The total area of the new construction land (including the newly built rural houses and new constructions in the linked urban area) should be less than the area of the demolished old homestead

permitted by the central government further lift these restrictions. First, the two parcels involved in a linking-up program are not necessarily pre-determined. With a quota certificate as a medium of exchange, land quotas certified by governments can be transferred on land markets to developers intending to develop certain land in urban areas. Second, such quotas can be traded in the entire city, instead of one specific county. This means the scope of transactions is significantly enlarged, accompanied by more sellers and more buyers (Xiao, 2014).

As the ultimate goal of this policy is to increase the urban (state-owned) construction land, the focus of most local governments is on how to acquire more quotas for urban construction quickly. The legal rights and interests of the affected farmers may be sacrificed during the demolition and relocation process. It is in this respect that the experience in Chengdu City — a market transaction of land quotas — can better secure the farmers' land rights and interests, as shown in the second and the third case below.

*A market transfer of land quotas in Chengdu City*²⁷⁰

Overall, there are four steps involved in the transfer of land quotas in Chengdu City — land consolidation, land reclamation and acceptance, trading of the saved land quotas, and the use of the transferred quotas.

First of all, the land quotas in Chengdu City are generated from land consolidation programs, in which individual collectives and farmers have the right to decide whether to participate in transactions of land quotas, how to build new living places, how to distribute the profits from the transfer of quotas, and the reallocation of farmers' land rights involved. After the declared land consolidation program is approved, the collective and individual farmers involved may choose to implement this program themselves, or cooperate with investors or the governmental land consolidation agencies. The saved construction land quotas are consequently owned by the collective and farmers involved in the former case,

(Article 2 and 5). Moreover, these two connected land parcels should locate in the same county including the county-level city (Article 4). That is, the county-level government actually controls the transfer of the land quotas saved in the demolished area.

²⁷⁰ In 2004, Sichuan Province was chosen as one of the four cities for testing the Linking-up Policy, and Chengdu as the capital city of Sichuan Province was a pilot city designated by the provincial government. Initially, it is limited to the transfer within the same county, which is controlled by the city government. With the establishment of the Exchange, a market mechanism is created for the transfer of the saved land quotas. Another related market for the transfer of such quotas is created in Chongqing, which is called the transactions of 'land tickets' (*di piao* 地票). In 2007, it was designated as the experiment city for urban-rural coordinated development, together with Chengdu City. Before the commencement of transactions of land quotas, there were a large number of empty houses in the rural areas due to the fact that many farmers go to work in the cities. Local officials thus seized this opportunity for meeting the high demand for urban development by using these empty houses. For a detailed introduction of the transactions of land tickets in Chongqing City, please see Deng, 2013.

while in the latter case, the distribution of the saved quotas through cooperation with investors or governmental agencies depends on a prior contract between two parties.

Second, through consolidating the abandoned rural construction land and reclaiming it into farmland, and after deducting the new residential area of the affected farmers and setting certain part of land aside for further development of collective farmers, the remaining construction area which is checked and accepted by the Exchange is the transferable (construction) land quotas. These qualified land quotas will be registered and a Construction Land Quota Certificate will be issued to their owners. Since 15 April, 2011, developers who intend to develop land which lies in the city center and districts in the second ring of Chengdu City should buy certain quotas before signing any transfer contracts for state-owned construction land use right (the transferred land area should be the same with the bought quotas). For land locating in counties in the third ring of Chengdu City, although it is not compulsory for the interested developers to own land quotas before the contract is signed, they have to pay a price for the same area of land quotas based on a minimum protective price determined by the city government.²⁷¹

Third, the land quotas can be acquired through participating in land consolidation programs (based on the agreement with collective farmers), or purchasing in the Chengdu Agriculture Equity Exchange and the Land and Mineral Rights Trading Center (the Land Auction Center) in Chengdu City.²⁷² Moreover, after the land quota is transferred and registered in the Exchange, it cannot be transferred again, but can be used through partition or merging with other quotas. The final price of land quotas should be based on the minimum protective price and decided by the parties according to market rules. Also, the land quotas should be used within two years since they are transferred and registered in the Exchange. Otherwise, it will be repurchased by certain agencies designated by the Exchange

²⁷¹ According to one notification of Chengdu Agriculture Equity Exchange in August 2010, any applicant who will participate in the bidding of state-owned construction land use rights announced by the Chengdu Exchange after 1 August, 2010 must hold a certain area of 'Construction Land Quota Certificate' or a payment certificate for the deposit of certain land quotas beforehand. This imposed unfair restrictions on the eligibility of certain bidders. As the land quotas within a certain period are limited, only those powerful companies or enterprises may have chances to bid for such quotas. This actual monopoly results in a distorted and significantly high price of land quotas. Meanwhile, it can be transferred to other investors, which may further push its price up. Although a high price of land quotas means more funds will be received by the collectives and farmers concerned, this extremely high price also increases the costs of developers, which consequently leads to a rising price of housing. Interests of the ordinary (housing) buyers will be jeopardized. That is why the transactions of land quotas in the Chengdu Exchange was stopped by the MLR in December 2010 (Wang, 2011).

²⁷² In practice, the first way is not desirable for most developers. First, it is not easy to find an appropriate land consolidation program. Second, as it concerns the demolition of farmers' old houses which is similar to the demolition in expropriation projects, various disputes may happen (Qin, 2011).

at the minimum protective price. Profits from such transferable land quotas shall be owned by the collective and farmers involved if the land consolidation project is implemented by them. For projects that completed through cooperation between collective farmers and investors or governmental agencies, the distribution of profits relies on a prior agreement. And after the saved land quotas are transferred, the supplier of quotas should pay certain infrastructure costs for public facilities, which is 10% of the transaction price.

Fourth, as the transferred quotas are primarily used in urban areas where the quotas for construction are used up (that is, new constructions based on expropriated land will not be allowed), the acquisition of new quotas means a same area of collective land can be expropriated and used for new constructions in this area. As mentioned above, originally the transfer of land quotas relates closely to the land expropriation system. However, on the basis of the direct transactions between the developers and the collectives (farmers) involved, transactions of land quotas in Chengdu City become more market-oriented. This is different from the original Linking-up Policy, which is government-dominated and limited to transactions among county governments like the first case below. In addition to having a better living environment, farmers may also obtain extra profits from selling the saved land quotas. More noticeably, the acquirement of such benefits has close ties with the participation of farmers in transactions of land quotas.

Participation of farmers in TLQ

After the saved and registered land quotas are transferred, an application for a change of the registration of land quotas is followed by transferees or developers. With the modified construction land quota certificate, the developer can purchase a certain piece of state-owned construction land (use right) listed in the Exchange. As mentioned above, this is only needed for the land located in the city center and the first ring of Chengdu City. If the developer acquired certain land quotas through participating in land consolidation programs, that is, it holds these quotas as an original owner, it can either use them itself (which means directly buy a specific construction land use right that requires a land quota certificate) or sell it to other developers through the Exchange. The sold land quotas cannot be transferred again. However, due to the complexity and difficulty in consolidating rural land, usually the developer prefers to buy the quotas it needed through the Exchange. Thus, the transferor of land quotas in practice is either the collective that conducted land consolidation programs or certain governmental agencies that participated in such programs. More notably, the less the government intervention in the transaction of the saved land quotas, the more benefits the collective (farmers) involved may receive. Below, three brief cases concerning the transfer of

land quotas in three villages of Chengdu City are analyzed, in order to show how the changes in the government intervention can affect the distribution of profits from such transactions.

Table 6.3 Comparison between the three types of administration of land quotas in China*

	Traditional administration of land quotas	Government-led transfers of land quotas	Market-led transfers of land quotas
Contents	<p>Under the planned land use control system, it includes the following systems:</p> <p>Overall land use planning; Annual land use plans; Farmland protection; Farmland conversion; Land expropriation</p>	<p>► Transfer of land quotas for the balance between occupation and supplement of farmland (<i>gengdi zhanbu pingheng zhibiao</i> 耕地占补平衡指标) through the consolidation of agricultural land;</p> <p>► Transfer of land quotas (<i>jianshe yongdi zhibiao</i> 建设用地指标) for construction through the consolidation of collective construction land/homestead — the Linking-up Policy</p>	<p>► Local experiments in Chengdu and Chongqing;</p> <p>► Quotas are created through land consolidation programs initiated by farmers;</p> <p>► Quotas can be acquired through participating in land consolidation or purchasing in the Exchange;</p> <p>► The transaction of land quotas is secured by formal registrations</p>
Characteristics	<p>► A planned and classified management of land quotas;</p> <p>► The acquirement of quotas focuses on newly added construction land, instead of the existing construction land;</p> <p>► Collective land cannot be transferred directly in the land market like state land;</p> <p>► The acquirement of construction land is mainly through expropriation with a low compensation for collective farmers</p>	<p>► The land involved in both sending area and receiving area must be pre-determined;</p> <p>► Certain farmland has to be reclaimed before a same area of land quotas can be transferred;</p> <p>► The Linking-up Policy is only limited to specific counties</p>	<p>► Local governments only play a guiding role in such transactions, such as the formulation of policies and preparation of planning for programs;</p> <p>► The collective decides the start of a consolidation program;</p> <p>► The town (ship) government guides the reallocation of land use rights</p>

<p>Problems</p>	<ul style="list-style-type: none"> ▶ The acquisition of quotas is unsustainable; ▶ Revenue from land sales is monopolized by local governments; ▶ Inefficient use of land resources 	<ul style="list-style-type: none"> ▶ Dominated by local governments, the free will of collective farmers is suppressed; ▶ Forced demolition and forced construction in practice; ▶ Pressure for local revenue due to the huge costs incurred in the consolidation 	<ul style="list-style-type: none"> ▶ The transaction is still connected to the land expropriation system; ▶ It primarily protects the land rights and interests of farmers in the sending area; ▶ For farmers in the receiving area, their land still has to be expropriated without fair compensation
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*This table is made based on the research of Wu and Cao (2014).

The first case in Changlin Village (长林村), Tangyuan Town (唐元镇), Pi County (郫县) happened in 2004, which is the first program experimenting the Linking-up Policy in Sichuan Province. As the ‘(planned) farmland conversion quota’ (*nongyongdi zhuanrong jihua zhibiao* 农用地转用计划指标) (or quotas for farmland occupied by constructions) in Pi County from 1996 to 2010 has been used up in 2004, no more construction programs will be allowed in this county until 2011. The emergence of the Linking-up Policy just meets the real need of the Pi county government for more construction land quotas. In this case, Changlin Village composed of 411 households and 1,434 villagers is the old demolition area. Among the total 2,294.4 *mu* area of land, 548.6 *mu* is collective construction land. The construction land per capita in this village was 255 m². After the consolidation, the new residential area occupies 112.26 *mu* of land, and the construction land per capita reduces to 79.4 m². More importantly, 263 *mu* area of farmland was reclaimed from the demolished old homestead (collective construction land) and became the same area of land quotas which can be used in the urban area. Here the 263 *mu* area of land quotas was used in other two towns near the county center — Xipu Town (犀浦镇) and Youai Town (友爱镇), and exchanged for 1.1 billion Yuan (4.18 million Yuan per *mu*) through an auction on land market. After deducting all kinds of taxes amounting to 560 million Yuan, around 540 million Yuan left. Furthermore, demolition of the old village site and construction of the new residential area cost 55 million Yuan. Also, more than 80 million Yuan was spent to compensate and resettle the farmers whose land was expropriated and turned into urban construction land in Xipu Town and Youai Town. The left 400 million Yuan belongs to the Pi county government who planned and implemented the whole Linking-up program. Overall, through this program, 263 *mu* of construction land was added in the urban area, whose total consideration is 1.1 billion Yuan. In detail, farmers including the villagers of Changlin Village and the one whose land were expropriated in other two towns received 135 million Yuan

(55 million plus 80 million Yuan).²⁷³ In terms of the government, the Pi county government got 400 million, and the Chengdu city government, the Sichuan provincial government and the central government together obtained around 565 million Yuan through various taxes and fees. That is, merely 12.3% of the land price was paid to the farmers, who lost land or a right to develop the land. Nevertheless, this compensation for both groups of farmers is much higher than the compensation in the case of a land expropriation. According to the calculation of Zhou (2014 a: 90), the highest compensation for the same area of expropriated land in Pi County in 2007 is 100,000 Yuan per mu. However, in this Linking-up program the compensation for farmers in Changlin Village is around 210,000 Yuan per mu (55 million divided by 263), while the payment for farmers in the other two towns who lost their land is up to 305,000 Yuan per mu (88 million divided by 263). A further question is whether it is possible for farmers to get more in such programs.

In the first case above, as the land consolidation is initiated and implemented by the county government, the land quotas generated are thus owned and transferred by the government. Furthermore, if farmers could sell these quotas directly on the land market, they can be paid more for their loss. The second case happened in Jinling Village (金陵村), Dujiangyan City (都江堰市, a county-level city of Chengdu City) during the reconstruction after the 2008 Wenchuan earthquake is exactly such an example. After the earthquake, village collectives that are seriously affected by the disaster are allowed to transfer the saved land quotas (through reconstruction) to the Land Reserve Center of Chengdu City in exchange for money. Also, these land quotas can be transacted in the Chengdu Agriculture Equity Exchange through public bidding or auctions. In the case of Jinling Village, through the Villagers' Assembly 76 *mu* of saved land quotas was decided to be transferred to the Trading Center of the Bureau of Land and Resources of Dujiangyan City (都江堰市国土资源局交易中心) at a price of 150,000 Yuan per mu. This raised 11.4 million Yuan for the reconstruction of the new village 'Jinling Garden'. Another 34 *mu* of saved land quotas was transferred to a company focusing on senior care business through an auction in the Exchange. More precisely, it is a 40-year land use right that was transferred at a price of 442,000 Yuan per mu, which raised 13 million Yuan for the reconstruction. In addition to the costs of constructing the Jinling Garden, more than 3.3 million Yuan was left

²⁷³ For the farmers in Changlin Village, the reclaimed 263 *mu* of farmland is still owned by the village collective, and individual farmers have a right to use it. For the farmers in Xipu Town and Youai Town, 263 *mu* areas of farmland they used to cultivate and their old homestead were expropriated, as they were resettled to the town center. The auctioned 263 *mu* areas of land quotas were actually owned by them (Study Group on China's Land Reform, 2010).

for villagers for further development. As you can see, the local government did not buy all the saved land quotas in Jinling Village. Part of them was sold directly to developers on land market with a much higher price. Reasons for why the government gave up part of the land quotas lie in the high costs for reconstructions of the destroyed villages. As the local government cannot provide a full reconstruction fund for all needed areas, investments through market transactions of certain land quotas provide a better source of reconstruction funds. However, if farmers did not receive the funds from the government first, there would be no reconstruction and thus the land quotas. That is, if farmers intend to transfer the saved quotas on land markets, they have to find enough funds to start and complete the reconstruction. Therefore, a more important question concerns whether farmers can find such a large amount of money themselves.

As mentioned above, if collective farmers can initiate and implement a land consolidation program themselves, they can own all the saved land quotas and transfer them directly on the land market. A key issue here is the lack of start-up capital for the consolidation. This is why local governments dominate most of land consolidation programs and controls the transfer of land quotas at the outset. Meanwhile, a majority of investors are not interested in participating in land consolidation programs to obtain land quotas themselves due to the complexity involved.²⁷⁴ Therefore, finding a stable and safe funding source for the reconstruction is significant for collective farmers. The third case in Qun'an Village (群安村) from Qiquan Town (桤泉镇), Chongzhou City (崇州市, a city-level county of Chengdu City) is a breakthrough in this respect. In order to apply for a loan from the bank, households in villagers' group No. 5 and No. 6 of the village²⁷⁵ established a land stock cooperative based on the registered farmland use rights and the collective construction land use rights.²⁷⁶ The registered and

²⁷⁴ According to the Opinions on Improving the Transaction System of Construction Land Quotas and Promoting the Consolidation of Rural Land (*guanyu wanshan jianshe yongdi zhibiao jiaoyi zhidu cujin nongcun tudi zonghe zhengzhi de shishi yijian* 关于完善建设用地指标交易制度促进农村土地综合整治的实施意见) issued by the Chengdu Exchange in April 2011, after the saved land quotas are transferred in the Exchange for the first time, it cannot be transferred again. Thus, local governments cannot buy land quotas from farmers first and transfer it to developers again on land market, as the local government did in the first two cases since then.

²⁷⁵ There are 16 villagers' groups, approximate 900 households and 2,758 villagers inside the Qun'an Village. It was a quite poor village in Chengdu City.

²⁷⁶ After the Industry and Commerce Bureau of Chongzhou City approved the establishment of the Lotus Planting Cooperative in Qiquan Town whose main asset is the contributed farmland use rights, it assisted the cooperative members in restructuring the cooperative. The number of cooperative members increased from 12 people to 176 people, and the total contribution of cooperative members rose from nearly 0.604 million Yuan to nearly 50.33 million Yuan. In addition to the contributed farmland use rights, certain area of collective construction land use rights were also evaluated and contributed to the cooperative. This obviously contributes to the start of the later land consolidation programs. See the Industry and Commerce Bureau in

certificated 165.75 *mu* of construction land was contributed at a price of 50.25 million Yuan, which is 300,000 Yuan per *mu*. With the registered status as a legal person in the Industry and Commerce Bureau, the cooperative received a loan of 36 million Yuan from Chengdu Bank who accepted the contributed collective construction land use rights as collateral. This is the starting funds for the approved land consolidation program, through which 150 *mu* of land quotas are generated. Moreover, before the cooperative received the loan from the bank, a transfer agreement for the saved land quotas between the cooperative and a company had been made to ensure that the cooperative is able to repay the loan. For that reason, the company who signed the agreement bought these land quotas at a price of 300,000 Yuan per *mu*. The money made from this transaction was used to repay the bank first. The left money — around 9 million Yuan ($300,000 \times 150 - 36$ million) — belongs to all cooperative members. It is obvious that the government's role in raising money for initiating and implementing such land consolidation programs can be substituted by financial institutions. Nevertheless, the assistance from local governments in attracting the participation of local financial institutions in these programs is needed.

In order to help the Lotus Planting Cooperative in Qiquan Town get the loan from Chengdu Bank, the Chongzhou city government signed a Strategic Cooperation Agreement for piloting the mortgage of collective land use rights with Chengdu Bank beforehand. It also established a risk fund for mortgaging rural property rights, which is mainly used for acquiring the foreclosed assets of banks. More notably, in September 2011, the Chengdu Rural and Commercial Bank (CDRCB) issued a rather detailed regulation on the pilot of providing loans for rural land consolidation programs (*Chengdu nongshang yinhang nongcun tudi zonghe zhengzhi xiangmu daikuan shidian guanli banfa* 成都农商银行农村土地综合整治项目贷款试点管理办法). Similarly, the borrower is only limited to certain rural collective asset management companies, farmers' cooperatives or other economic organizations established by collective members (Article 4). Cooperative members or shareholders should transfer the registered collective construction land use rights to the cooperative or company as main collateral (Article 9). Besides, if the saved land quotas through land consolidation are the first source of the repayment, the borrower together with the governmental land consolidation agency, including the local land reserve center should sign an agreement with the bank, permitting that the governmental agency will transfer the price for purchasing the land quotas to the borrowers' account opened at the Bank. The Bank is entitled to deduct the repayment directly from the account (Article 26). Although this requirement is for the guarantee of the borrowers' repayment, it does not take into account the participation of other investors such as the direct transaction between the

Chongzhou City Vigorously Promotes the Development of Land Joint-stock Cooperatives (*Chongzhou gongshangju dali tuijin tudi gufen hezuoshe fazhan* 崇州工商局大力推进土地股份合作社发展), available at the website of the Chongzhou city government: <http://www.chongzhou.gov.cn/index.php?cid=21&tid=127464>.

cooperative and the company in the case of Qun'an Village. More pilots are needed for banks to explore the means of reducing its own risk.

Table 6.4 Differences in the three cases concerning the transfer of land quotas (TLQ)

	Changlin Village	Jinling Village	Qun'an Village
Developers of land quotas	The government of Pi County	Villagers from the village	Villagers from the village
Sources of the funding for land consolidation	The government of Pi County	Sale of certain land quotas to local government agency	Loan from the bank
Transferees of land quotas	Xipu Town and Youai Town designated by Pi County	Local government agency and a company	A company
Benefits received by the collective who had land quotas	55 million Yuan for the saved 263 <i>mu</i> area of land, the price for each quota is around 210,000 Yuan per <i>mu</i>	11.4 million Yuan from the transaction with the local government agency, the price for each quota is around 150,000 Yuan per <i>mu</i> ; 13 million Yuan from the transaction with the company, the price for each quota is 442,000 Yuan per <i>mu</i>	The saved 150 <i>mu</i> area of land was sold to the company at a price of 300,000 Yuan per <i>mu</i> . After deducting the 36 million Yuan paid back to the bank, the rest 9 million belongs to the villagers participated in the consolidation

These three cases above show a different distribution of the profits from transactions of the saved land quotas in land consolidation programs. It is obvious that the less intervention of local governments in the transfer of land quotas (TLQ), the more benefits left for collective farmers. In other words, the deeper the collective farmers participate in the TLQ, the greater the likelihood of getting more income for them. Yet, it is still too early to conclude that collective farmers benefit the most in the entire transaction process. In particular, in cases like the first one, although farmers received more benefits than in the case of land expropriation, the local government is the biggest winner based on its dominance in the transaction. Technically speaking, it is not a market transaction, but a transfer among town governments from the same county. As stated by some news reports, the farmers involved remain relatively passive in the experiment of the Linking-up Policy (Deng, 2013). This partly can be attributed to the lack of

respect for the rights to know and rights to participate of individual farmers.²⁷⁷ In this respect, the second and the third case in which farmers can directly sell the quotas to investors set good examples.

Who is the biggest winner in TLQs?

Through a growing number of transaction practices of land quotas in Chengdu City, a formal transfer market was established based on the Agriculture Equity Exchange. Moreover, collective farmers as the real owner and user of the collective land can receive certain benefits from the market transfers of collective land (including the collective construction land and the converted farmland whose proceeds used to be controlled by the governments only). A key question followed is which kind of benefits the local governments can receive in such market-oriented transactions. This relates to the impact of land quotas' transactions on the final land price and the fiscal revenue of local governments.

A number of studies have shown that incomes from land leasing are the main source of the fiscal revenue of most local governments (Wang and Herd, 2013; Sun and Zhou, 2014). The leased land is urban land originally owned by the state, or it is used to be collective land and later expropriated by the state. Moreover, no matter for residential or commercial projects which can generate immediate revenues, or industrial projects which may bring longer term benefits for local governments, more land is always what the government most needed. As stated by an approximate calculation, before imposing quotas on the developers of

²⁷⁷ According to the latest notification on a strict regulation on pilots of the Linking-up Policy of the State Council (*guowuyuan guanyu yan'ge guifan chengxiang jianshe yongdi zengjian guagou shidian qieshi zuohao nongcun tudi zhengzhi gongzuo de tongzhi* 国务院关于严格规范城乡建设用地增减挂钩试点切实做好农村土地整治工作的通知) in 2010, the dominant position of the affected collectives and farmers in the pilot process and their rights to know and rights to participate should be safeguarded. Moreover, a prior public hearing for such pilots must be held to solicit views of the collective farmers involved. However, in practice, such pilots mostly are dominated by local governments. Reportedly, in Shandong Province — a pilot province chosen by the MLR, after plans for merging villagers into planned neighborhoods of township governments are approved by higher levels of governments, they can organize and implement these plans themselves. In the famous Zhucheng (诸城市, a county-level city in Shandong Province) Incident, the city government announced in June 2010 that the 1,249 administrative villages covered by the city will be revoked, and replaced by 208 rural communities. It is estimated that if all the farmers moved to the community center, up to 80,000 *mu* of rural homestead can be reclaimed and turned into farmland. According to the local plan, 4,300 *mu* of homestead (the old village site) will be reclaimed each year, by which 3,000 *mu* of construction land quotas can be saved for urban construction annually. The land revenue from such a transfer is up to 200 or 300 million Yuan per year. Besides, in order to facilitate the demolition process, the city government adjusted the administrative divisions in 2007. The former 23 towns were merged into 13 towns. The average area of each town is nearly doubled. The area of urban districts also increased through the merge of three suburban towns. It can be said that the implementation of the Linking-up Policy leads to an accelerated urbanization. See Forced to Move to Storied Building (*bei shanglou* 被上楼), *baidubaike* 百度百科, available at: <http://baike.baidu.com/view/4625727.htm>.

residential and commercial projects, what they need to pay is only the land price decided by open bidding. This price in Chengdu City in 2012 was 3 million Yuan/mu on average. Now with the requirement for quotas, the developers first have to spend 0.3 million/mu or about one tenth of the land price on quota, which will be paid to the collectives — the quota developers. As mentioned above, before 15 April, 2011, only with a land quota certificate, developers can be entitled to bid for the urban construction land use rights listed in the Exchange. This resulted in an extremely high price of land quotas, which pushed up the already high housing prices in the local area. As the cancelation of this requirement, the price of land quotas becomes normal. Yet, the price of land quotas is still a part of the land costs for developers. Will this price affect the final land leasing fee paid to the government? The practice in the Exchange shows that the developers are also rational. When they bid for the land, their bidding prices will be lowered to accommodate the costs of quota. Thus, the overall land costs are the same, but the land leasing fee is reduced. Regarding the 3 million Yuan/mu land price (the original land leasing fee), the government will get 2.7 million Yuan/mu as fiscal revenues, and the collective who sold land quotas get 0.3 million Yuan/mu (Xiao, 2014).

In accordance with the regulations on the TLQ in Chengdu City, development projects that require land quotas in the receiving area do not cover industrial projects.²⁷⁸ It seems that the land needed by industrial enterprises does not require certain land quotas. This is, however, not the real situation. It is the local government who has to attract industrial investors that buys the needed land quotas for the industrial enterprises. These enterprises do not need to buy quotas themselves. In other words, no matter for which kind of projects invested in the receiving area, it is the local government who bears the costs of land quotas. Through the quota market, the reduced fiscal revenue of local governments is transferred to the rural area of Chengdu City. If we generally look at the number of benefits received by all parties involved, the government is undoubtedly the biggest winner in the transactions of land quotas. In the meantime, compared with the distribution of benefits in the case of land expropriation, collectives and individual farmers may receive a much higher income through the TLQ, especially the one based on market transactions. That is, a ‘win-win’ result can be achieved in the (market) TLQ.

²⁷⁸ In practice, in order to attract more industrial projects, local governments prefer to give certain urban land (use rights) to industrial users at very low price, or even for free. Although the land leasing fee from industrial projects is rather low, the government does benefit from the long-term profits such as taxes, employment and local economic growth. This is also why there is no requirement for buying land quotas for investors who are interested in industrial projects. With the limited quotas for constructions, local governments have to buy the land quotas needed first, in order to attract investors.

Nevertheless, the TLQ has little effect on improving the problematic land expropriation system. On the contrary, it may increase the frequency of land expropriation as it can generate more quotas in the receiving area. The real importance of the Linking-up Policy or the TLQ lies in the improvement in the planned land use control system. Through a more flexible allocation of land quotas among local governments, land resources in different locations may be used more efficiently. A fundamental issue here involves the nature of the TLQ and thus its future developments. Furthermore, it concerns whether the transferred land quotas belong to the so-called transferable land development rights or not.

6.5.3 Future developments of TLQ

TLQ and land development rights in China

As analyzed in chapter 4 (4.3 and 4.4), a series of restrictions are imposed on the exercise of collective land ownership and its subordinate land use rights. Through forbidding a direct conversion of agricultural land to construction land, profits from developing collective land are completely controlled by the government. Although there are certain compensations for the affected collectives and individual farmers, it is far enough to compensate the lost land (development) rights of collective landowners — the collective farmers as a whole. To some extent, the land development right exclusively owned by the state in China is similar to the nationalized land development right in the Town and Country Planning Act of the UK in 1947.²⁷⁹ Meanwhile, another set of land development rights (LDR) together with a transfer of development rights (TDR) system evolved in the US since the 1960s. The LDR and TDR system in the US is much more market-oriented, compared to the nationalized one in the UK. The transfer of land quotas (TLQ) in Chengdu City above also facilitates a market transaction of certain land rights. Is it a transaction of certain land development rights?

In order to find out whether the TLQ is a TDR or not, the first question is whether a LDR exists. More precisely, it concerns whether private parties can exercise

²⁷⁹ Under the context of eliminating market failures through a deep government intervention after World War II, the central government of the UK issued the Town and Country Planning Act in 1947, to control the planning of all urban and rural land. This Act brought a series of major changes in the urban and rural planning in the UK: (1) the planning system involves both the urban areas and the rural areas; (2) the planning power was centralized to the central government and county governments; (3) compensation for development rights was to be paid 'once and for all' out of a national fund; (4) permits from the planning department had to be received before any constructions on the urban and the rural land; (5) for the approved developments, developers had to pay a development charge amounting to 100% of the increase in the value of land resulting from the development; and (6) the government has a right to compulsorily purchase the desired land according to the planning. Through these measures, development rights in land and the associated development values were nationalized in the UK. However, this nationalized land use right is gradually abolished in the later amendments to this Act (Cullingworth and Nadin, 2006: 22-26).

certain LDRs in China or not. As all land in China is divided into state-owned land and collective land, the development right in the state-owned land is certainly owned and exercised by the state or governments as representatives of the state. However, with regard to the development right in the collective land, although there is a strict control over the development of both collective farmland and collective construction land under the current legislation, the collective (farmers) still has a certain level of land development rights. Since the early 1980s, collectives and farmers were encouraged to build different facilities on their construction land to manage themselves or rent out to outside investors, which brought about a prosperous development of township and village enterprises (TVEs). This right to develop collective land which sometimes may include farmland enjoyed by the collective is confirmed by the 1986 Land Administration Law (LAL).²⁸⁰ Even in the later 1998 LAL which further strengthens the protection of farmland and the control over the conversion of farmland into construction land, the collective still has a right to develop collective land including farmland, especially in the case of promoting collective enterprises.²⁸¹ In other words, the collective farmland can be converted into collective construction land and used for economic development, provided that it is approved by competent authorities in accordance with local land use planning, and meets the requirement for reclaiming the same area of farmland.²⁸² With this legal support, a *de facto* control over land development rights is gained by rural collectives in certain localities, through various organizational structures (Su et al., 2013).²⁸³ However, the success of such village collectives relies heavily on its geographic location and an appropriate organization of the collective. In particular, under the excessive expropriation of collective land nationwide, the strong backing of local governments is indispensable to such developments in these collectives. Like the development of Jiaolong Port (蛟龙港) which is constructed on the collective land

²⁸⁰ The 1986 LAL, Article 39 and 42. The full text of this law (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=12916&CGid=>.

²⁸¹ The 1998 LAL, Article 60.

²⁸² *Ibid*, Article 31.

²⁸³ Three cases are analyzed in this research, which concerns how village collectives utilize collective land development rights in Nanhai City in Guangdong Province, Kunshan County in Jiangsu Province and Zhenggezhuang Village in Beijing City. The Nanhai case and Kunshan case focus on renting industrial facilities built on the collective land. In Nanhai City, all villagers from the same collective have an equal access to rents from their land development rights, based on the established village shareholding corporations or joint-stock cooperatives. Villages in Kunshan County, however, rely on investment cooperatives and provided individual villagers more choices to directly acquire gains from land development rights. Different from the first two cases, Zhenggezhuang Village mainly depends on developing commercial housing built on villagers' old homestead and their contracted farmland. Now, the villagers can also use their land to start their own enterprises. As a matter of course, villagers in these villages have a higher income than other villagers in rural China.

in Chengdu City, supports of the local government such as the modification of local land use planning, the assistance in paying various fees including the expenses for farmland reclamation, and the approval for the conversion of the farmland involved, are critical to the creation of a Jiaolong mode (Study Group on China's Land Reform, 2010: 64-67). To sum up, as the land owner, (village) collectives do have rights to develop the collective land under the legislation. Yet, this development right over collective land cannot be transferred to any outsiders.²⁸⁴ That is, it is a non-transferable land development right. What is worse is that, with the control over the conversion of farmland, and especially driven by the high profit from monopolizing the transfer of collective land, local governments usurp the land development right of collective farmers through the poorly regulated land expropriation system.

Currently, the central government is trying to return certain land development rights to village collectives and individual farmers, in order to improve the land expropriation system. For instance, for the commercial constructions on collective construction land in accordance with the local land use planning, the collective concerned now may directly assign, lease or contribute such land use rights as shares on land markets (without land expropriation) and acquire the appreciation of the land. The compensation with a return of land development rights to landless farmers in Lingshui County above provides a good example, although it is still subordinate to the land expropriation system. In this case, a direct transfer of collective construction land through land markets marks a full return of this usurped land development right to the collective (farmers). This has been experimented in the Jinjiang District (锦江区) of Chengdu City in 2008 (Study Group on China's Land Reform, 2010: 76-77).

Compared with the direct transfer of collective construction land — a fundamental reform in the expropriation system, the transfer of land quotas (TLQ) only realizes a transfer of the development right over certain collective construction land — part of the former farmers' homestead. Moreover, collective farmers did not receive the profit from the added value of the transferred LDR, even in the market transactions of such land quotas in Chengdu City. Through the expropriation of the desired land in the receiving area, most of the added value of the transferred development right is still occupied by local governments. In the future, the TLQ shall be decoupled from land expropriation. Otherwise, it can neither preserve farmland effectively, nor safeguard collective farmers' land

²⁸⁴ According to Article 63 of the 1998 LAL, no collective land use rights may be granted, assigned or leased for non-agricultural constructions, with the exception of the enterprises that have lawfully obtained land for construction in conformity with the overall land use plan but have to transfer, according to law, their land use rights because of bankruptcy or merging or for other reasons.

development rights. Furthermore, because of the government intervention in the use of the transferred quotas through the land expropriation in the receiving areas, the TLQ cannot be regarded as the TDR in the US.

Differences between the TLQ in China and the TDR in the US

In accordance with a detailed comparison between alternative mechanisms of the TDR, a transaction mechanism is one central component of any TDR program in the US (Bratton et al., 2008). Although government involvement in the transaction process is needed, it is mostly limited to recording of transactions, record keeping and tracking the allocation and use of development rights. Basically, it can realize both a better preservation of farmland in the sending area and a more efficient use of land in the receiving area, on the basis of a transaction mechanism. Like the TDR system in the US, there are also a sending area — the old demolition area — and a receiving area — the new urban construction area — in the TLQ in China. It seems that the development right to the reclaimed farmland in the sending area is transferred to the converted construction land (which was collective land) in the receiving area through a market transaction in TLQ. Besides, the price paid by developers can be regarded as a compensation for the loss of these land development rights. On the surface, such a transaction of land quotas in Chengdu city is a TDR. However, several major differences between these two systems do exist.²⁸⁵

First, in a TDR program, both the sending and the receiving area are preferably pre-determined during a comprehensive plan update process by a municipality or region considering the use of the TDR as a plan implementation tool. In other words, the application of the TDR in the US relates closely to the change of the land use planning involved. This complies with the original nature of the Linking-up policy in China, in which the sending area and the receiving area are regarded as a unity based on a new land use planning. However, this does not mean that there is no special market in the US for TDRs. As stated by certain empirical research on TDR programs, although a TDR bank is not critical to the success of a TDR program, an incorporation of development-right banks into TDRs plays a rather positive role in the development and effectiveness of a development-right

²⁸⁵ It is worth noting that the TLQ also shares certain similarities with the TDR in terms of the transfer scope. As the TDR has a longer history in the US, there are three generations and four types of TDR programs in total (Machemer and Kaplowitz, 2002; Kaplowitz et al., 2008). A TDR may occur between neighboring parcels which may be owned by the same owner, within a designated district, from rural to urban areas within the same jurisdiction, or between different jurisdictions in the same region. Currently, the latter two types predominate in the third-generation programs. In China, transfers of land quotas were initially limited to the transfers from rural to urban areas within a certain county. Yet, in Chengdu and Chongqing — two approved pilot cities, the scope of the transfer is extended to the entire city.

market (Machemer and Kaplowitz, 2002; Pruetz and Pruetz, 2007; Kaplowitz et al., 2008; Pruetz and Standridge, 2008). In the experiment of the TLQ in Chengdu and Chongqing, the requirement for pre-determined sending areas and receiving areas is relaxed. With the local Agriculture Equity Exchange as a medium of exchange, the saved land quotas in the form of a land quota certificate can be transferred and registered in the Exchange.

Second, the purpose of the transfer is different. Based on empirical research on the implementation of the TDR in the US, TDR programs focus initially on land preservation (82.5%) than land development or redevelopment (45.6%). In detail, 70.2% of the surveyed programs focus on environmental protection, while 63.5% of them focus on agricultural land preservation. That is, environmental protection and farmland preservation are the main purpose of TDR programs in the US (Kaplowitz et al., 2008: 384). Although the preservation of farmland is also an important goal of the TLQ in China, a more obvious objective for local governments as the initiators of such programs is to acquire more construction land quotas to develop urban areas. As mentioned in the first case in Changlin Village above, after the saved land quotas are transferred to the new construction area, a same area of farmland has to be expropriated and converted into urban land. Even in the later cases in Jinling Village and Qun'an Village, where market transactions of land quotas were applied (acquisition of land quota certificates through the purchase of land quotas on land market), the urban construction land use rights obtained by developers (with certificates) through bidding or auctions in the Exchange used to be collective land, which were converted into urban land via expropriation.

Third, the TDR in the US has close ties with a conservation easement (CE).²⁸⁶ In Pennsylvania, for instance, landowners are given an opportunity under

²⁸⁶ According to the Uniform Conservation Easement Act (1981), a conservation easement (CE) refers to a non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open-space use, protecting natural resources, and the like. It is actually a severance of development rights from farmland. There are mainly two ways of severing land development rights in the US, and a CE involves the donation of development rights by a landowner. A CE can also be sold on land markets, which is called a purchase of development rights or PDR. Usually, both types of severance are regarded as a CE, no matter it is through a market transaction or a donation. The buyer or the grantee of the easement is mostly either a governmental agency or a non-profit land trust (or charities), who acquires the right to prevent certain development of the land, instead of further developing the land. After a CE is agreed and recorded at the county government, the land owner cannot conduct certain developments — usually commercial or industrial development on the land. In return, there are two forms of federal tax benefits available to landowners — a federal income tax deduction and a federal estate tax deduction in the case of a donation. If the development right is purchased on a land market, the landowner shall pay taxes on the profits from the sale. Besides, in addition to the monitoring of the grantee — certain governmental agency or land trust — on (threatened) violations of the landowner — the grantor, other residents may also notify the grantee of such violations. See the Deed of Conservation Easement

municipal zoning to legally sever the development rights from their land and sell these rights to other landowners or developers for use at another location. Land without the (severed) land development rights is perpetually protected through a CE or other restrictive covenants, which has to be recorded at the county government. As there may be several development rights to a certain piece of land, through this negotiable easement the landowner may choose to transfer out part of his development rights, while keeping a right to develop the land in a certain way ('reserved development rights') himself. More notably, TDR only applies to land that has been planned for non-agricultural use. It is not for land that used for agriculture under the current planning. In the case of TLQ, through land consolidation and reclamation of certain area of farmland, the development right of (part of) former rural homestead/residential land is transferred to the land in urban area. However, there are no clear rules for the use of the reclaimed farmland in the TLQ program. Besides, while TDR is initiated voluntarily by private landowners, the TLQ in China is generally government-led.

Last but not least, although the implementation of both a TLQ and a TDR relies on the changes in the land use planning involved, the content of such restrictions from planning is different. To some extent, the implementation of a TDR program in the US is based on a detailed calculation of the density of developments in both horizontal and vertical directions. For instance, the development of parcels in receiving areas is usually subject to a dual zoning regulation — a base zoning regime and a bonus zoning regime — for parcels with applicable TDR (Machemer and Kaplowitz, 2002: 775). In the TLQ in China, however, under the planned land use control system which is characterized by a numeric control, only a horizontal restriction is imposed on the development of the parcels in receiving areas. There is no detailed calculation of the development density in the vertical direction.

A need for further reforms in land expropriation system

As shown above, the transaction of land quotas in China is different from the TDR system in the US. In the long run, it is not sustainable as it mainly aims for acquiring more land quotas for constructions in urban areas. In essence, it emerges because of the rigidity of the planned land use control system — an administrative allocation of land resources. With the development of the Linking-up Policy, a government-led TLQ and a market-led TLQ are created. This innovation in allocating land resources obviously can bring a more effective use of land in different locations, especially in the case that the land in the sending area is abandoned or left idle. Moreover, through such a transaction, the market-led one in

(Kittitas County Transfer of Development Rights Program), available at: <https://www.co.kittitas.wa.us/uploads/documents/cds/forms/TDR-Conservation-Easement.pdf>.

particular, part of the appreciation of the land in the receiving area can be transferred to the collective farmers in the sending area. In other words, based on the transferred land development rights, farmers in the sending area now are able to share the benefits from the appreciation of the land generated by market transactions of the collective land (rights). However, for farmers in the receiving area, in addition to having a chance for higher compensation for their expropriated land, there is no big difference from an ordinary land expropriation project. Under the current situation, their participation in the expropriation process is still limited. More precisely, the share of the profits from the appreciation of the expropriated land received by the farmers in the receiving area is still small. The land development right of these farmers is not well safeguarded. Therefore, a fundamental reform in the land expropriation system — a direct transfer of certain collective construction land on land markets by the collective land owner — is significant and indispensable.

With the permission for direct transactions of certain collective construction land in the central policy, farmers in the receiving area may directly sell their land rights to developers.²⁸⁷ The need for more land quotas for construction will be reduced, accompanied by a narrowed scope of land expropriation. However, this does not mean that the TLQ will be meaningless and replaced in the near future. On the contrary, as the improvement in the planned land use system, especially the establishment of an effective and detailed land use planning system, the TLQ can be developed into a TDR system like the one in the US. This will be a long process, as currently the TLQ is limited to local pilots and the reliance of governments on the planned land use control system. In the meantime, the problems arising from the transfer process of land quotas, such as the government dominance in producing quotas, the lower quality of reclaimed farmland and the changes in farmers' lifestyle, are noteworthy in local pilots (Wang et al., 2010).

6.5.4 Inspiration for further land reforms from the Chengdu experiment

As the first part of the requirement for 'Returning Rights and Endowing Farmers with Transfer Rights', the promotion of a comprehensive and highly participatory registration of land in rural Chengdu secures the collective land ownership and individual farmers' land use rights. In other words, the land ownership conferred on the collective owner through registration is supposed to be a complete right, which includes a right to possess, use, seek profits from and dispose of the land.

²⁸⁷ See the Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform announced in November 2013 (the 2013 Decision of the CCCPC). The full text of this decision (English version) is available at: http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

More importantly, the registration and certification of collective land lay a foundation for land transfer, including both collective construction land and the contracted farmland. This is from the second part of the requirement. The promoting role played by registration in market transfers of farmland has been mentioned in the case of Wayao Village. The main inspiration for further land reforms from the Chengdu experiment lies in the reform in the land expropriation system. First, based on the Linking-up Policy and a government-led transfer of land quotas (the first case above), farmers in both the sending area and the receiving area have a chance for sharing the appreciation of the expropriated land. Second, through an enlarged transaction of land quotas, or a market-led transfer of land quotas (the second and the third case above), farmers in the sending area may receive higher compensation for their transferred land development rights. Third, in order to better protect the land development rights of farmers in the receiving area and improve the land expropriation system at the same time, the collective construction land is allowed to be transferred directly by the landowner under certain circumstances. This shall be based on a unified and effective land use planning system involving both urban areas and rural areas.²⁸⁸ Last but not least, as the liberalization of the direct transfer of certain collective construction land, the key objective of the planned land use control system — farmland protection — may be threatened. A Farmland Protection Fund is, therefore, established in 2008 by the city government.²⁸⁹ Through providing certain economic incentives, individual farmers are encouraged to protect their own contracted farmland. This also facilitates the overall reform in the land expropriation system.

By and large, the comprehensive reform in Chengdu City provides a route to correct the land expropriation system, which can be inspiration for other local areas. In particular, the market-led TLQ in Chengdu can be regarded as a policy innovation, which is designed to better secure farmers' land rights and interests under the strict land use control system. On the basis of the increasing empowerment of rights-holders of the collective land, a series of procedural rules are established to secure farmers' participation through the Agricultural Equity Exchange. However, certain limitations also exist in this experiment. First, as

²⁸⁸ The Regulation of the Chengdu City on Urban and Rural Planning (*Chengdushi chengxiang guihua tiaoli* 成都市城乡规划条例) is issued in 2009 and revised in 2012, in order to update the old planning system characterized by an urban-rural divide.

²⁸⁹ Since 2008, the Chengdu city government will pay 2.6 billion Yuan each year for the Farmland Protection Fund (300 Yuan/mu for regular farmland and 400 Yuan/mu for basic farmland), in order to better protect the farmland. This fund is mainly composed of the benefits from the transfer of the newly added construction land/expropriated land. More notably, the Measures for the Management and Use of the Farmland Protection Fund in Chengdu City (For Trial Implementation) (*Chengdushi gengdi baohu jijin shiyong guanli banfa* 成都市耕地保护基金使用管理办法(试行)) is issued in 2008 to regulate the use of this fund.

shown in the second and third case above, part of the innovation is attributed to the disastrous Wenchuan earthquake happened on 12 May, 2008. In order to reconstruct the houses damaged in the earthquake as soon as possible, the affected collectives and farmers were encouraged to attract social money to participate in the reconstruction process. That is, it is the best of a bad bunch for the city government. Second, as the local governments still rely heavily on the revenue from land sales guaranteed by the current expropriation system, the transaction scope of those collective land rights/rural equities in the Exchange is thus restricted. In accordance with the media report, government revenue from land sales still far exceeds the land sales by farmers in the Exchange (Yao, 2013).²⁹⁰ Therefore, the progress of the experiment depends crucially on the availability of other sources of revenue. For instance, a favorable shift in the distribution of revenues between the local and the central government, and the introduction and implementation of a property tax on the use and transfer of collective land may help to alleviate the reliance of local governments on the land revenue. Such changes would require major fiscal and tax reforms, which are also overdue reforms. I will discuss this further in chapter 9.

6.6 Analysis of cases

6.6.1 Participation practice of farmers in land expropriation

The first two cases concern the current expropriation practice in local areas. The Tongling case actually represents the general situation of most expropriation projects in China. In most cases, farmers' participation in land expropriation is limited to the compensation and resettlement phase. Moreover, if there is no active involvement of an impartial third party, the affected farmers cannot fully express their objections to the compensation and resettlement either. In terms of the compensation standard, as it is usually set by higher levels of governments without public participation, it is hard for farmers to strive for higher compensation. In the Lingshui case, the compensation paid to the affected farmers is increased through a variety of means. In particular, on the basis of the retained land or the compensation with returned land development rights, a stable source of income is secured for the landless farmers. This is certainly based on a formal acknowledgement of the collective farmers' rights to use and develop their own land. That is, collective construction land that planned for profit-oriented use can be directly transferred through land market by the collective land owner without

²⁹⁰ According to the reports of local media, revenue from land sales of Chengdu city government is 36.7 billion yuan in the first eight months of 2013. However, the land transaction volumes of farmers in the Exchange since 2008 have only totaled 20-30 billion yuan.

land expropriation. In order to ensure a fair distribution of the profits from such transfers inside the collective, a joint-stock system reform of the collective is also implemented. More importantly, these local innovations have been confirmed by local regulations, such as the Measures of Hainan Province for the Administration of Resettlement with Retained Land in Expropriation (*Hainansheng zhengdi anzhi liuyongdi guanli banfa* 海南省征地安置留用地管理办法) issued in June 2012 and the Measures of Hainan Province for the Administration of Collective Construction Land (For Trial Implementation) (*Hainansheng jiti jianshe yongdi guanli banfa* 海南省集体建设用地管理办法 (试行)) issued in October 2013. The fifth case in Chengdu city concerns a comprehensive reform in the planned land use control system. Through a highly participatory registration of all collective land, rights over collective land are officially conferred on the collectives and farmers in rural Chengdu. In particular, based on the acknowledgement of the collectives' rights to transfer the collective land, a route to reform the land expropriation system can be detected. With the market-led transactions of land quotas and the direct transfer of certain collective construction land through the Agriculture Equity Exchange, farmers may receive more profits from the transactions of their own land rights. To some extent, due to the introduction of a certain market mechanism in both the Lingshui case and the Chengdu case, the affected farmers are given more opportunities to enjoy the appreciation of their land, which is strictly controlled by the government under the current legal system.

These three cases are representative examples of the participatory practice of farmers in land expropriation. On the whole, at least three problems can be identified from those local practices.

First, there is no overall participation framework in the expropriation process. For instance, regarding the establishment of local compensation standards, no public hearing was held, especially in the Tongling case.

Second, local innovation in land expropriation is mainly reflected in the compensation and resettlement phase. To be specific, the affected farmers in those local areas can receive a higher percentage of the added value of their expropriated land. However, if we take a closer look at both the Lingshui case and the Chengdu case, it is hard to say that the farmers involved acquired the whole added-value of the expropriated land. To put it differently, even in those innovative local practices, farmers cannot receive fair compensation — compensation based on the market value of the expropriated land. For example, among the 3,108.56 *mu* land expropriated in Dadun Village, only 8% of it was returned to the village collective. This means the farmers involved only obtained a bit more than 8% of the total appreciation of the land. In the transactions of land quotas in Chengdu city, the farmers involved in Changlin Village received only 12.3% of the total land price.

Third, with the aim of secure a fair distribution of the increased compensation inside the collective, a joint-stock cooperative or company is usually established in the event that most or all of the collective land is expropriated. Being affected by an absolute equal distribution of such benefits, shares of individual households are initially not fixed as in the case of land reallocation in the collective. With the stabilization of the collective membership, shares of each household should be fixed. Besides, certain supervision shall be available inside the cooperative or the company to prevent the administrative intervention by the villagers' committee. A corporate governance structure may be adopted in such joint-stock cooperatives.

6.6.2 Participation practice of farmers in market farmland transfers

The third and the fourth cases concern the market farmland transfer in local practice. In the Changsha case, the government-guiding mode in Changsha County and the market-bargaining mode in Changsha City are discussed. Overall, the government-guiding mode is more common in practice, especially in the large-scale transfers of the contracted farmland. Whether in terms of the selection of the transferee, the determination of the transfer price or the conclusion of transfer contracts, local governments play a dominant role. This is usually assisted by the villagers' committee concerned, as most or all of the collective land is involved in such transfer programs. The individual households do not have a real say in the transfer of their contracted farmland. As in the expropriation cases, a joint-stock cooperative is sometimes established to facilitate the distribution of the profits from transferring the contracted land. However, under an overall control by local governments and villagers' committees, such a cooperative cannot truly represent the interests of individual farmers. In the market-bargaining mode, through the establishment of various service organizations for farmland transfer like the Trading Center in Changsha City, the intervention from local governments and local cadres in the transfer process is reduced, especially in the large-scale transfers. In order to establish a formal market for the transfer of farmland, the Wuhan Comprehensive Agriculture Equity Exchange creates certain incentives to attract more farmer transferors to transfer their land (rights) through the Exchange. More notably, if the transfer involves the entire collective farmland, the participation of individual households in the transfer process is secured through a series of procedural rules. In the case that the transferee is a certain industrial or commercial enterprise, measures such as a 'risk deposit' are introduced to protect individual households' interests.

In general, the intervention from local governments is also obvious in the market transfers of farmland. Driven by the desire for more commercial investments, local governments are fairly active in promoting large-scale transfers

of farmland to develop modern agriculture. The government-guiding mode of farmland transfer far outstrips the market-bargaining mode, which is the first characteristic of the market transfer of farmland in practice. Second, the exercise of the FUR of individual households is deeply affected by the collective land ownership. Usually, the collective land ownership is represented by the villagers' committee, which is actually an administrative organization and controlled by local governments. Due to the absence of an effective governance structure of the (representatives of the) collective land owner, the management of collective land is controlled by the villagers' committee/village cadres. It is the same in the transfer process of the contracted farmland. In the Shuanghe Village case in Changsha County, the 13 villagers' groups are the actual landowner. However, it is the villagers' committee who signed the transfer contract with the investor. Although various meetings were organized concerning the major decisions on the transfer of farmland by the villagers' committee, it is limited to a vote through referendum. A careful deliberation of the individual households is ignored. Thus, the lack of effective forms of participation for individual households is the third characteristic of the market transfer of farmland in practice.

6.6.3 Distribution of the profits from farmland transfer

Whether in the land expropriation or the market transfers of farmland, the distribution of the profits from land transfer is important. This concerns the third variable in balancing the private land rights and the government regulation in the land transfer process introduced in chapter 2 (2.3.4). The distribution issue here first refers to a fair distribution between the collective and the individual households. Compared with the land expropriation, the distribution of profits from market transfers of farmland is simpler. As the legal and stabilized user of the contracted farmland, the individual household is entitled to own the profit from transferring the land use right. Even in the transfer involving the whole collective farmland, especially when a joint-stock cooperative is established to facilitate the transfer, the profit generated by such transfers shall be fairly distributed to each household according to their shares. Regarding the distribution of the compensation in land expropriation, it is more complicated as the collective land ownership is expropriated together with the land use rights of individual households. According to the current law, the compensation for expropriated land includes the compensation fee for the land, the subsidies for resettlement and the compensation fee for ground attachments and young crops on land.²⁹¹ The compensation fee for ground attachments and young crops belongs to the household whose land is expropriated. The subsidies for resettlement belong to the

²⁹¹ The 1998 LAL, Article 47.

household who needs to be resettled, if there is no unified resettlement. As regards the compensation fee for the expropriated land, it actually is a compensation for the terminated collective land ownership. Thus, only farmers having the collective membership are entitled to receive this compensation. Although the farmland use right (FUR) of individual households is also ended with the termination of the land ownership, there is no separate compensation for this usufruct/a limited real property right. In accordance with a judicial interpretation of the Supreme People's Court, the distribution of the compensation fee for the land can be determined through Villagers' Assembly or other autonomous organizations inside the village or villagers' groups.²⁹² The establishment of a good governance structure for such organizations again is the key to ensure a fair distribution. Besides, the provincial government is allowed to make rules on the distribution of this compensation based on the local situation.

The second issue involved in the distribution of profits from farmland transfer is the distribution between the collective land owner and the expropriator/the acquiring authority. As argued in chapter 4 (4.4.2), the current regulation system for land use and transfer in China is unbalanced, which is highly favorable to the public authority who represents the public interest. This primarily concerns the distribution of the appreciation of land after it has been expropriated, especially when the land is used for profit-oriented purposes. In essence, it is about the balance between the private interests and the public interests involved in this compulsory transfer of land, which concerns the third dimension of the governance perspective in government regulation established in this research. More accurately, the empowerment and participation of private parties should not damage the public interests concerned. With the increasing empowerment of the collective land owner, such as the direct transfer of certain collective construction land, the scope of land expropriation will be reduced. On the basis of the protected land rights and interests of the collective landholders, the public interest in the appreciation of land can be secured through the establishment of a comprehensive property tax system for collective land. The existing taxation system for state-owned land can be a source of reference (Study Group on China's Land Reform, 2010: 87).

6.7 Concluding remarks

The lack of procedural rules in both laws and central policies concerning farmland transfer leads to rather limited participation of individual households/farmers,

²⁹² Interpretations of the Supreme People's Court about the Issues concerning the Laws Applicable to the Trial of Cases of Disputes over Rural Land Contracting (*zuigao renmin fayuan guanyu shenli sheji nongcun tudi chengbao jiu fen anjian shiyong falv wenti de jieshi* 最高人民法院关于审理涉及农村土地承包纠纷案件适用法律问题的解释), Article 24.

especially in the land expropriation process. According to the second dimension to the governance perspective in government regulation of land transfer, the establishment of a series of procedure which may secure an equal bargaining status for both parties is the key to a better regulation. As the main regulating and governing tool, relevant laws in a certain country shall provide enough procedural rules to secure an equal bargaining power through full participation of both parties, especially when the public authority is one party to the transfer like in the expropriation. However, this is far from being realized in China. The various innovations in local practice provide a fertile and valuable source of such procedural rules. For instance, the trading rules of the Wuhan Exchange, which provide a practical and detailed guidance on the market transfer of farmland, are adopted by the central government in the Opinions of the General Office of the State Council on Guiding a Healthy Development of the Transfer Market for Rural Property (*guowuyuan bangongting guanyu yindao nongcun chanquan liuzhuan jiaoyi shichang jiankang fazhan de yijian* 国务院办公厅关于引导农村产权流转交易市场健康发展的意见) issued in January 2015. Nevertheless, there is still no progress in the rules concerning the participation of individual households in large-scale transfers involving most or all of the collective farmland. In terms of the land expropriation, the lack of participatory rules is even more serious. As argued in the Chengdu case, a viable route to future reforms in the expropriation system has been available. Based on a highly participatory registration of the land ownership and collective land use rights, collective construction land planned for profit-oriented use can be transferred directly on the land market. However, the scaling-up of this experiment to other local areas is still limited. Meanwhile, a comprehensive property tax system for the use and the transfer of collective land shall be established to ensure the public interest in the appreciation of land, in accordance with the third dimension to the new governance perspective in government regulation of farmland transfer. Overall, the restructuring of the land expropriation system and the related changes in the fiscal and tax system may lead to a fundamental reform in the planned land use control system. In my opinion, before this planned system is fundamentally changed, the establishment of a proper participation procedure for the key decision-makings involved in land expropriation is the best solution for protecting the legal rights and interests of the collective landholders. In addition to the inspiration from these local innovations, relevant international experiences are also noteworthy in terms of the making of such participatory rules. This will be discussed in chapter 7 and 8.

7 Balanced governance of (market) farmland transfers based on international experience

Through the introduction and the analysis of the current regulations on the farmland transfer system, the highly centralized control over the collective land use, which roots in the planned economy, is still evident. In the process of China's transition to a market economy, the concept of contract is becoming increasingly important in addition to property rights (Cheng and Rosett, 1991). In terms of the rural collective land, however, the use of a contract is uncommon (Schwarzwalder et al., 2002: 163-164). This can be attributed primarily to the stringent legal restrictions on the transaction of collective land, including farmland. With the increasing liberalization of the transfer of collective land, especially the (market) transfer of the contracted farmland, a market mechanism for farmland transfer based on contract rules shall be established or at least designed. As stated by the property-rights theory, a clearly defined property rights system is an essential prerequisite for market transactions (Upham, 2009: 612). Nevertheless, it does not mean that a transfer system will be established consequently and the property will be used efficiently. An effective incentive mechanism is more significant in this respect. To some extent, a well-functioning property rights system not only defines various rights to a certain property, but more importantly, the rights-holders may be endowed with enough options to use and dispose of the property. The quasi-private farmland use right (FUR) of individual farmers supported by the ongoing land registration process shows the commitment of the central government to secure the Chinese farmers' land rights and interests. However, the existing management of farmland transfer is still characterized by strict government regulation through a series of restrictive rules and regulations. Restrictions on the private autonomy in concluding such a transfer contract are necessary, yet a proper balance between private land rights and government control over land use is much more needed. The adoption of a balanced governance structure for farmland transfer, in this case, is significant to a further protection of farmers' land rights both in law and in practice.

In this chapter, based on an individual analysis of the tricky issues in concluding farmland transfer contracts, such as the formalization of spontaneous transfers among individual farmers, the entry of various enterprises into the farming system, and the protection of farmers' legal rights and interests in large-scale transfers, a balanced governance structure for market transfers of farmland is expected to be established in China. To be specific, the need for more detailed rules on the transfer between farmers is emphasized in the first section. Then, on the basis of related rules in the Dutch law, possible means to better regulate those small-scale

transfers are proposed in the second section. From a global perspective, as the proliferation of foreign investment in land in developing countries, large-scale acquisition of farmland has multiplied in recent years. Under this global land grabbing, protection of the farmers involved is a pressing issue faced by those developing countries (Kaag and Zoomers, 2014). Although the large-scale acquisition of farmland caused by foreign investment is not so serious in China, the one caused by domestic investment is prominent. This has been proved by a series of field studies mentioned in chapter 5 (5.6.2). Hence, the establishment of a good governance structure for such large-scale transfers of farmland is also important. In the third and fourth section, a series of procedural rules which can secure a free, prior and informed consent of the affected parties and the regulatory rules needed for governing the transfers involving commercial investments are discussed. My assumption is that farmers' land rights which are increasingly strengthened by the central policies and law can be further secured through a series of procedural rules in the transfer process. To some extent, the design of such procedural rules is for improved implementation of the substantive rights recognized by law. In addition to such procedural rules, extra measures are needed to guarantee a substantive freedom of contract, especially for the farmer transferors. This will be analyzed in the fifth section. In essence, a good/balanced governance structure has to be established through a series of legal rules. Therefore, the following section concerns how the rules for establishing such a balanced governance structure can be formulated, viewed mainly from the perspective of contract governance. The last section concludes.

7.1 Governance of transfers among farmers/smallholders

7.1.1 Current rules and regulations on farmland transfer in China

As analyzed in previous chapters, rules regarding farmland transfer are dispersed in different levels of regulations. The highest legislation is the Rural Land Contracting Law (RLCL) adopted in 2002, in which the means that allowed to transfer the FUR, the principle of transfer, the conclusion and the content of transfer contracts, the settlement of disputes and the legal responsibility are provided (Section Five of Chapter Two and Chapter Five). The Measures of the MOA on the Administration of Transfer of the Right to Contract and Manage Rural Land in 2005 (the 2005 Measures of the MOA) is a further detailed interpretation of the regulations in the RLCL. Issues concerning principles of fair negotiation, in accordance with law, free will and compensation, parties to the transfer, methods of transfer, transfer contracts and administration of transfer are discussed. In terms of the participation of an individual household/farmer in the making of transfer

decisions, a right to determine of his own will whether the contracted farmland shall be transferred and determine the objects and the ways of transfer is provided. The transferee may be other collective farmers or may be any other organizations or individuals that are allowed to undertake agricultural production and management according to the relevant laws and regulations.²⁹³ However, currently no legislation clearly stipulates which kind of organization can conduct agricultural production. It is only in certain central policies that contracted farmland is encouraged to be transferred to farmers' cooperatives through lease or contribution as a share. The transfer to industrial and commercial enterprises (ICEs) is strictly constrained.

In addition to these central regulations, various Implementation Measures of the RLCL of local (provincial) governments also appeared.²⁹⁴ On the one hand, rules concerning farmland transfer in these measures shall be consistent with these central regulations; on the other hand, more detailed rules can be made based on different local conditions. More importantly, in order to facilitate and formalize the transfer of farmland, a growing number of intermediary organizations have been established, mainly by local governments. The recent and most structured one is the Agriculture Equity Exchange introduced in the last chapter (6.4 and 6.5). Taking the Wuhan Exchange as an example, systematic trading rules covering the pre-approval of local departments, the applications for transfers, the publish of relevant information, the organization of transactions, the conclusion of transfer contracts, the payment of the transfer price, the authentication (*jianzheng* 鉴证) of contracts and the change of land registration are provided. In comparison with the regulations (both the central and the local one) above, these trading rules are more instructive and practicable.

By and large, due to the particularity of the farmland transfer contract, it is regulated separately from other types of contracts.²⁹⁵ In addition to the rules from

²⁹³ The 2005 Measures of the MOA, Article 6 and 9. The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3933&CGid=>

²⁹⁴ For instance, the implementation measures of the Rural Land Contracting Law (RLCL) in Anhui Province adopted in June 2005, the implementation measures in Hainan Province adopted in July 2006, and the one in Sichuan Province adopted in November 2007. These measures are made by the local (provincial) Standing Committee of People's Congress.

²⁹⁵ The Contract Law of the PRC issued in 1999 recognizes 15 types of contracts in general: Sales Contracts (Chapter 9); Contracts for Supply of Power, Water, Gas, or Heat (Chapter 10); Gift Contracts (Chapter 11); Contracts for Loan of Money (Chapter 12); Leasing Contracts (Chapter 13); Financial Leasing Contracts (Chapter 14); Contracts for Hired Works (Chapter 15); Contracts for Construction Projects (Chapter 16); Carriage Contracts (Chapter 17); Technology Contracts (Chapter 18); Safekeeping Contracts (Chapter 19); Warehousing Contracts (Chapter 20); Agency Appointment Contracts (Chapter 21); Trading-Trust Contracts (Chapter 22); and Brokerage Contracts (Chapter 23). The full text of the Contract Law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm.

traditional private law (freedom of contract), a series of regulatory rules are imposed on farmland transfer, with a view to protecting the farmland resources and the land rights and interests of individual farmers. As discussed in chapter 3 (3.3), with the increasingly strengthened FUR in the central policies and law, a quasi-private property right is established for individual households. Furthermore, this reinforced private property right signifies that the rights-holders should have enough options to use and dispose of their land. Whether in terms of the selection of the transferee, the form of transfer or the transfer price, the individual household shall have a final say. With these various transfer options, maximum participation of individual households in the transfer process is possible. However, the different preferences of the regulator and the landholders in choosing the transfer forms show that such options are constrained in China.

7.1.2 Large-scale or small-scale transfer?

In practice, spontaneous transfers among individual households are rather popular (Schwarzwalder et al., 2002: 163-164; Zhu et al., 2007: 785). To some extent, what (most) individual households prefer is an independent transfer to other farmers, especially their relatives. This has been confirmed by a large number of field studies mentioned in previous chapters. However, based on the related central policies and legal regulations, it is obvious that what is encouraged and supported by the government only involves formal transfers with written contracts. Besides, in order to realize scale farming, transfers to large professional households, family farms, farmers' cooperatives and agribusiness are strongly promoted by the central government.²⁹⁶ The intention of the central government here is firstly to reduce the fragmentation of farmland through exchanges among individual households and other forms. Moreover, through the support for professional growers, family farms, and farmers' cooperatives, a moderate scale of farming is expected to be realized in the future. The series of No. 1 Document issued by the Central Committee of the Communist Party of China (CCCPC) together with the State Council/the central government exactly shows the expectation of the central leaders for farmland transfer and the agricultural development in China. The increasing number of forced or government-dominated transfer in local areas is obviously contrary to this intention. Driven by the desire for developing modern agriculture and attracting more investment, large-scale transfers of farmland to investors become the first choice of many local governments. In terms of the farmland transfer and scale

²⁹⁶ See the Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform in December 2013 (*zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jue ding* 中共中央关于全面深化改革若干重大问题的决定) (2013 Decision). The full text of the decision (English version) is available at: http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

farming, local governments have different understanding and objectives compared to the central government. The inconsistency between the objectives pursued by the regulators and the responses of the regulatee should be carefully considered by the regulators, in order to make further practical regulations.

As regards the reasons for the preference of individual farmers for informal and kinship transfers, three points are worth noting. First, transactions among kinships can save the costs of searching information on the transferees for transferors. A trust based on the kinship facilitates the whole transfer process as there are less moral hazard problems (Sadoulet et al., 1997). Second, compared with the scale operation of companies, spontaneous (small-scale) transfers among individual households may provide the ‘left-behind’ farmers (farmers who cannot find off-farm jobs due to old age or illness) a stable income from farming. This cannot be substituted by the unstable jobs provided by the companies, not to mention that only few farmers can find a job in such companies.²⁹⁷ Last but not least, because of the flexibility of these informal and usually short-term transfers, transferors can choose to engage in farming again if they lost their off-farm jobs in cities. To some extent, a relatively stable rural society can be secured through such informal arrangements. However, from the perspective of the transferees, this informal and short-term transfer is not conducive to keep continuous agricultural production, and thus affects the investment in land. In the long run, certain legal rules should be available to protect the rights of both the transferors and the transferees of the contracted farmland. The agricultural tenancy in the Netherlands, in this case, may provide valuable experiences for the Chinese legislators.

7.2 Emphasis on transfers between farmers based on the Dutch law

Although the rise of large-scale operation of farmland in practice is increasingly obvious, transfers among individual households should be the dominant form of farmland transfer in rural China in the near future (2013 Decision of the CCCPC). As discussed in chapter 5 (5.6.1), subcontract (land lease with farmers from the same collective) and lease are the first choice of most transferors. That is, the primary form of (regulated) farmland market in China is expected to be a land rental market instead of a land sales market. Although the basic form and content of a transfer contract are available in the RLCL and the 2005 Measures of the MOA, they are too simple to provide a practical guidance. A variety of mode texts for the transfer of farmland in certain areas, in this respect, provide more detailed

²⁹⁷ According to the survey of the MOA in 2013, in the case of the direct management of agricultural land by ICEs, only about 20 % of the original contract farmers can find a job in these enterprises. A majority of farmers cannot earn an income through both receiving certain transfer fees and working for the enterprises (Li and Cheng, 2013).

and practical rules; still they are simply expansions of the contract articles prescribed by law.²⁹⁸ It can be said that more legal rules regarding the relationship between transferors and transferees are needed, especially in the central legislation.

In developed countries where private land ownership is adopted, tenants or lessees are usually regarded as the weaker party in comparison with the landowner. In particular, in certain Western European countries, agricultural legislation and policies mainly focus on improving the land tenure security of the lessees (Hoyle, 2010: 354-355). Measures such as minimum lease terms, maximum rents, automatic lease renewal, and a preferential right to buy the rented land when the owner decides to sell it are prevalent in the legislation concerned. Compared with the relatively free or nonintrusive regulation of the farmland leases in the US, a strict regulation through state statutes applies in those countries (Grossman, 1992: 74).²⁹⁹ The *Pachtwet* (Land Tenancy Law) in the Netherlands was the most typical example of a strict regulation of farmland leases in favor of tenants. Before this law was modified in 1995, only one lease contract was provided by law. It featured price control through government regulation, continuation rights for tenants, and preferential rights for tenants. Because of these excessive or overprotective rules in law, tenancy has declined since the 1950s, as the landowners had no better choice but to sell their land (van den Noort, 1986). Although with the modifications of the law in 1995, two new types of lease — one cultivation-cycle lease and single-term lease (without such controls in the regular lease contract) — were designed for the parties, the area of leased land in the Netherlands was still decreasing since 1995 (Slangen and Polman, 2008: 398). In the new revision of these regulations on agricultural tenancy in the Dutch Civil Code in 2007, more flexibility is given to

²⁹⁸ The Model Text of Transfer Contracts of the Right to Contract and Manage Rural Land in Zhejiang Province (*Zhejiangsheng nongcun tudi chengbao jingyingquan liuzhuan shifan hetong* 浙江省农村土地承包经营权流转示范合同) is a pioneer in this respect. Take the lease contract as an example, it includes seven parts: (1) basic conditions and usage of the land transferred; (2) duration of the lease; (3) rent and means of payment; (4) rights and obligations of transferors; (5) rights and obligations of transferees; (6) liabilities for breach of contracts; and (7) other agreements. The one in Shandong Province further provides the disposal of ground attachments and related facilities after the contract expires, the modification and termination of contracts, and the resolution of disputes. These model texts facilitate the transfer process in practice.

²⁹⁹ In the US, land lease is the most common form of lease in agriculture. Generally, there are three types of land lease in agriculture: the cash rent lease, the crop-share lease, and the emerging hybrid lease — a combination of the cash and crop-share leases which provides greater flexibility in certain circumstances. No matter in which type of lease, parties to the contract can negotiate terms to help limit their exposure to various risks. More noticeably, oral leases are allowed in law as long as certain requirements are met. In terms of the length of leases, leases within one year, tenancy for a period of years, and periodic tenancy (such as month-to-month or year-to-year lease) are available for parties to choose. Although the statutes in certain states may put some limits on the form and the length of specific leases, parties still have a considerable autonomy in concluding a farmland lease that they need in accordance with law. For more information, please see *Agricultural Leases: An Overview*, <http://nationalaglawcenter.org/overview/agleases/>, accessed on 26-05-2014.

the parties to lease contract, with the establishment of two new types of liberalized agricultural leases — a farmland lease contract of 6 years or shorter and a contract longer than 6 years.³⁰⁰ Although with less government regulation on the rent and tenants' preferential rights in one cultivation-cycle lease and liberalized farmland lease³⁰¹, a gray farmland lease market (contracts not being approved or registered by the Agricultural Lease Authority, *Grondkamer*) appears and is still growing in practice. The characteristics of Dutch lease contracts are summarized in table 7.1 below. In accordance with the empirical research on the preference of the landowners as to the choice of lease contracts, the gray contract is valued the highest. Moreover, it is used more often between farmers (as landowners) and family, farmers and other farmers (non-family), farmers and private persons, and mainly concerns smaller plots (Polman and Slangen, 2009: 284).³⁰² Some similarities with the Chinese farmland transfer market exist here.

By and large, through certain administrative controls — an approval of the Agricultural Lease Authority based on a substantive examination — and certain judicial protection by the Agricultural Land Tribunal,³⁰³ relationships between landowners and tenants in farmland lease contracts in the Netherlands are strictly defined in law. In other words, agricultural lease contracts in the Netherlands, including farmland lease, are primarily controlled by a series of external regulations, instead of internal negotiations between the parties involved. This is especially obvious in terms of the regular lease contracts. The lack of flexibility in concluding contracts leads to the development of a gray or informal lease market, which is not expected to be substituted by the newly-introduced liberalized lease in the near future (Slangen and Polman, 2008). At this time, it is hard to forecast the

³⁰⁰ In the meantime, rules for the regular land tenancy are still provided in the law. They apply to all land tenancy contracts originated before 1995 (when there was no single-term lease), and to newer contracts that did not stipulate that these contracts are meant to be a single-term lease/liberalized lease (but that only happens to people who want a gray contract – with all the risks involved – and to people who are not aware of the law). Moreover, the liberalized lease contracts are only possible if just some land is leased. If someone wants to lease a farmstead (with a farmhouse), a liberalized contract is not legally possible. A temporary right of use for such a farmstead is only possible under the regular land tenancy rules (with continuation and take-over rights and with price control) or by establishing a right of leasehold. Such a leasehold needs to be established for a fixed period which is longer than 25 years (article 7: 399d, the Dutch Civil Code). Otherwise, the rules regarding land tenancy will apply to the leasehold as well. This information is from Fokke Jan Vonck, Assistant Professor of Notarial Law, University of Groningen. The whole content of the Dutch Civil Code is available at: <http://www.dutchcivillaw.com/civilcodebook077.htm>.

³⁰¹ See Article 396 for one cultivation-cycle lease and Article 397 for liberalized agricultural lease in the Dutch Civil Code (Title 5, Book 7).

³⁰² For the public landowners (including the Service of Public Lands, National Forestry Service and other nature conservation organizations), on the contrary, regular lease contracts are more frequently used.

³⁰³ With regard to the role of this tribunal in agricultural leases, please see Article 316, 317, 322, 325, 345, 349, 350, 363-365, 369-380, and Article 391 of the Dutch Civil Code.

final destiny of this gray market, as it mainly relies on the reputation and trust that existed between farmers (private landowners and lessees). Despite such disputes on

Table 7.1 Summary of the characteristics of Dutch lease contracts

Characteristic	Regular lease	One-cultivation lease	Single-term lease	Liberal lease		Gray lease
				> 6 year	≤6 year	
Continuation rights	Yes	No	No	No	No	No
Priority rights	Yes	No	No	No	No	No
Price controls	Yes	No	No	Yes	No	No
Approval by Land Tenure Board required	Yes	Yes	Yes	Yes	Yes	No
Registration with Land Tenure Board	Yes	Yes	Yes	Yes	Yes	No
Duration in years	12 or 6	1-2	1-12	>6	≤6	Open
Operational in 2008	Yes	Yes	No	Yes	Yes	Yes

Source: Polman and Slangen, 2009, p. 272.

the rigidity of law, a relatively stable and developed farmland market has been established. This has greatly facilitated the overall agricultural production in the Netherlands (Koomen et al., 2005: 218).

Returning to the specific situation in China, the popularity of informal transfers of farmland shows the trust between individual farmers on the one hand; on the other hand, it indicates that a formal farmland market is far from being established in rural China. Due to the public sentiment against landowners in the Netherlands, lessees are considered to be weaker parties. Several rights have been given to them in order to maintain a continuing operation of farmland, such as the taking-over of the lease by families or relatives of tenants under certain circumstances. Besides, the death of the lessee or the lessor does not end the lease contract, and in the case that the leased property will be alienated by the lessor, the tenant has a preferential right³⁰⁴ to acquire the property.³⁰⁵ In China, although generally the lessee is not a weaker party, certain protective regulations, such as the preferential right to acquire the land, may be incorporated into legislation with the aim of establishing a stable

³⁰⁴ This right becomes much weaker as the landowner is allowed to sell the land to a so-called ‘safe lessor’: Article 7:370 (1) sub e CC. Moreover, the preferential right and the right to take-over the lease from a relative does not apply in the case of a liberalized contract, as mentioned in the table above.

³⁰⁵ See Article 363, 366 and 378 of the Dutch Civil Code respectively.

operation of farmland. Meanwhile, lease contracts with different durations and different arrangements of rights and obligations of the two parties shall also be available in the central legislation, in order to provide enough options for farmer lessors.

Although the reasons for the expansion of the gray farmland market in the Netherlands may be multiple, strict price-capping and rent-capping set by the government (the maximum price and rent are lower than the market price) is a crucial one (Ciaian et al., 2012: 15). Unlike the intention of the Dutch government to protect the lessees, the farmland transfer policy in China is primarily aimed at creating opportunities for collective farmers/the farmer lessors to acquire more profits. Thus, even if measures for maintaining contract relations can be adopted by the Chinese legislature,³⁰⁶ a pricing right should be allocated to the transferors/lessors to improve their bargaining positions. Instead of a maximum rent price, a minimum rent can be formulated by local governments based on local conditions. The final price is determined by the parties involved through fair negotiations. Overall, both the rules concerning the conclusion of transfer contracts in China and the stricter one from the Dutch Civil Code create a playing field for the parties involved to pursue and realize their own goals. Together with further detailed rules on a diversified duration of contracts and a flexible rent system, a balanced protection (neither excessive regulation nor inadequate protection) for both parties based on their freedom of contract may be achieved. Generally speaking, contract law or certain contract rules are primarily used as a facilitator of private transactions. Meanwhile, if a certain public interest is involved in such relationships and/or the bargaining power of one party is vulnerable, the legislature as a state agency may put particular restrictions or extra regulations on the parties concerned. This means that contract law also has a regulatory function (Möslein and Riesenhuber, 2009: 274). In practice, in addition to the design of a legal framework for these small-scale transfers among individual farmers, a more pressing issue concerns the participation of smallholders in large-scale transfers of farmland. In other words, regarding the large-scale transfers of farmland or land transfers concerning large entities, more regulatory rules are expected to be established to secure a right balance between the different interests involved.

7.3 Prior consent of specific farmers in large-scale transfers

In accordance with the law, apart from the transfers of farmland by farmers themselves, they can also entrust the contract-issuing party — usually the

³⁰⁶ For instance, the priority right of the lessees to continue to rent the land, the taking-over of the leased land by lessees' families and the automatic renewal of (regular lease) contracts mentioned above.

collective or an intermediary organization — to transfer their land (use rights).³⁰⁷ In practice, this mainly happens in large-scale transfers. In comparison with the small-scale transfers among farmers, the guarantee of farmers' participation in large-scale transfers is more complicated, due to the involvement of village collectives in most cases. As argued in chapter 3 (3.3), although with a quasi-private FUR, the collective land ownership which is usually represented by the villagers' committee may surpass the private land rights of individual farmers, when it concerns the transfer of a majority or all of the collective farmland. Under the adherence of the central government to the collective land ownership, village collectives are entitled to negotiate with investors in the interest of the collective farmers in large-scale transfers of farmland. In this case, the assurance of prior consent of the farmers involved becomes more complicated and more difficult to be implemented. In order to protect farmers' rights from the infringement of local cadres and investors, certain procedural requirements or obligations of the latter are significant and indispensable.

7.3.1 Making of a legal entrustment for land transfers

As a matter of fact, there are no detailed procedural rules about farmers-commissioned transfer of farmland in law. Based on the existing regulations in the 2005 Measures of the MOA and relevant experiences in local areas, a five-step process can be observed. First and foremost, the household/contractor should issue a power of attorney for land transfer. The power of attorney shall specify the entrusted matters, the power and the time limit with the signature or seal of the entrusting party. Usually, the signature of all household members should be included, instead of only the one from the head of the household.³⁰⁸ Second, the collective or other intermediary organizations such as the township or the village service agencies for farmland transfer should examine and verify the power of attorney, and discuss whether or not to accept the commission. A final decision should be sent to the commissioned household within a certain period of time. Third, if the collective or the intermediary organization decides to accept the commission, it shall conclude a commission contract with the commissioned household, and publish the basic information about the contracted

³⁰⁷ The 2005 Measures of the MOA, Article 8 and 22.

³⁰⁸ As the contractor of the collective farmland is the specific household as a unit instead of the individual family members, the contracted land is thus an undivided co-owned property of the household concerned. According to Article 97 of the Property Law, the consent of all joint owners shall be obtained, in terms of the disposal or major repair of a commonly owned property, except it is stipulated otherwise by the co-owners. Therefore, the consent of all the family members is needed in the case of an entrustment of the transfer of the contracted farmland. If any other family members (with civil capacity) disagree with the entrustment, the land concerned cannot be transferred.

land, such as the contracted household and the boundaries of the contracted land, in an appropriate form both inside and outside the collective. It should also report this to the county or the township transfer service agency, who should announce the transfer after receiving such reports. Fourth, the potential transferee who intends to accept the contracted land may submit a written application to the county or the township transfer service agency within a valid period announced by the latter. Finally, after the announcement period expires, the county or the township service agency should convene the applicant who had submitted applications timely and consult with them. The transfer price can be determined by negotiation or by way of tender. Meanwhile, a draft contract can be drawn up on a fair and reasonable basis between the household or the commissioned party and the final transferee, which should be valid with the signature of both parties.³⁰⁹

In accordance with the recent management measures of most local Agriculture Equity Exchange, both the transfer of individual households' contracted farmland and the transfer of all the contracted farmland in the collective are covered. Specifically, the transfer of an individual farmer's land should be based on his own will, while the transfer of the whole contracted farmland should obtain the consent of more than two thirds of collective members or their representatives. In other words, under the collective land ownership, even if certain collective farmers disagree with the transfer of their own contracted land in the case of the transfer of the whole collective farmland, their land has to be transferred under the majority rule. As shown in chapter 3 (3.2.3), the exercise of individual land use rights is deeply affected by the vaguely defined collective land ownership. In essence, this concerns a right balance between the private interests and the collective interests, and the key to striking such a balance is to make sure that the decision-making under the majority rule is a participatory and democratic process. In this perspective, the principle of Free, Prior and Informed Consent is noteworthy.

7.3.2 How can a FPIC be adopted and implemented in large-scale transfers

The principle of Free, Prior and Informed Consent (FPIC) was proposed and developed first by certain international and regional organizations, with a view to protecting the rights of indigenous people in development projects affecting them (Tamang, 2004). With the support of the United Nations Development Program (UNDP) and its embeddedness in international law, the FPIC has been recognized broadly in the international society. In particular, as the issuance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, it has

³⁰⁹ Article 22 of the 2005 Measures provides that, in the case that a contractor entrusts any contract-issuing party or any intermediary service organizations to transfer his contracted land, the transfer contract shall be signed by the contractor or the agent under his entrustment in written forms.

become an international human right of indigenous people, which should be respected by national governments and the project developers concerned.³¹⁰ As a tool for the affected communities to hold project developers and governments accountable, a clear and detailed procedure shall be available to truly implement this principle in practice. In this respect, guidelines from certain international organizations like the FAO, the UN-REDD Program, the Forest Stewardship Council (FSC) and NGOs like Oxfam may play a significant role.³¹¹ A variety of handbook and training manual on the FPIC are also available in specific programs.³¹² Although these documents mainly focus on the FPIC of indigenous people in large-scale development projects, the whole procedure established for implementing the FPIC surely can be adopted and used in other large-scale investments in land. Even though the large-scale transfer of farmland discussed in this chapter does not primarily involve indigenous people, and the definition of ‘large-scale’ may be different from other countries, certain farmers as smallholders will be affected by such investment. An accessible FPIC system is equally significant to them.

In accordance with the Practical Guidance of FAO for respecting the FPIC in land acquisition, there are 10 steps in total concerning the implementation of a FPIC: identifying rights-holders; ascertaining the legal status of the land; mapping claims to and uses of land; identifying decision-making institutions and representatives; carrying out iterative consultations and information-sharing; providing access to independent sources of information and advice; reaching

³¹⁰ Article 19, 29 and 32 of the UNDRIP explicitly recognize the principle of the FPIC in terms of the adoption and the implementation of legislative or administrative measures that may affect indigenous people by the state, the conservation and protection of their land from hazardous materials, and the approval of any projects affecting their lands, territories and other resources. Here I only focus on the FPIC in the third case.

³¹¹ In 2010, the Oxfam issued a Guide to the FPIC in order to assist the organizations supporting communities that affected by large-scale development projects. The FSC guidelines for the implementation of the FPIC was published in October 2012, which aims at assisting all the parties involved in FSC certification in safeguarding the rights of forest dependent indigenous peoples and local communities in or near FSC certified operations. The Guidelines on the FPIC from the UN-REDD Program was issued in January 2013, which focuses on outlining a normative, policy and operational framework for UN-REDD Program partner countries to seek FPIC. The latest and most comprehensive one is the practical guidance of FAO concerning the FPIC in land acquisition in March 2014. As a technical guide for implementing its voluntary guidelines on governance of tenure, practical actions for government agencies to respect and protect FPIC and for civil society organizations, land users and private investors globally to comply with their responsibilities in relation to FPIC are endorsed by this guideline.

³¹² For example, the Handbook on Free, Prior and Informed Consent For Practical Use by Indigenous Peoples’ Communities (http://www.thai-ips.org/Documents/FPIC_Handbook_Final.pdf); Training Manual on Free, Prior and Informed Consent in REDD+ for Indigenous Peoples (http://www.iwgia.org/iwgia_files_publications_files/0593_FPIC-Manual-eb.pdf); and Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A Guide for Companies ([http://www.rspo.org/files/resource_centre/FPIC%20and%20the%20RSPO%20a%20guide%20for%20companies%20Oct%2008%20\(2\).pdf](http://www.rspo.org/files/resource_centre/FPIC%20and%20the%20RSPO%20a%20guide%20for%20companies%20Oct%2008%20(2).pdf)).

agreement and make it effective; monitoring and verifying agreements; establishing a grievance process; and providing access to remedy and conflict resolution. More importantly, the affected rights-holders shall be given a right to participate in all the steps above. In other words, the requirement for free and informed consent means that whether before or after the conclusion of an agreement, the affected people are entitled to protect their land rights through full participation in the project concerned. In terms of prior consent, certain measures should be taken by governments to make sure that the affected people can be included in the land use and project planning as early as possible (FAO, 2014: 16).

In the case of China, principles of fair negotiation, in accordance with law, free will and compensation have been recognized in law concerning the market transfers of farmland. However, the free will of individual farmers in large-scale transfers is usually ignored or replaced by the consent of local cadres as representatives of the collective. On the basis of relevant documents on FPIC, the obtaining of a free and prior consent of the farmers involved includes two steps. First, for the investor or the demander of land, a consultation with the local community/collective is required. In accordance with the ILO Convention No. 169 (Indigenous and Tribal Peoples Convention), the demander of land shall consult the people concerned through appropriate procedures, especially through their representative institutions. The means through which the affected people can freely participate at all levels of decision-making should be available. Means for the full development of the affected peoples' own institutions and initiatives shall also be established.³¹³ Second, in the event that the communal/collective land has been allocated to individual households to cultivate, the individual land use right should be protected through participatory mechanisms. The role of NGOs in assisting the establishment of such mechanisms is significant (USAID, 2011: 8). However, due to the underdevelopment of NGOs in China and the control of villagers' committees over the use of collective farmland, it is hard for these outside organizations to intervene this 'village affair'. As discussed in chapter 3 (3.4.2), currently a joint-stock cooperative system is greatly promoted by the Chinese government to reform the collective structure. On the basis of a well-governed structure of the cooperative, land rights and interests of collective farmers/shareholders can be better protected through an effective representative institution. Nonetheless, the establishment of a good governance structure of the cooperative itself is a big issue in practice.

³¹³ C169 Indigenous and Tribal Peoples Convention, International Labor Organization (ILO), 1989, Article 6. The full text of this convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314.

As mentioned above, the implementation of the FPIC covers the whole process of a project. In addition to the determination of proper representatives, the provision of accurate information, especially the information that should be provided by investors, should also be strengthened. Only with a detailed understanding of the investor can the affected farmers check if there are alternatives to the proposed development. Furthermore, other tenure and production patterns may be applied depending on the specific capacities of the investor concerned (FAO, 2014: 34). At the same time, certain restriction and examination of the capacity of the investors before the start of any projects, are necessary and should be provided by the government. Below, a regulatory system for such large-scale investments in farmland in China will be discussed in detail.

7.4 Governance of large-scale transfers based on procedural rules

In most large-scale transfers of farmland in local areas, industrial and commercial enterprises (ICEs) are frequently involved as the transferee. Although the legislation does not prohibit the access of the ICEs to farmland use, a series of central policies do discourage the long-term and large-scale lease of farmland by such investors.³¹⁴ In the annual No.1 Document of the CCCPC and the central government, an increasing number of measures are proposed to protect the dominance of individual farmers in the transfer process. The 2014 No.1 Document especially suggests the establishment of a regulatory system for the lease of farmland by the ICEs. This is a critical issue as the scale of farmland lease by the ICEs is increasingly expanding.³¹⁵ Compared with the restrictions on farmland

³¹⁴ The central policy on the participation of ICEs in the transfer of farmland is consistent. As early as 2001, the Notice about Bettering the Work of Transferring the Farmers' Rights to Use the Contracted Land (*zhonggong zhongyang guanyu zuohao nonghu chengbaodi shiyongquan liuzhuan gongzuo de tongzhi* 中共中央关于做好农户承包地使用权流转工作的通知) provides that enterprises, institutions, and the urban residents are not encouraged to rent farmers' contracted farmland. To stabilize agriculture and the rural society, the central government does not promote the long-term and large-scale lease and the operation of contracted land by ICEs. Local governments should not encourage and organize urban residents to lease farmers' contracted land in rural areas. This policy is maintained in following central policies. In the 2013 Decision of the CCCPC, ICEs are encouraged to investing in rural areas to develop modern planting and breeding industries that suitable for commercialized management, and introducing modern factors of production and operation models into agriculture. In the 2014 No.1 Document, a financial guarantee system for controlling risks in the farmland transfers of the ICEs is promoted and the non-agricultural use of the transferred farmland is clearly forbidden. Therefore, although the transfers of farmland to ICEs are restricted all the time, it is not forbidden in law or in the central policies. Moreover, such large-scale transfers are very welcomed by local governments in practice. Even though these restrictions mentioned above are strict, they are too simple and not legally binding to local governments and the ICEs.

³¹⁵ According to a preliminary statistics of the MOA, as of the end of December 2012, the transfer area of the contracted farmland nationwide is 270 million *mu*, which accounts for 21.5% of the total area of the

lease by the ICEs, land lease by (large) professional growers, family farms and farmers' cooperatives — the so-called 'entities of scale farming' — is greatly encouraged and supported by the central government. However, as there are no unified criteria for assessing their qualifications, transfers to such entities may also result in problems like non-agricultural use of farmland. Although the focus of the analysis below is on the lease by the ICEs, the (future) access system for agricultural operations including farmland use should also cover these scale entities.

7.4.1 An access system for farmland use of the ICEs

From a global perspective, usually agricultural operations of enterprises are directly restricted in many countries. In particular, in developed countries farmland is primarily managed by farmers or farmers' cooperatives. Nevertheless, the involvement of the ICEs in agriculture and farmland use is inevitable, especially in developing countries where the agriculture is characterized by a lack of capital investment. Large-scale transfers, including large-scale acquisitions of farmland are increasingly noticeable in transition countries like Central and Eastern European countries, and the general Global South (African countries and Latin America) (German and Schoneveld, 2013; Borras Jr. et al., 2012). Although what is mainly concerned in such issues is foreign direct investment (FDI), massive investments from domestic enterprises in agriculture are rising in countries like China, where scale farming is strongly promoted by the central government. Regarding the problems caused by those large-scale acquisitions of farmland, a responsible investment in land covered by a responsible governance of land is proposed and encouraged by the FAO together with the World Bank.³¹⁶ An emphasis on the Corporate Social Responsibility (CSR) and the integration of responsible land governance into the CSR are recommended to deal with problems caused by irresponsible investments (Wehrmann, 2014). Nonetheless, the lack of legally binding rules (especially at an international level) and land-based investment models for local community benefits pose challenges to an effective

contracted land in China. Among them, 2.8 million *mu* was transferred to the ICEs — an increase of 115% compared to 2009, and accounting for 10.3% of the total area of farmland transfer (Li and Chen, 2013).

³¹⁶ Article 12 in Part 4 of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (usually named VGGT) of the FAO exclusively deals with the issues concerning responsible public and private investments in land. Meanwhile, in the 2014 Annual World Bank Conference on Land and Poverty, topics on the responsible private investments in agriculture constitutes the most important sessions of the conference. See the agenda of this conference, <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTIE/0,,contentMDK:23540185~pagePK:64168182~piPK:64168060~theSitePK:475520,00.html>.

regulation on private (enterprises) investments in agricultural land (Rurangwa, 2014).³¹⁷

To some extent, international regulation of private investments in farmland use is still in process. Before that, certain regulations at the national level — preferably in the form of legal rules — are desirable and significant to the protection of local communities and the farmers involved. Specific to China, although there is no special provision on the access of enterprises to farmland use in the law, a certain legal basis does exist for a further regulation. For instance, a basic principle for farmland transfer is that the transferee shall have the capability for agricultural operation.³¹⁸ Besides, where units or individuals other than the ones of the collective concerned undertake contracts, the contracts shall be concluded only after an examination of the credit position and management capability of the contractors.³¹⁹ Therefore, an access system including the areas that the ICEs may have an access, an examination of the qualification of the transferees, the total transfer area and duration, a review on the projects involved, and a risk prevention mechanism for farmland transfer should be and can be established in law.

Specifically, entities mainly composed of farmers, such as professional growers, family farms and farmers' cooperatives, are allowed and supported to directly conduct agricultural operations. Meanwhile, for the (agricultural) enterprises, through focusing on providing services for agricultural operation especially for the planting and breeding industry, and developing the wastelands that farmers or collectives themselves are not able to reclaim, a proper balance between the enterprises' own profits and a long-term benefit for local collectives and farmers may be achieved. This is the primary goal of this access system. Besides, an examination of the credibility, financial strength, management ability and (contract) performance capabilities of the transferee is indispensable, before the approval of the project by government agencies. With regard to the transfer area and the duration, there should be a definition of the large-scale transfer in law. It is not necessarily unified nationwide. Local governments can develop their own standards based on local conditions. In certain local areas, if the transfer area is

³¹⁷ Since the middle of the 1990s, a series of CSR-related law have been issued, characterized by the promulgation and amendment of the Chinese Company Law in 1993 and 2006 respectively. However, the current enforcement of these related laws is far from satisfactory. In addition to the construction of an environment of mutual trust which allows companies to develop the CSR, the Chinese government should try to implement existing regulations and provide opportunities for companies to improve the CSR practices (Zhao, 2014: 248-249). Currently, the CSR in China is improving, especially in terms of the protection of laborers (Zhao, 2014: 245). However, the incorporation of land governance into the CSR in China still needs more advocacies.

³¹⁸ The RLCL, the fourth paragraph of Article 33. The full text of the RLCL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382125.htm.

³¹⁹ The RLCL, the second paragraph of Article 48.

above 100 *mu* or the duration is over five years, a prior approval is required.³²⁰ Regarding the project itself, an examination of its compliance with the current law, relevant central policies, environmental protection and primarily the local land use plans shall be conducted by certain agencies. More importantly, in order to better protect farmers' land interests, a 'risk deposit' is suggested to be paid by these 'large' transferees. In the case that the transferee goes bankrupt, this deposit can be used as compensation for the farmers involved.

As a matter of fact, certain measures above have been discussed in chapter 6 in the analysis of farmland transfer practice in the Wuhan Comprehensive Agriculture Equity Exchange. Different from other intermediary organizations or the Exchange in other cities who are established as a government agency, the Wuhan Exchange is a nonprofit corporate enterprise. It is established by the city government, and supervised by the Regulatory Commission on the Exchange of Comprehensive Agriculture Equity, which is led by the Bureau of Agriculture of Wuhan City. In comparison with the Agricultural Lease Authority (*Grondkamer*) in the Netherlands — a government agency, the Wuhan Exchange can be regarded as a semi-official agency. Through a cooperation with relevant departments of the city government, more precisely, through providing certain workplace for the departments of land and real estate, water, agriculture and forestry, the Exchange makes a prior examination of the qualification (in terms of the confirmation of land records) of the transferor before the release of transfer information possible. As regards the interested transferee, it is the Exchange who checks its qualification and credit certificates. This in part ensures a relatively fair result, as the rent-seeking opportunity of local officials is lessened. Specific means of organizing transactions such as negotiations, bidding or auctions, are also chosen by the Exchange, depending on the specific circumstances of the transactions. As mentioned in chapter 6 (6.4.2), the initial contract concluded by two parties can only be valid with a final examination by the Exchange in the form of a specific authentication certificate. Also, with this certificate, the record or registration of the land use right concerned can be changed in specific departments. A land transfer is finally completed with this change of registration.

It is worth noting that the prior examination of the qualification of the transferor by relevant departments is needed in China, as a unified land registration system is not yet established. Currently, even for rural land such as farmland, grassland, forest land and water, the registration concerned is undertaken by different departments. With the establishment of a unified registration system, especially a digitized system, this prior examination can be conducted by the Exchange itself. In that case, functions of the Exchange are much similar to those of the

³²⁰ See the Additional Opinions of Shunyi District in Beijing City on Promoting the Transfer of the Right to Contract and Manage Land (*Beijingshi shunyi qu renmin zhengfu guanyu tuijin nongcun tudi chengbao jingyingquan liuzhuan gongzuo de buchong yijian* 北京市顺义区人民政府关于推进农村土地承包经营权流转工作的补充意见), Network of Information on Agricultural Land Transfer in Beijing (北京市农地流转信息网), <http://www.bjndlz.gov.cn/level3.jsp?id=80>. Besides, the case in Changsha City analyzed in chapter 6 (6.3.2) also mentioned the limit on the transfer scale.

Agricultural Lease Authority in the Netherlands.³²¹ A distinctive role of the Exchange, however, is to make sure that individual farmers can truly participate in the transfer process, based on the information and services provided by the Exchange. The access system for farmland use of these scale entities, especially the agricultural enterprises, can strengthen this participation as a preventive mechanism.

7.4.2 Design of procedural requirements for securing farmers' participation

Even if a transfer contract concerning a large-scale transfer of farmland can be concluded and be valid through such (legal) procedures above, certain regulatory measures against violations in the course of the performance of the contract are more crucial to the protection of specific farmers' interests, as well as the public interests. Apart from the requirement of paying a deposit by transferees in the case that they cannot pay the due rents, measures for preventing non-agricultural use of transferred farmland and appropriate remedies should also be provided by law. As a matter of fact, during the authentication of transfer contracts, an inspection of the land use purpose is required. Only when the transferred farmland is used for agriculture will the contract be authenticated. In areas where an Agriculture Equity Exchange is established, the contract is usually validated by the Exchange. The central government also encourages certain authentication of transfer contracts, with a view to stabilizing the contractual relationship and preventing relevant land disputes.³²² However, in most local areas, the role of such an authentication is underestimated. Essentially, it is an administrative act, as it is traditionally conducted by local government departments. In order to reduce administrative interventions, the notarization of farmland (transfer) contract was proposed to

³²¹ Due to the adoption of a pro-lessees principle, an approval power concerning various aspects of a lease contract is given to the Agricultural Lease Authority in the Netherlands.

³²² In the process of concluding a farmland transfer contract, a verification of the contract to the department of rural land contracting management of the county or township governments is provided by the 2005 MOA Measures (Article 24). However, it is not compulsory and there are no more rules regarding its implementation. The 2008 Notification of the MOA on Better the Current Transfer Management and Service of the Right to Contract and Manage Rural Land (*nongyebu guanyu zuohao dangqian nongcun tudi chengbao jingyingquan liuzhuan guanli he fuwu gongzuo de tongzhi* 农业部关于做好当前农村土地承包经营权流转管理和服务工作的通知) is a further refinement of relevant regulations on the farmland transfer system in the 2008 Decision of the CCCPC (the Decision of the CCCPC on Several Major Issues about the Rural Reform and Development). In addition to the stress on the conclusion of a written transfer contract and its record in local governments, it also promotes the verification of transfer contracts. Specified staff should be responsible for handling the applications. During the verification, advices shall be provided timely, if there are violations of law and policies in the transfer contract. However, no detailed procedure is provided for this verification.

assist the government authentication system.³²³ Nevertheless, neither of them is broadly used in practice. Given its importance to the validity of a transfer contract, as well as the protection of farmers' rights in large-scale transfers, an authentication should be available either in the local Exchange or in the local agricultural departments.

Regarding the supervision over the change of land use by transferees during the performance of a transfer contract, the transferor (specific farmers or collective farmers as a whole) can play a much bigger role than local government departments. In most cases, farmers are directly or indirectly involved in the operation of the transferees concerning the transferred farmland. Certain incentives can be created for the farmers involved to supervise the non-agricultural use of farmland by the transferees. Moreover, a specific agency, more precisely, a judicial agency shall be available to deal with the reported information, as it concerns a breach of transfer contracts. Take the Dutch Agricultural Land Tribunal as an example, in the event that the lessee fails to fulfill its obligations, including stopping using the land as farmland, only the tribunal may rescind the lease contract.³²⁴ As mentioned in chapter 5 (5.5.2), an arbitral tribunal for rural land contract disputes is greatly supported by the MOA, compared to the reconciliation of the parties by themselves, the mediation by people's mediation committee or administrative authorities, and litigation. With an improvement in the rural land arbitration system in terms of the arbitration rules and the training of arbitrators, this arbitral tribunal is expected to play a similar role as the Dutch one. That is, if the transferee changes the land use agreed in the contract later, the farmer lessor can make a claim to the tribunal about rescinding the contract.

It is also possible that the farmer transferor may be directly involved in the non-agricultural use of transferred farmland. In this case, certain sanctions are needed for punishing both the transferors and the transferees. In the FAO's new framework for the application of the FPIC, participatory monitoring is proposed to deal with problems that may arise from the practical implementation of the contract, especially when there is no oversight mechanism in the national legal system.

³²³ According to the Several Opinions of the Ministry of Justice on the Expansion and Standardization of Notarial Work in 2003 (*sifabu guanyu tuozhan he guifan gongzheng gongzuo de ruogan yijian* 司法部关于拓展和规范公证工作的若干意见), the notarial office should promote the notarization of rural land contracts, transfer of land use rights, purchase and sale contracts of agricultural products and rural financial credit in rural areas. It clearly admits the feasibility of the notarization of farmland (transfer) contracts.

³²⁴ See Article 376 of the Dutch Civil Code, Book 7, Title 5. With the aim of protecting the lessees/tenants, the lessor cannot rescind the contract himself if the lessee does fail to fulfill his obligations. Besides, even if the lessor claims for a revocation of contract to the tribunal, the tribunal may order an investigation as to if and how the lessee has met his obligations to maintain the farmland involved. In the case that the lessee fails to fulfill his obligation, certain period of time will be given to him to correct his behavior. If the lessee is still negligent in fulfilling his duties, the contract will be revoked by the tribunal.

Investors are encouraged to design a monitoring of project implementation jointly with the collectives and farmers involved (FAO, 2014: 36). More importantly, other interest groups, such as relevant government agencies, shall also be included in this monitoring system, in order to prevent joint violations committed by the investors together with the transferors.

By and large, through the obligation of the transferees to maintain an agricultural use of the transferred farmland, and the right of the farmer transferors to rescind contracts under certain conditions, the legislator may ensure the attainment of certain public goals, such as the protection of weaker parties and the maintenance of a certain amount of farmland. A regulatory function of contract law is obvious in terms of the regulation on large-scale transfers of farmland (Möslein and Riesenhuber, 2009: 274). However, these regulatory rules should not interfere in the private autonomy or the freedom-of-contract of both parties to the contract. Again, through the design of certain default rules concerning the rights and obligations of both parties to protect certain public goals, a free bargaining process in favor of the farmers can be established. A procedural framework that allows farmers to truly participate in the whole project and negotiate directly with the investors should be available in large-scale transfers of farmland. More importantly, a right balance between the private interests and the public interests can be achieved if these regulatory rules can be expressly incorporated into this framework. The guidance of the FAO for stakeholders to respect the FPIC in land acquisition provides a good example for national governments.

7.5 Maintenance of a substantive freedom of contract

Although farmers' bargaining power may be improved based on such procedural requirements above, extra measures are still needed in order to secure a substantive fairness for this weaker party. During the negotiation process, more obligations are supposed to be assumed by these 'large-scale' transferees, especially the industrial and commercial enterprises (ICEs). When the initial contract is submitted for authentication, the agency involved shall examine if both parties truly understand their rights and duties agreed in the contract. In particular, the understanding of the farmer transferor should be the focus. This contributes to the realization of a substantive autonomy or freedom-of-contract of the farmer transferors. Nevertheless, certain legal remedies for protecting farmers' rights are also indispensable, even after the contract is verified by governments and/or notaries.

In terms of the protection of a substantive party autonomy in contract law, two different approaches can be distinguished. In countries where fundamental rights have an increasingly strong effect on the private relationships under contract law, a horizontal effect of fundamental rights in contract law is recognized. This is the

so-called ‘constitutionalisation of contract law’ (Cherednychenko, 2007: 5). For example, in certain European countries, due to the existence of a constitutional court and the transnational European Convention on Human Rights (ECHR), a substantive understanding of the freedom of contract is popular.³²⁵ The second approach concerns the development of contract law itself. In order to reduce the inequality in bargaining powers between two parties, rules concerning invalid or revocable contracts and basic principles like good faith usually are provided in traditional contract law or civil code. In particular, with the emphasis on the protection of the weaker party, more obligations are allocated to the stronger party, like the financial agency in a contractual relationship with its customers. This society-oriented development of contract law unquestionably aims at protecting the substantive or the real freedom of contract of the weaker party. However, a bargaining process through which the real freedom of contract of both parties can be realized is much more significant (Cherednychenko, 2007: 10). This signifies the necessity of a principle of balancing and a principle of proportionality in modern contract law (Reich, 2014: 131-187). It can be said that no matter which approach is adopted, contract law/rules that can secure a fair bargaining process for the weaker parties to express their real will is the most critical issue of any contracts.

In China, the horizontal effect of fundamental rights in contract law is generally very little. Although the Constitution acknowledges that the state respects and protects human rights of all citizens, freedom of contract provided by the Contract Law is not identified as a fundamental right or freedom in the Constitution.³²⁶ However, principles of fairness and good faith in concluding and performing contracts, circumstances under which a contract shall be null and void, as well as contracts that can be modified or revoked by a court or an arbitration institution based on the party’s requests are explicitly defined in the Contract Law.³²⁷ More

³²⁵ According to Ciacchi’s observation, no matter in countries like Germany, Slovenia, Greece and the Netherlands where a substantive freedom of contract is identified as a constitutional or human right; or in countries like Italy, France and Poland where a constitutional dimension of freedom of contract and party autonomy is acknowledged, a substantive party autonomy in contract law should be recognized and protected by the judiciary. In an in-depth analysis of the general principles of the future EU civil law, the principle of ‘framed’ autonomy is proposed primarily by Reich. In his opinion, freedoms including the freedom of contract are fundamental rights, yet they are also limited due to the mandatory provisions in civil law for certain objectives. That is, regardless of the difference in the legal and judicial system, a substantive party autonomy in contract law will be accepted in these EU countries with the formulation of a unified EU Civil Law (Ciacchi, 2010; Reich, 2014).

³²⁶ The Constitution of the PRC, Article 33. The full text of the Constitution is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm.

³²⁷ In accordance with Article 4-6 of the Contract Law, the parties have the right to lawfully enter into a contract of their own free will in accordance with the law, and the principle of fairness and good faith should be observed in deciding and exercising their rights and performing their obligations. Meanwhile, in cases

importantly, in the second interpretation of the Supreme People's Court (SPC) on the application of contract law in 2009, certain protection for the weaker party, more precisely, the parties accepting the standard terms, is emphasized. For instance, the party supplying the standard terms shall inform the other party to note the exclusion or restriction of its liabilities by using marks including characters, symbols, fonts that are sufficient to attract their attention, and explain the standard terms upon request by them. The supplying party shall bear the burden of proof for the exercise of its obligations to provide tips and instructions in a reasonable way.³²⁸ That is to say, a substantive party autonomy does exist and is protected by certain rules in the Contract Law, rather than being recognized as a fundamental right by the Constitution. This reflects a weak indirect horizontal effect of fundamental rights in contract law. In detail, the contract law still plays a key role in deciding the disputes between private parties and protecting weaker parties. In the meantime, values implicit in fundamental rights, like a substantive party autonomy, are recognized and respected in contract law. This complementarity between fundamental rights and contract law is proved to be the most appropriate form of developing contract rules with the aim of protecting weaker parties in most EU countries (Cherednychenko, 2007: 505). This is also true in China, as the effect of fundamental rights and the Constitution on contract law is increasing, yet not strong enough to dominate the adjudication of disputes between private parties.³²⁹ Therefore, rules provided by the Contract Law are still the main legal basis for resolving private disputes. Meanwhile, through the application of fundamental values enshrined in the Constitution in specific cases, the judiciary plays a big role

such as a contract is concluded through the use of fraud or coercion by one party to damage the interests of the state, or malicious collusion is conducted to damage the interests of the state, a collective or a third party, the contract involved shall be null and void (Article 52). For contracts that are concluded as a result of significant misconception or that are obviously unfair at the time when concluding the contract, the affected party shall have a right to request for a modification or revocation of the contract (Article 54).

³²⁸ See Article 6 of the Interpretation II of the SPC of Several Issues concerning the Application of the Contract Law of the PRC. Besides, if the supplying party fails to fulfil its obligations to provide instructions and interpretations, and because of this the accepting party did not notice the provisions excluding or limiting its liabilities, the court should rescind the standard terms based on the application of the accepting party (Article 9). Moreover, if the supplying party fails to fulfil its obligations above, and the standard terms concerned comply with one of the circumstances that a contract, certain exception clauses, or other terms that shall be null and void, the court should find the terms invalid (Article 10). The full text of this interpretation (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=7533&CGid=>

³²⁹ In accordance with the observation of Fu (2011: 163-167), the constitutionalization of the contract law in China is still not feasible. On the one hand, the application of the Constitution into private cases is not yet legitimated. On the other hand, although the traditional value of social justice had been deeply rooted in Chinese society, it is not widely conveyed into the modern Chinese contract law. The protection of party autonomy by contract law in China is still needed to be strengthened from both aspects above.

in protecting the interests of weaker parties, as a final guarantee for a substantive party autonomy.³³⁰

Specific to the autonomy of the affected farmers in large-scale transfers of farmland, in addition to the safeguard provided by the rules governing the conclusion of transfer contracts — a series of procedural requirements, regulations on the performance of the contract are also indispensable. In the meantime, rights to obtain legal remedies in the case of violations are supposed to be available both in law and in the contract involved. It is noteworthy that although the protection of party autonomy frequently focuses on the farmer transferors — the weaker party, an equivalent protection for the investors — the stronger party — should not be ignored. A balanced framework through which both parties may obtain a real autonomy is the best embodiment of a contracting process. In this perspective, the full participation of affected farmers and their effective coordination with the investors provide strong possibilities of realizing this goal. The participation here primarily refers to the performance of the contract or the implementation of the project. More importantly, in the case of violations in the implementation process, alternative dispute resolution (ADR) such as mediation should also be emphasized, apart from the judicial system.³³¹ In the case of China, ADR is paid more attention than the court in the resolution of farmland transfer disputes. An initial dispute settlement mechanism, including the reconciliation of the parties by themselves, the mediation by people's mediation committee or the administrative authorities, arbitration, and litigation has been created in China. Moreover, the parties are encouraged to choose reconciliation and mediation first, which is more favorable to keep the harmony between the disputants and the harmony of the whole society. Under the current laws and central policies on farmland transfer, this mechanism is mainly used for the disputes between the collective and collective farmers, and the disputes among individual farmers. In large-scale transfers involving various enterprises, reconciliation and mediation may be effective if the farmers concerned can truly participate in the resolution process. Otherwise, an involvement of arbitration agencies or local courts may be more beneficial to these farmers.

³³⁰ The Interpretation of the SPC concerning the Application of the Contract Law, especially the rules regarding the protection of weaker parties, provide some instructions for the judiciaries to realize the substantive freedom of contract of certain weaker parties.

³³¹ In accordance with the practical guidance of the FAO on the FPIC in land acquisition, a grievance process that allows consent to be re-established through a more accessible and local alternative to external means of dispute resolutions is encouraged. Besides, in terms of accessing to remedy and conflict resolution, a professional mediator, conflict resolution expert or ombudsman is proposed to mediate the conflict, instead of the court (FAO, 2014: 36-38).

7.6 Making of new legal rules through governance of contract law

As analyzed in chapter 2 (2.4), governance is in essence a steering mechanism. This means a specific governance structure is composed of rules affecting the behavior of all the parties involved, in order to realize certain public objectives. Furthermore, a contract governance perspective focuses on the effect of contract rules on the behavior of parties involved, in addition to the function of such rules as a tool of resolving disputes (Cherednychenko, 2014: 63). It does not only focus on how to interpret and apply contract rules in practice, but how to improve the related institutional framework of the rule-making in contract law, namely the governance of contract law. To be specific, it refers to the analysis and design of an institutional framework within which contract rules are created (Möslein and Riesenhuber, 2009: 260). This is especially important for the regulators or rules-makers to deal with the problems that no specific rules are available or the existing rules are quite dispersed. With the aim of establishing a balanced governance structure for the market transfers of farmland, the key is to making appropriate rules which can secure such a balance. On the basis of the governance of contract law, three issues are involved in the making of these rules.

First, the rules for establishing this balanced governance structure for market transfers of farmland involve not only contract rules, but also rules on property rights. On the one hand, a clear and protected right over the desired land is a necessary prerequisite for this balanced governance structure. Before the commencement of the transfer project, the landholders involved and their rights over the land shall be ascertained by local governments and/or the demanders of land. On the other hand, although the term ‘large-scale transfers of farmland’ is frequently used in this research, it does not mean that all investment programs (both existing and future ones) will touch upon a massive transfer of land rights, whether ownership rights or land use rights. On the contrary, a consensus has been reached in the international society that alternative models of agricultural investment that do not involve transfers of land ownership should be improved and promoted by national governments (Taylor and Bending, 2009: 19). To some extent, if affected farmers can still hold their land rights during the operation of such investment projects, their bargaining power and participation may be secured. This is also supported by the latest practical guideline of the FAO on the FPIC in land acquisition (FAO, 2014: 34). In the 2014 No.1 Document of the CCCPC and the State Council, the farmland use right (FUR) of Chinese farmers is separated into a right to contract land and a right to manage land, and only the right to manage land is allowed to be transferred. In other words, the collective farmers are still entitled to use their contracted farmland after the transfer contract expires. This provides a good example for other countries.

Second, in terms of the nature of the rules needed, in addition to the rules of private law — contract rules and the rules on property rights, rules of public law are also included. Public law refers to the legal rules and regulations issued by the legislature or the government as the regulator of the overall land use, with a view to realizing certain regulatory objectives. The Land Administration Law in China is a typical example. In accordance with the contract governance, contract-related rules are firstly used as a facilitator for private transactions. In the meantime, its regulatory function is also significant, especially if a certain public interest is involved. Furthermore, the regulatory objective declared in the public law can be achieved through improving the relevant contract rules. For instance, the requirements for a prior approval of certain government agency, the registration or record of transfer and the participatory monitoring over the use of transferred farmland, are aimed at preventing conflicts caused by informalities and protecting a certain amount of farmland resources. To some extent, certain constraints on the capacity of transferees, the term of transfer contracts and the area of the transferred land are necessary, and should be integrated into the future legislation. Such regulatory rules are more important when it comes to large-scale transfers of farmland.

As discussed above, the governance of large-scale transfers of farmland in China focuses on a series of procedural requirements, which can secure full participation of the affected farmers in the whole process of concluding and implementing the contract, or throughout the lifetime of the project involved. These procedural mechanisms are principally composed of certain mandatory rules, which can be included in specific contracts in the form of default rules. Furthermore, the protection of farmers' land rights and participation means that the investor may assume more responsibilities and obligations in this contractual relationship. For example, the investor shall provide relevant information regarding itself and the projects involved in time, and accept the supervision of relevant government agencies and the affected collective farmers. Such regulatory rules can be included in the CSR, and a business case for responsible investments can be established through the cooperation of various stakeholders involved (Wehrmann, 2014).³³² Nevertheless, such default rules aimed at securing both farmers'

³³² Stakeholders here include clients/consumers, civil society organizations and media, governments, regional bodies such as the EU, financial institutions, and the companies themselves. Companies may influence the consumers through benchmarking and reporting on land governance, to better exploit their corporate social responsibilities in terms of investments concerning land. Meanwhile, governments can translate relevant regulatory measures into certain legally binding rules and sanctions should be available in the case of violations (Wehrmann, 2014: 17). In addition to the creation of legal rules in the international level based on the existing guidance and guidelines on responsible investments, national governments should also be encouraged to making special laws or certain rules primarily on the investments of domestic investors.

participation and certain public goals should not damage the basic freedom of contract of both parties. A procedural framework within which both parties are allowed to devise a detailed structure to conduct direct negotiations shall be provided by law. To sum up, the final goal of this balanced governance structure is an equal bargaining process on the basis of these procedural and mandatory rules.

Third, with regard to the main sources of the rules needed for establishing a balanced governance structure, in addition to the legal regulations and policies of the central agencies (the CCCPC and the State Council/the central government), rules from relevant international documents and local experiments should also be considered. As mentioned above, current rules on farmland transfer in China mainly concern the transfers among individual farmers, and the transfers between farmers and certain organizations. In accordance with the central policies, the organizations here are limited to family farms or farmers' cooperatives. Transfers to other investors, especially to various enterprises are strictly constrained by the central policies. Even for these small-scale transfers among farmers, there is no unified law or regulation. Relevant rules in the RLCL and the 2005 Measures of the MOA in particular, provide a basic framework of this contractual relationship. However, more detailed rules which can meet the different needs of the parties in terms of the transfer term and the area of the land concerned are needed. In this respect, the related regulations in the Dutch Civil Code can help to devise a practical and well-regulated framework of governing this contractual relationship. In the meantime, the introduction of more specific rules on different types of transfer contracts should not increase the transaction costs of both parties, especially the transferors. As mentioned in chapter 5 (5.6.1), farmland transfers in practice are usually informal and limited to kinships. The low cost guaranteed by the trust in each other and the zero transfer fees is the root cause behind the informality. In order to stimulate the use of formal contracts in transfers among farmers, apart from providing more choices for both parties by designing a diversified contract system, extra costs incurred with formalities shall be afforded by local governments or the state.³³³

Besides, although the transfer of farmland to companies or enterprises is clearly restricted by the central government, in practice it already existed in one way or another. The pilot of contributing the FUR of individual farmers as a share to

This is especially important for countries like China and India, where the investments are mainly from domestic companies.

³³³ For instance, costs for the registration and certification of rural land should not be borne by farmers. Otherwise, the participation of the affected farmers will become even lower. As shown in chapter 5 (5.3.2), if all the costs are paid by the local governments, the whole process will also slow down as the local government is not enthusiastic about this huge investment. For the relatively backward areas in particular, the investment of the central government is indispensable.

companies in Chongqing City was an early experiment of introducing companies into agricultural production.³³⁴ In recent years, with the firm support of the central government to farmland transfer, some domestic enterprises or businessman began to be interested in agriculture. However, reportedly, most of these investments in agriculture involve an enclosure of large-scale farmland, and sometimes the farmland use purpose changed.³³⁵ In addition to those domestic investments, the FDI in agriculture concerning large-scale transfers of farmland also happens in China, although it is much less than the African countries (Ho and Hofman, 2014). Conflicts between these foreign investors and affected farmers are not less than those concerning domestic investors.³³⁶ Under such circumstances, relevant rules on the FPIC from the international documents should be carefully considered in the making of future legislation. Meanwhile, experiments in local areas, such as the

³³⁴ In 2007, as a national pilot area for the comprehensive reform in both urban and rural areas, the new policy of Chongqing City expressly permitted that the FUR can be contributed as a share to establish a company. According to the Notice of the Office of Administration for Industry and Commerce in Chongqing City on Relevant Issues about the Registration of the Contribution of the Right to Contract and Manage Land to Establish a Company (*Chongqingshi gongshang xingzheng guanliju bangongshi guanyu nongcun tudi chengbao jingyingquan rugu sheli gongsi zhuce dengji youguan wenti de tongzhi* 重庆市工商行政管理局办公室关于农村土地承包经营权入股设立公司注册登记有关问题的通知), which was announced in August 2007, the company here only refers to the limited liability company. However, this reform was banned by the central government imperatively. Based on the requirement of the central government, the Agriculture Committee of Chongqing and the Chongqing Industry and Commerce Bureau released the Notification of Relevant Issues about the Registration of the Contribution of the the Right to Contract and Manage Land to Farmers' Professional Cooperatives (*guanyu yi nongcun tudi chengbao jingyingquan rugu fazhan nongmin zhuan ye hezuoshe zhuce dengji youguan wenti de tongzhi* 关于以农村土地承包经营权入股发展农民专业合作社注册登记有关问题的通知) in 2009, which is committed to the development of farmers' cooperatives. Therefore, farmers cannot contribute their FURs as a share to establish companies even in pilot areas.

³³⁵ The most famous example is that of the pig farms established by Ding Lei — the CEO of NetEase — one of China's most famous internet technology companies. In 2009, NetEase rented 1,200 *mu* of collective land from Luosifang Village (洛四房村), Anji County (安吉县), with a view to exploring new models of raising pigs. According to the first planning, NetEase will invest 300 million Yuan to build a modern pig farm, which can accommodate 6,000 to 10,000 pigs. However, until 2014, only 500 pigs are raised in the farm, which is far from the original plans. For more information, please see Pig farms of the NetEase (网易养猪场), available at: <http://baike.baidu.com/view/5422348.htm>.

³³⁶ The most typical case concerning the FDI in China is the forestland acquisition of Stora Enso — a large multinational pulp and paper producer for its eucalyptus plantations. Technically, conflicts involved in this case study is not directly between farmers and the foreign company. Relied on local governments and certain intermediaries, Stora Enso acquired 80% of the land it needed — millions *mu* (1 *mu* equals to 0.067 hectares or 667 square meters) of forestland. Although Stora Enso itself was not physically involved in these coercive land acquisitions, as a direct beneficiary, it should be partly responsible for the violations during the acquisition process. As recommendations, design and implement a more pro-farmer contract screening and correction process, strictly follow laws and the central policies in the event of future land acquisition, pay rent directly to individual households, and further improve grievance mechanisms to effectively address farmers' concerns are proposed to clarify Stora Enso's responsibilities. However, the motivation for the company to follow these suggestions is not discussed (Li and Nielsen, 2010; Li and Wang, 2014).

establishment of the Comprehensive Agriculture Equity Exchange in Wuhan City, provide practical experiences for the making of regulatory rules on large-scale investment projects. In terms of securing a FPIC of farmers in particular, the relevant rules of the Exchange do play an important role.

Therefore, apart from the direct intervention of the state through legislation — ‘hard law’, more ‘soft law’ is taken into account by this governance perspective. Regarding the governance of market transfers of farmland, relevant rules in the RLCL and the 2005 Measures of the MOA are ‘hard law’, while rules from the international documents and local experience belong to ‘soft law’. In the new governance structure for the transfer of farmland, especially the large one, these ‘soft’ rules will play a bigger role than the hard ones. This means that private parties will be involved more in this issue, which was traditionally strictly-regulated by the government. Furthermore, the making of a unified law/regulation of the market transfers of farmland may be conducted from both a horizontal and a vertical dimension. In terms of the horizontal dimension, rules for the capacity of the transferee, various enterprises in particular, the FPIC of the affected farmers, the approval and authentication of contracts, the mandatory obligations of commercial investors, the participatory monitoring of the performance of contracts, and the existing rules on legal remedies for the breach of contracts should be integrated together, in order to enrich the basic contractual framework under the current legal system. In terms of the vertical dimension, on the basis of the existing hard law — national laws and regulations, rules from the related international documents, local experiments, and central policies shall be strengthened and improved to promote the implementation of related legal rules. In this perspective, an agency which can combine all stakeholders helps to make more practical and coordinated rules concerning farmland transfer. The Land Consultative Forum established recently in Mozambique is a good example. Although it is still challenged in terms of the power of decision-making and a narrow scale of participation, it did provide a necessary platform to discuss a number of increasingly urgent reforms.³³⁷

7.7 Concluding Remarks

In essence, a shift from the current regulatory system to a governance perspective in regulating farmland transfer contributes to the implementation of existing legal

³³⁷ The first plan for establishing such a forum actually was proposed more than 10 years ago. However, it is until October 2010 that the Government of Mozambique established this multi-stakeholder forum through a decree. Composed of government and civil society representatives, this body meets to discuss certain urgent issues concerning land, and provide recommendations for the government to modify current land policies. For more information about this Forum, please see Hanlon, 2011.

rules and related policies in practice on the one hand; on the other hand, it helps to formulate new rules governing certain behaviors of the parties involved. Under the regulatory system, it is the government who can control the whole process of the rule-making. In the new governance structure, actors who will be affected by the transfers of farmland will have chances to actually influence the final governing norms. Nevertheless, due to the special nature of farmland, even if the private party can be involved more in this new governance structure, a self-regulation of such a contractual relationship is not feasible. Whether in the governance of transfers among smallholders or the governance of large-scale transfers, certain regulatory rules are indispensable, in order to secure an equal bargaining status especially for the weaker parties. An effective mechanism for monitoring how these rules work out in practice is also needed to avoid excessive intervention by the public authorities. The final objective of such a governance structure is to find a right balance between the private interests and the public interests involved.

Based on the international efforts to make legally binding rules on the responsible investments concerning the farmland of smallholders, national governments are supposed to translate such related rules into state laws or national policies in a timely manner. Moreover, commercial investors should be encouraged to respect the fundamental rights of the affected smallholders and obey their responsibilities in land investments. In the case of a lack of motivation of a certain investor in following its responsibilities, these requirements can be converted into mandatory obligations, and clearly defined by the law and the specific contract. In fact, these two approaches to limiting the violations of the investors can be improved at the same time. Regarding the lack of good models for local community benefits in land-based investments, experiments or pilots in local areas shall be encouraged and promoted by the central government. In this respect, the 'try and error' model adopted by the Chinese government, more accurately, the open attitude of the central government to local experiments on (collective) land transfer issues may provide inspiration for other countries. It is worth noting that the determination of a governance structure for farmland use in a certain country relates closely to its development strategy. For the governments in developing countries, due to the domination of industrialization and modernization, it is hard to manage the increasing commercial pressures on land. Whether in countries where the investments are mainly from domestic investors such as China and India, or countries where the investments are dominated by FDIs like most African countries, how to control this pressure on farmland use depends on how the development strategy is. This is more important for the design or the reform of a land expropriation system, which will be discussed in detail in chapter 8.

8 Adoption of the international model of a well-governed expropriation system in China³³⁸

As concluded in chapter 7, the governance structure of farmland use in a certain country depends heavily on its development strategy. Under a ‘development at any cost’ view, it is conceivable that a large number of private interests have to be sacrificed in the name of public interests — economic growth of the country. This is inevitable in countries suffered from severe poverty and backwardness before, such as China and India, in which the social system, including the land system, is designed for supporting its economic growth (Huang et al., 2012). The dual structure of Chinese society and the unequal urban and rural land use are typical examples. In order to satisfy the needs of national and local economic construction projects for land, the state is endowed with a power of land expropriation or eminent domain by the Constitution. What is more notable is that, with little restriction on this state power, the exclusion of farmers in the expropriation process is a reality (ADB, 2007: 22-23, 26). As discussed in chapter 4 (4.4.1) and chapter 5 (5.4.1), due to the unclear definition of the public purpose, whether this is intentional or not, the scope of expropriation under the law is too broad. It is unfair to the rights-holders of the rural collective land, as the dominance of governments is pretty obvious throughout the whole process. Characterized by this strict government control, little private autonomy is allowed concerning the use of rural collective land in China, and the farmland conversion in particular. Neither can the affected private parties effectively participate in the use and the disposition of their own land (rights) (5.4.2). To some extent, it is because of the lack of actual and effective participation of the affected parties that the land expropriation system in China is so problematic. As the land expropriation system is a country-specific issue, which means every country has its own set of rules, the understanding as well as the scale of participation is consequently diverse across the world. Certain international criteria for measuring the effectiveness of participation of the affected parties in land expropriation are thus significant.

In this chapter, based firstly on the existing international documents on land governance, especially the governance of land expropriation, expropriation will be redefined from the perspective of governance. Then, a four-phase model of participation in land expropriation from the international experiences will be introduced in the second section. This is followed by an examination regarding the compliance of the current expropriation system under the Chinese law and policies with this four-phase participation framework in the third section. Specifically, the

³³⁸ A brief version of this chapter has been published in *European Property Law Journal*, 2015; 4(3): 1–22.

problems of the expropriation system of collective land in China, and the feasible measures that can be adopted to improve the current situation will be proposed and analyzed. Under the bifurcated land system in China, a more participatory framework for the expropriation of (houses on) the state-owned land has been established. This lays a foundation for the adoption of the four-phase participation framework in the expropriation system of China, including the expropriation of collective land. This will be discussed in the fourth section. In comparison with this international model, at least six issues should be highlighted in China concerning the expropriation of collective land, which is the focus of the fifth section. Certain concluding remarks will be given as the final part.

8.1 A governance perspective for land expropriation

As a matter of fact, whether in countries where private land ownership is adopted, or in countries that accept state land ownership, the state is given a power to acquire land for public purposes. Usually, it is accompanied by a requirement for a fair compensation. This expropriation power is either directly conferred by the Constitution such as China, the Netherlands and the US; or recognized by a separate legislation — land expropriation law/act, such as India.³³⁹ Although expropriation has different synonyms across the world, like the compulsory acquisition in the UK and the takings in the US, it is usually based on the state power of eminent domain (Verstappen, 2014). I will not go into details regarding the evolution of this power in this chapter. As mentioned, a traditionally defined expropriation must involve a public purpose and fair compensation for the affected people. However, this is far from sufficient to support a fair, transparent and especially participatory procedure, through which a proper balance between such private interests and the public interests concerned is more likely to be realized. As the participation of the affected farmers in market transfers of farmland, a series of international guidelines are also available for the governance of land expropriation, including the participation of the affected parties. In particular, the standards proposed for assessing the specific structure of governing land expropriation are notable.

³³⁹ According to Paragraph 3, Article 10 of the Constitution of the PRC, the state may, for the public interest, expropriate or take over land for public use, and pay compensation in accordance with the law. Article 14 of the Constitution of the Kingdom of the Netherlands provides that, expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament. Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for. Meanwhile, in accordance with the Fifth Amendment to the United States Constitution, no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8.1.1 What is good land governance?

The recent and the most influential documents concerning the governance of land issues, and land expropriation in particular, are the Voluntary Guidelines of the FAO on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security in 2012 (usually named VGGT), the Land Governance Assessment Framework of World Bank in 2012 (usually named LGAF), and the Working Paper I of GLTN (Global Land Tool Network) — Evictions, Acquisition, Expropriation and Compensation: Practices and Selected Case Studies in 2013. Earlier documents include the Land Tenure Studies of the FAO No.9 — Good Governance in Land Tenure and Administration in 2007 and the Land Tenure Studies of the FAO No.10 — the Compulsory Acquisition of Land and Compensation in 2009. The latter provides a relatively inclusive guide regarding the procedure of land expropriation.

With the aim of promoting responsible governance of tenure of land and other resources, five general principles and the ten principles of implementation are proposed in the VGGT (FAO, 2012: 3-5). As shown by these principles, responsible governance of land is a holistic and interconnected system, and the fair treatment of the people affected is the objective. This is also confirmed by the FAO land tenure study No. 9 (Grover et al., 2007: 6). A good framework for land governance is certainly indispensable, yet how to assess the effectiveness of this interlinked and complicated system is also important. The LGAF can be regarded as a proper tool for this assessment. Following the methodology used by the Public Expenditure and Financial Accountability (PEFA) assessment tool, 21 Land Governance Indicators (LGIs) covering five thematic areas of good land governance are created (Deininger et al., 2012: 39, 40-45). On the one hand, based on the requirement for the recognition and protection of private land rights and the restriction and supervision over relevant public powers, fairness to the private landholders is guaranteed (LGI 14). On the other hand, as shown by the indicators, good land governance should also be cost-effective and efficient (LGI 13), which means good governance of land tenure shall build upon a proper balance between efficiency and fairness. This also applies to the governance of land expropriation.

It is understandable that there must be some overlap between the content of VGGT and the indicators under the framework of LGAF, as both of them deal with the framework of good land governance. In the meantime, they can supplement each other if certain cooperation can be available. Generally, good land governance structures involve the legal recognition and enforcement of tenure rights, management of land use and transfers, management of public land, as well as land administration. Although the establishment of a well-functioning governance

structure does not mean that each item above must meet the highest standards, at least they should be available and work effectively in practice.³⁴⁰

8.1.2 Redefinition of expropriation from a governance perspective

Unlike the traditional defined land expropriation, under this overall land governance framework — an interconnected and balanced system, more elements shall be added into the expropriation system. A newly defined (land) expropriation is needed with the improvement of land governance. As discussed above, a holistic perspective is included in responsible/good land governance. In addition to seeking a balance between the private interests and the public interests involved in specific issues, it also emphasizes the interactions among different parties. Furthermore, a holistic consideration of expropriation requires a prior examination of the expropriation itself as a way to acquire the desired land. In certain cases, expropriation may not be the best way to achieve a public purpose, and acquiring the desired land on the free land market should be the first choice of governments (Verstappen, 2014: 17). Additional methods for determining the public purpose and a fair compensation are also needed. Most importantly, from the perspective of the affected parties, this new understanding of expropriation essentially signifies broader participation of these private parties. No matter in which phases of expropriation, their effective participation helps to realize a balance between the efficiency and fairness of the overall process — a goal pursued by good land governance. In the VGGT of the FAO (Section 16 Expropriation and compensation), the LGAF of World Bank (LGI-13 and LGI-14), and especially the Working Paper I of the GLTN, the elements in this newly defined expropriation have been mentioned and discussed (van Eerd and Banerjee, 2013: 58-61,78-83).³⁴¹

8.2 An international governance of participation in land expropriation

It is obvious that broader participation of the parties involved is the key to understanding and realizing the newly defined expropriation.³⁴² Also, because of

³⁴⁰ It is worth noting that the LGAF, more accurately, the LGIs are not designed for ranking land governance structures through the score of each indicator. Instead, it is used as a tool to guide discussion about assessments from the dimensions of certain expert panels and drawing of lessons from good practice in different countries (Deininger et al., 2012: 46).

³⁴¹ In the conclusion as well as the annex part of this Working Paper, the definition and determination of public interests and compensation are particularly discussed, and an initial idea for redefining expropriation is proposed. For the discussion on the determination of public purpose, please see page 58, 78-79, and 81-83. For compensation, it is on page 59-61, and 79-80.

³⁴² The expropriation here refers to the administrative expropriation, instead of the judicial expropriation or statutory expropriation. In most cases, expropriations occur through an administrative action. That is, with

this governance perspective, the content of the affected parties' participation becomes much richer. In accordance with the different stages of expropriation, there are at least four phases of participation involved in specific programs. It includes the participation prior to the approval of an expropriation decision, the participation prior to the approval of compensation and resettlement plans, the participation in the implementation of the expropriation plan, and the participation of the affected people in monitoring the use of the expropriated land. Although these different phases of participation have been stated somewhere in the international documents, the FAO land tenure study No. 10 in particular, none of them has made a clear distinction between these four phases.³⁴³

First, regarding the decision-making of a proposed expropriation, it is usually controlled by the government and on the basis of a public purpose. With the aim of limiting the expropriation power of the government, the public purpose shall be clearly defined in law (Keith et al., 2009: 10-11). Moreover, as the determination of public purposes is usually controlled by governments, measures such as a Social Impact Assessment (SIA) can restrict this expropriation power. This is especially important for countries where there is no clear definition of public purposes in law, or an open-ended article is provided for the definition. In developed countries such as the Netherlands, spatial planning and especially local zoning plans play a key role in determining the public purpose. To some extent, the public purpose required by expropriation is secured by the active and effective participation of affected people in the making and modification of zoning plans. In the event that the intended use in the zoning plan differs from the current use, the government is entitled to expropriate the land concerned, which is followed by a series of procedural requirements for the involvement of the affected people (Verstappen, 2014: 11). In the meantime, even if the land is acquired for a public purpose, alternative approaches to achieving this purpose can be discovered through effective participation of all affected parties. That is, attempts to acquire the land in question through voluntary transactions should be made by the acquiring authority before exercising the expropriation power (Keith et al., 2009: 54).

Furthermore, if the voluntary purchase failed, issues involving effective and equal participation in this decision-making, the access to information, people who can participate in the procedure and forms of participation should be clarified

the purpose of realizing a public interest, the state exercises its statutory power to expropriate desired land through certain administrative agencies.

³⁴³ Besides, the Technical Guide of FAO on Respecting Free, Prior and Informed Consent (FPIC) in land acquisition discussed in chapter 7 may also provide certain inspiration in this respect. Although it focuses on the implementation of the FPIC in land acquisition concerning large-scale investments in land, the emphasis on the participation of affected people in the whole acquisition process can be adopted regarding the participation in land expropriation.

beforehand (Hoops, 2014). Firstly, in accordance with the VGGT, existing power imbalances between different parties should be taken into consideration (FAO, 2012: 5). In particular, a fair representative mechanism shall be established based on the free will of the affected rights-holders (FAO, 2012: 16). Secondly, in order to facilitate effective participation in the decision-making, the acquiring authority is encouraged or even obliged to provide related information in a timely manner (Keith et al., 2009: 20). Thirdly, regarding the range of participants, anyone likely to be affected should be identified, and properly informed and consulted at all stages (FAO, 2012: 27-28). As required by the FAO study No. 10, the participation of individuals and groups in related decision-making should be active, free, effective, meaningful and informed (Keith et al., 2009: 20). Last but not least, the most crucial issue in this phase concerns the forms of participation, which directly determines the result of the participation. Again, an impact assessment in the planning phase of proposed projects, including an SIA, is strongly promoted in the FAO study No. 10 (Keith et al., 2009: 19). The SIA adopted in the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR) of India is a typical example in this respect.³⁴⁴

Second, in addition to the requirement of a public purpose, another prerequisite for expropriation in most national laws is a fair compensation. This concerns the participation in the second phase of expropriation. Section 16.3 of the VGGT requires that the state shall ensure a fair valuation and a prompt compensation in accordance with national law (FAO, 2012: 28). As a fair compensation generally means the market value of the desired land, the valuation of land is thus crucial to the amount of final compensation. In the FAO study No. 10, certain assistance is encouraged so that owners and occupants can participate effectively in negotiations on valuation and compensation (Keith et al., 2009: 17). Whether the valuation is undertaken by the acquiring authority or by an independent appraisal agency, the affected rights-holders should be allowed to determine the value of their land through hiring their own valuers. This cost should be covered by the acquiring authority (Keith et al., 2009: 25). In the later VGGT, as a part of land administration systems, the establishment of a fair and timely valuation system for expropriation is regarded as a responsibility of national states. Instead of focusing on the assistance for the affected people, it highlights the transparency, quality and training of certain national standards for valuation (FAO, 2012: 30-31). However,

³⁴⁴ This new Act was approved in September 2013, and replaced the Land Acquisition Act adopted in 1894. As a matter of fact, an SIA as a preliminary investigation for determining the social impact and public purpose of specific projects is also required in the old act. However, it was optional. In the new act, it becomes compulsory and a much more inclusive procedure covering the preparation of the SIA study, public hearing for SIA, publication of SIA study, appraisal of SIA report by an expert group, and the exemption from SIA is provided.

this does not preclude the participation of the affected people. If they do not trust the valuation result, opportunities to apply for an administrative and/or judicial review of such decisions should be provided (FAO, 2012: 10). Regarding the form of compensation, if it is possible, alternative land shall be used as an appropriate compensation (FAO, 2012: 28). To some extent, providing suitable land can help to reduce objections to the process and reduce the total costs of compensation (Keith et al., 2009: 38-39).

Third, even if the whole expropriation plan has been approved by competent authorities, in the implementation process, the participation of affected people is still significant. Here the participation mainly concerns the supervision over the competent authority in implementing the agreed compensation and resettlement. In many Constitutions or special legislations, it is only mentioned that the payment of compensation should be prompt. There is no (clear) provision for the period in which payment is to be made (Keith et al., 2009: 26). In order to ensure that the whole compensation can be paid on time, the legislation should require that only after the entire compensation or a substantial percentage of it has been received by the affected people, can the acquiring authority take possession of the land. In the case of delay in payment, those people concerned are entitled to claim for the overdue money and the interests on it (Keith et al., 2009: 27). The LGAF suggests that most expropriated land owners shall receive compensation within one year (Deiningner et al., 2012: 44). The legislation may also need to provide the basis on which compensation is allocated between landowners and the real land users, in the case that they are not the same (Keith et al., 2009: 32). Moreover, people who have to vacate their land and/or houses should be given enough time to clear out the land or move to the resettlement housing. For farmers who rely on agriculture for a living in particular, a certain period of time should be set aside to recoup their investments in land (Keith et al., 2009: 44).

Fourth, as one part of a land governance system, an appropriate monitoring mechanism is indispensable for improving the governance structure of land tenure (FAO, 2012: 5).³⁴⁵ Specific to the monitoring regarding land expropriation, one primary objective is to safeguard the legal rights and interests of the affected

³⁴⁵ According to 3B.10 of the VGGT, states should improve mechanisms for monitoring and analysis of tenure governance, in order to develop evidence-based programs and secure on-going improvements. Then, the monitoring of related policies, legal and organizational frameworks by national states and other parties (civil society, private sector and academia) (5.8), the state monitoring of the outcome of land allocation programs (8.11), the monitoring of information on market transactions and information on market values (11.4), the effective monitoring of the implementation and impacts of agreements involving large-scale transactions in tenure rights (12.14), the monitoring of redistributive reform programs (15.10), and monitoring of the regulated spatial planning (20.1 and 20.4), are mentioned in sequence, but not specifically on the monitoring of land expropriation.

people. Another important goal is to curb and reduce corruption in governing land use (FAO, 2012: 8-9). The establishment of a specialized court or a tribunal that mainly deals with disputes over land rights can contribute to the protection of the affected people's rights, and ensure the fairness of an expropriation process (FAO, 2012: 33; Deininger et al., 2012: 44). In addition to the judicial protection, the creation of a special monitoring agency for violations including corruption concerning expropriation also helps to protect this fairness. Regarding the monitoring of the land use after the expropriation is completed, usually this is the responsibility of certain government agencies. However, when such an agency is not available or it does not really work in practice, the monitoring from private parties such as NGOs or even social media may play an important role (FAO, 2009: 50-51; Bong et al., 2012; Arpit, 2012). The affected people can also help to supervise the use of the expropriated land. Moreover, in the event that the land is not used in accordance with the purpose of the initial plan, or the land is not needed due to the changes of plans afterwards, the original landholders should have a priority to re-claim the land (FAO, 2012: 28). The establishment of a special monitoring agency and the public participation in the monitoring of land use can ensure the use efficiency of the expropriated land at the same time. According to the LGAF of the World Bank, the time-efficiency of expropriation processes can be guaranteed, if the majority of land that has been expropriated in the past 3 years has been transferred to its destined use (LGI 13 ii) (Deininger et al., 2012: 43). This is, however, not the usual case in countries like China, where the management of land use is dominated by the need of industrialization and economic development (Ding, 2007: 3-5). As analyzed below, a new governance structure for land expropriation is urgently needed in China.

8.3 A new governance structure for land expropriation in China

The design of a land governance system is deeply influenced by the development strategy of a certain country. In order to get rid of poverty and promote industrialization, land rights and interests of Chinese farmers were sacrificed for the development of urban area (Dang, 2005). On the basis of a bifurcated land system, the use and transfer of rural land use rights are greatly restricted, especially by the disordered land expropriation system (L. Chen, 2014). According to the Decision of the Central Committee of CPC (CCCPC) on Some Major Issues Concerning Comprehensively Deepening the Reform adopted in November 2013 (*zhonggong zhongyang guanyu quanmian shenhua gaige ruogan zhongda wenti de jueding* 中共中央关于全面深化改革若干重大问题的决定) (the 2013 Decision), a major strategic judgment that development is still the key to solving all the problems in China was proposed. This means economic development is and will be

the central task of future reforms in China. Meanwhile, the development here does not merely focus on the increase of efficiency ensured by an overarching control of governments, but a fair and more market-oriented development.³⁴⁶ This new development strategy will influence the reform of expropriation system, as since the Tax Sharing Reform (fenshuizhi 分税制) in 1994, land expropriation is regarded as the main way to acquire land to develop the local economy (Loo and Chow, 2006). Currently, the expropriation process is overall dominated by local governments — the acquiring authority, thus it is mainly an administrative procedure. The role of the judiciary in expropriation is rather limited (ADB, 2007: 31; Wörner, 2014: 15). What is more notable is that, the affected farmers do not have rights to oppose the expropriation plan. With a vague definition of public interests, the necessity of expropriation is barely questioned (ADB, 2007: 22; Ding, 2007: 7-8; Washburn, 2011: 81-82; Wörner, 2014: 4-5).

8.3.1 Participation prior to the expropriation decision

To some extent, there are two types of land expropriation in China. The first one is the widely acknowledged ‘expropriation for public interests’, which is regulated by Article 10 of the Constitution. However, the second type of expropriation is not purely for public interests. In accordance with the Law on the Administration of the Urban Real Estate (Article 9) and the 1998 LAL (Article 43 and 63), investors cannot directly negotiate and buy the collective construction land from the collective. Only after the desired land is expropriated and converted into state-owned land, may it be granted (*chu rang* 出让) to investors by local governments.³⁴⁷ This can be named ‘expropriation for private interests under the name of public interests’. Although it is hard to measure the proportion of each type of expropriation, the rapid urbanization and the recently exposed ‘Ghost Town’ in an increasing number of local areas show that the percentage of the second type is huge.³⁴⁸ One may argue that the land expropriation for urbanization is for public

³⁴⁶ According to the 2013 Decision of the CCCPC, an appropriate handling of the relationship between the government and the market is the core issue of the economic reform. On the one hand, the market should play a decisive role in allocating resources; on the other hand, the functions of the government should be improved to promote further economic development.

³⁴⁷ The full text of the Law on the Administration of the Urban Real Estate (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383755.htm; and the full text of the 1998 LAL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383939.htm.

³⁴⁸ According to one survey of the Reform and Development Center of Cities and Small Towns (*chengshi he xiaochengzhen gaige fazhan zhongxin* 城市和小城镇改革发展中心) of the National Development and Reform Commission (NDRC) in 2013, in the surveyed 156 prefecture-level cities and 161 county-level cities from 12 provinces, 92.9% of the prefecture-level cities and 41.6% of the county-level cities proposed the construction of new cities and new districts. Moreover, most new constructions have been put into action, instead of being in the local planning (Li and Fan, 2013).

interests, yet the unrealistic pursuit of urban expansion and the resulting abuse of expropriation power is definitely not for the public good.

In accordance with the international framework, anyone that will likely be affected is entitled to participate in the planning of expropriation projects. As long as the parties that likely to be affected can prove that there are alternative and practical ways to realize the proposed project, the desired land should not be expropriated. This provides an opportunity for private parties to challenge the public purpose claimed by the acquiring authority. However, the transition from a totally government-controlled decision-making process to a participatory one under the Chinese context is not easy. In particular, not all the parties involved are capable of conducting a comprehensive survey, and thus propose convincing proofs as to the impracticability of the project. In this case, the affected people may hire certain experts and get reimbursement from the government, if they can succeed in halting the expropriation. A more pragmatic solution is the design of an SIA provided in the new land acquisition act of India mentioned above. According to Article 4 (4) of the LARR³⁴⁹ in India, the SIA study should include an assessment for the purpose of the proposed expropriation, estimated number of affected families and affected property, whether the amount of desired land is a bare minimum, and whether there is an alternative land for realizing this project. The overall costs incurred by the SIA study and the project should be lower than the benefits generated by the project. Views of the affected families will be recorded and included in the SIA Report through a compulsory public hearing held by appropriate governments (Article 5). More importantly, the final SIA Report has to be appraised by an independent multi-disciplinary expert group. If the project is identified as inconsistent with the public purpose that is clearly defined in the Act (Article 2), or the overall costs exceed the expected benefits, a recommendation that the project shall be stopped will be made (Article 7). It can be said that the SIA study makes the involvement of the affected people in the identification of the expropriation purpose possible.³⁵⁰

As mentioned, the practice in the Netherlands provides another way of securing the public interest in the change of land use. Through firmly guaranteed participation in the making and the modification of local zoning, the public purpose or the land use agreed by the public can be secured. To put it differently, land expropriation in the Netherlands is primarily based on the change of zoning plans,

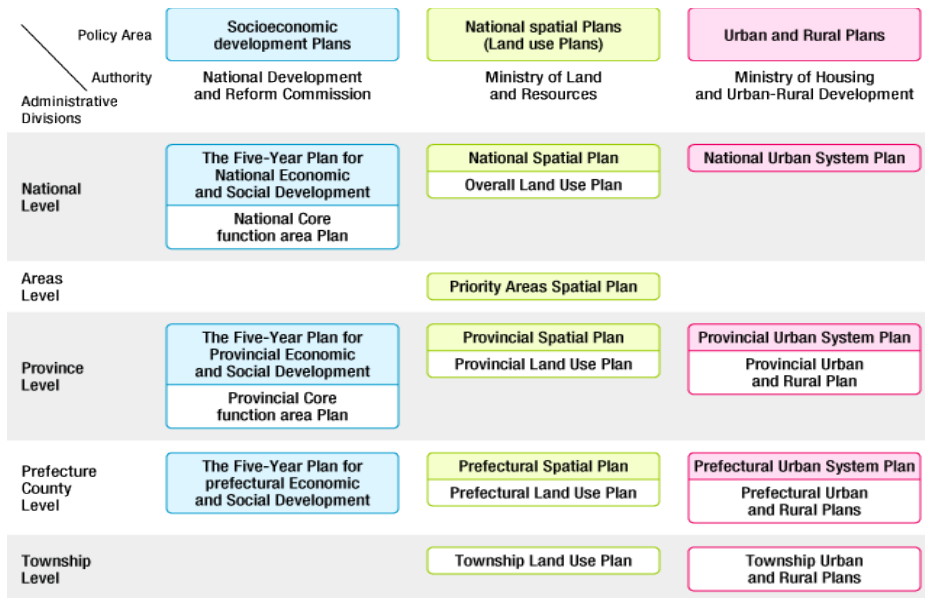
³⁴⁹ The full text of this act (English version) is available at: [http://rural.nic.in/sites/downloads/ general/ls%20 version%20of%20larr%20%20bill.pdf](http://rural.nic.in/sites/downloads/general/ls%20version%20of%20larr%20%20bill.pdf).

³⁵⁰ However, in the later LARR (Amendment) Bill, 2015, four types of projects have been exempted from the SIA. The amended Bill is available at: [http://www.prsindia.org/uploads/media/Land%20and%20 R%20and%20R/Notice%20of%20amendments-LARR.pdf](http://www.prsindia.org/uploads/media/Land%20and%20R%20and%20R/Notice%20of%20amendments-LARR.pdf).

although the change of local zoning plans does not mean that the landholders have to change the land use immediately (Cheng, 2010). Unlike the Netherlands, expropriation in China is merely initiated by governments based on an ambiguous public purpose — mostly in the name of local economic development. Also, the land use planning system in China is fairly complicated. In general, there are three types of plans in policies concerning spatial planning and territorial development in China — socioeconomic development plans, national spatial plans (land use plans), and urban and rural plans, which are managed by three different departments of the State Council (MLTN, 2014) (Figure 8.1). In accordance with the law, especially the 1998 LAL, the overall land use plan shall be regarded as the basis for making and modifying other related plans (Article 22). Based on the Outline of an Overall National Land Use Plan (2006-2020) issued in 2009 (the 2009 Outline) by the State Council, together with the other special planning regarding land consolidation and reclamation, now a relatively complete system of land use planning is available in China. However, this overall land use plan is not legally clarified and protected. The current legal regulations regarding land use planning are too simple to attract local governments' attention and restrain illegal land use.³⁵¹ Besides, the regulations and the agencies in charge of specific planning are rather dispersed. For instance, urban and rural planning is adjusted by the Urban and Rural Planning Law (URPL), and forest land use planning is adjusted by the Forest Law.

³⁵¹ The current law (mainly the LAL) only defines the basic principle of land use planning and the obligation of governments for drawing up planning, and there are no regulations on the legal status and legal force of the planning. In practice, some local governments adjust the land use planning freely in its implementation process. In particular, when the land use planning is inconsistent with other construction planning, usually the land use planning is forced to give way to the construction project. That is, planning concerning land use in local areas is not well made and implemented in reality (Dong, 2013).

Figure 8.1 System of Spatial Policy in China



Sourced from: CLAIR, Japan (July 2007); ‘Local Government and Fiscal System of China’, quoted from the website of the Ministry of Land, Infrastructure, Transport and Tourism of Japan, http://www.mlit.go.jp/kokudokeikaku/international/spw/general/china/index_e.html.

More notably, as the most essential principle of an effective planning, public participation is not fully legalized yet.³⁵² As it can secure the impartiality and fairness of the planning, and especially improve the knowledge and awareness of the affected people in the planning process, it should be further refined in law. In terms of the making of a law on national land use planning, certain local regulations are noteworthy, such as the Regulation of Guangdong Province on Land Use Planning in 2009 and the Regulation of Zhejiang Province on Land Use Planning in 2011. These local regulations may facilitate the formulation of a law on national land use planning. Nevertheless, the making and effective

³⁵² With the promulgation of the URPL in 2007, the rural planning (including village planning) is incorporated into a unified planning system through legislation. The bifurcated system of legislation and management concerning urban and rural planning is thus integrated into one system. In accordance with the URPL, the making of township or village planning shall respect the will of the villagers and be consented to by the villagers’ meeting or the villagers’ representative meeting before it is filed for examination and approval (Article 18 and 22). Besides, a nationwide pilot of village planning is initiated by the Ministry of Housing and Urban-Rural Development of the PRC (MOHURD) since February 2013. The participation of villagers is also emphasized in these pilots. However, in other related planning legislation, there are no such participatory provisions. The full URPL is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471595.htm.

implementation of this law cannot be easily realized in the near future,³⁵³ not to mention the establishment of a strict and highly participatory planning system. In order to ensure the public purpose of land expropriation, apart from the making of a more participatory land use planning, the Chinese government should also consider introducing the SIA at the beginning of expropriation projects. Meanwhile, in order to facilitate the assessment of the expropriation purpose, public purposes which can justify expropriations should be clearly enumerated in the law. Regarding the attempt of purchasing the desired land before the land expropriation, it is still unattainable under the current legal system, as the collective land can only be transferred to investors after it is expropriated and turned into state-owned land. Local pilots concerning the direct transfer or market trading of the collective construction land planned for profit-oriented use may turn a new page (Zou et al., 2014).

8.3.2 Participation prior to the approval of compensation and resettlement plans

In addition to the lack of participation in determining the purpose of expropriation projects, participation of the affected people in the making of a compensation and resettlement plan is also limited in both law and practice in China. According to the most recent document on expropriation — the Notice of the Ministry of Land and Resources on Further Improving the Management of Land Expropriation in 2010 (the 2010 Notice of the MLR), in order to shorten the implementation time of the expropriation project, under certain conditions, the compensation and resettlement plan made and announced after the approval of the expropriation plan can be implemented together with the approved expropriation plan. There is no need for another approval for the compensation and resettlement plan from higher levels of governments. These conditions include: the announcement of the expropriation plan, the confirmation of the information received by affected collectives and farmers, and a hearing (the first hearing)³⁵⁴ for objections to the proposed

³⁵³ According to the plan of the Ministry of Land and Resources (MLR), firstly articles regarding land use planning in the LAL will be amended. Then, a special regulation on land use planning will be made to better implement those articles in the LAL. Based on all those regulations, a special law on land use planning will be formulated (Ji, 2013). It is worth noting that in order to improve the implementation, evaluation, modification, and supervision over the overall land use planning at different levels, a Management Measures for Overall Land Use Planning (*tudi liyong zongti guihua guanli banfa* 土地利用总体规划管理办法) is planned to be issued by the MLR by the end of 2015. It is reported that the basic structure of this document has been established. The news report is available at: http://www.mlr.gov.cn/xwdt/jrxw/201507/t20150724_1360518.htm, accessed on 01-08-2015.

³⁵⁴ As it is a hearing for the expropriation plan before the plan is submitted for approval, I name it the first hearing in specific expropriation projects. The hearing for the compensation and resettlement plan made after the initial expropriation plan is approved is thus named as 'the second hearing'.

expropriation plan have been finished. Also, the confirmation of related information on the desired land and the registration of confirmed compensation have to be completed before the expropriation plan is submitted for approval. To some extent, this simplified procedure is very similar to the anticipated expropriation proceedings in the Dutch Expropriation Act.³⁵⁵ In the case of this shortened procedure, full and effective participation of the affected people in the making of the expropriation plan before it is submitted for approval is significant and indispensable. Meanwhile, in accordance with the provisions in other documents of the MLR, such as the Measures for Announcement of Land Expropriations (2010 Amendment),³⁵⁶ the affected people are only allowed to apply for a hearing (the second hearing) regarding the later compensation and resettlement plan, instead of the initial expropriation plan. In essence, the first procedure can better secure the participation of affected people from the beginning of an expropriation process. The second procedure mainly applies to the situation in which no chances were provided for the affected people to challenge the compensation and resettlement standard, before the expropriation plan is submitted for approval. Take these provisions literally, the central government does not intend to provide two chances of hearing for the affected people. Moreover, even if they may challenge the expropriation decision in the first hearing, it rarely happens in practice. The implementation of the second hearing is not satisfactory either.³⁵⁷

The second issue concerns the determination of compensation and the valuation of the expropriated land. In accordance with the international framework, the compensation should be based on a market land price and the affected people may hire an independent appraisal agency themselves if necessary. However, this is not applicable to China. In the 2010 Notice of the MLR, a unified annual output value of agricultural land (*tongyi nianchanzhi biao zhun* 统一年产值标准) or an

³⁵⁵ According to the Expropriation Act of the Netherlands, two types of expropriation proceedings are provided. One is the 'regular' proceedings, in which the amount of compensation is determined in the final expropriation judgment. The other one is the anticipated expropriation proceedings, in which the expropriation decision is made before the compensation is settled. The second one is most often followed in practice (Sluysmans, 2015). It is noteworthy that in the two procedures in China introduced below, both of the compensation are determined after the expropriation decision is approved. That is, the 'regular' proceeding does not exist in China.

³⁵⁶ The full text of the document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=8572&CGid=>

³⁵⁷ According to the China Land and Resources News, the proportion of expropriation projects that have been heard before implementation is relatively low. In all the submitted expropriation plans for approval of certain provinces, more than 90% of landless farmers abandoned their rights to a hearing. This may be partly attributed to farmers' low awareness of the hearing for expropriation, while more importantly, there is no proper procedure for them to attend the hearing. Sometimes the affected farmers were not told their rights to request for a hearing. To make matters even worse, they were forced to sign a proof of waiving their rights to be heard (Yang, 2014).

integrated land price within districts (*qupian zonghe dijia* 区片综合地价) are required to be made and announced in local areas. These standards may be adjusted and increased every two or three years, according to the growth rate of local income per capita. According to the Provisions on the Hearings in Respect of Land and Resources of the MLR in 2004, a hearing must be organized in the case of formulating or modifying the regional compensation standards.³⁵⁸ Measures that can guarantee a full and prompt compensation are also introduced. For instance, when a new construction project is submitted for pre-examination,³⁵⁹ the approval authority shall make sure that a full compensation has been included in the budget estimate. For the desired land within the same region where a unified annual output value is adopted or the same district where an integrated land price is applied, the compensation level should be basically consistent, regardless of the purpose of the expropriation.

According to the Guidance on Calculating the Unified Annual Output Value in Land Expropriation (Interim) (*zhengdi tongyi nianchanzhi biao zhun cesuan zhidaoxing yijian* 征地统一年产值标准测算指导性意见(暂行)) issued by the MLR in 2005, the unified annual output value refers to a comprehensive income value estimated on the basis of the land type, quality and grade, farmers' investments in land and prices of agricultural products in specific regions. Usually this standard is applied in counties or county-level cities. Moreover, there may be different standards based on the different land conditions within a specific county or city. The division of regions normally accords with the boundaries of towns and administrative villages involved. That is to say, instead of estimating the value of the particular piece of land that will be expropriated, a unified annual output value in that region will be used to calculate the compensation. In addition to this unified compensation standard, a multiple of compensation shall also be determined and announced by governments. The final compensation for land and resettlement subsidies is a product of the annual output value and the multiple of compensation.³⁶⁰ With regard to the integrated land price within districts, in accordance with the Guidance on Calculating the Integrated Land Price within Districts in Land Expropriation (Interim) (*zhengdi qupian zonghe dijia cesuan zhidaoxing yijian* 征地区片综合地价测算指导性意见(暂行)) issued also by the MLR in 2005, it is a comprehensive compensation standard based on the land type, output value and land location, local land supply and demand, level of local economic development, and the minimum standard of living for urban residents. Usually it is used in the scope of

³⁵⁸ The Provisions on the Hearings in Respect of Land and Resources, Article 12, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=3403&CGid=>.

³⁵⁹ The Administrative Measures for the Pre-examination on the Use of Land for Construction Projects (2008 Amendment) (*jianshe xiangmu yongdi yushen guanli banfa* 建设项目用地预审管理办法(2008 修正)), Article 2 and 14, available at: <http://en.pkulaw.cn/display.aspx?cgid=111114&lib=law>.

³⁶⁰ Generally, the compensation for expropriated land shall include compensation fee for land, resettlement subsidies and compensation for ground attachments and young crops on the expropriated land (Article 47 of the 1998 LAL). Here the calculation of the unified annual output value and the integrated land price within districts just concerns the first two items.

construction land determined by different levels of land use planning. As required and supported by the MLR, an integrated land price shall be provided for land within the scope of construction land according to local land use planning in eastern China. In the big and medium-sized cities of central and western China, an integrated price shall also be available. Such new ways to determine compensation standards can contribute to fairer land compensation, if they can be well implemented.

Besides, a diversified resettlement system including resettlement with alternative farmland, resettlement with retained land and providing social securities for landless farmers, is also supported. The affected farmers shall be resettled with alternative farmland first if the land is available (the 2010 Notice of the MLR). In practice, these resettlement schemes have been experimented in certain local areas (Li, 2014; Zhu & Prosterman, 2012). Compared to the first phase, the affected people are endowed with more opportunities to participate here. However, in accordance with Arnstein's ladder of citizen participation theory (1969), the participation in this phase is tokenism at best (6.1.4). First, although the unified compensation standard applied in specific areas secures a relative fairness for local people, it is still not based on the market value of the land concerned.³⁶¹ Second, the government's preference for the time efficiency of the expropriation process over a fair procedure is clear. Even for these chances for hearing provided by the central documents, no detailed rules are available to put them into practice.

8.3.3 Participation in the implementation of the expropriation plan

In addition to the focus on the overall efficiency of expropriation projects, measures aimed at protecting the private rights in the implementation of the expropriation plan are available in relevant laws and policies. For instance, without a full payment of the compensation to the affected party, the acquiring authority cannot take possession of the land (2004 Decision of the State Council). Payment of various expenses for land expropriation should be made in full within 3 months, starting from the date of approval of the compensation and resettlement plan (1998 RILAL, Article 25). Besides, funds earmarked for compensation and resettlement must and can only be used for the designated purpose (1998 RILAL, Article 26). Provincial governments shall guide the distribution of the compensation within the collective (2010 Notice of the MLR). The collective whose (part of) land is expropriated shall publish the balance of the compensation and accept supervision by its members (1998 LAL, Article 49). However, under the current law and

³⁶¹ See the Guidance on Calculating the Unified Annual Output Value in Land Expropriation (Interim) and the Guidance on Calculating the Integrated Land Price within Districts in Land Expropriation (Interim) mentioned above. Both of them are attachments to the Notice on the Formulation of a Unified Annual Output Value and an Integrated Land Price within Districts in Land Expropriation issued by the MLR in 2005. The full text of this document (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/zytz/200508/t20050812_69436.htm.

policies, there are no clear rules on the time for the affected farmers to vacate their land after receiving the compensation and resettlement subsidies. It is only mentioned that in the event that the affected farmers do not vacate the land within time limits, the acquiring authority can force farmers to hand over the land. If the farmers refuse, the authority may apply to the court for a mandatory enforcement (1998 RILAL, Article 45).³⁶² Meanwhile, although it seems that the existing rules can guarantee a full and prompt compensation, it is difficult for the affected people to find and apply these rules as they are from different laws, regulations and central documents.

One more important issue here is the availability of judicial review of the administrative decisions involved in land expropriation. As analyzed in chapter 5 (5.5.3), disputes generated by expropriation can be settled through administrative reconsideration or litigation.³⁶³ However, neither administrative reconsideration nor litigation is well applied in practice (Legislative Affairs Office of the People's Government of Anhui Province, 2010; Zhong, 2011). The current rules on administrative reconsideration and litigation of disputes concerning expropriation are seriously incomplete. In order to protect the litigious right of the affected farmers in land expropriation, the newly amended Administrative Procedure Law (APL) in 2014 further confirms that the affected party who has objections to the expropriation decision and the compensation decision may file a lawsuit directly with local courts. Moreover, if the acquiring authority fails to adhere to the compensation agreement or illegally modifies or terminates the agreement, the affected party may also file a lawsuit against the agency.³⁶⁴ In other words, in the first three phases of land expropriation, a right to directly sue the acquiring authority is provided for the affected farmers to protect their land rights and interests. This contributes to the establishment of a well-governed expropriation

³⁶² In accordance with the Provisions of the Supreme People's Court (SPC) on Several Issues concerning the Trial of Administrative Cases Involving Rural Collective Land (*zuigao renmin fayuan guanyu shenli sheji nongcun jiti tudi xingzheng anjian ruogan wenti de gui'ding* 最高人民法院关于审理涉及农村集体土地行政案件若干问题的规定) in 2011, this application for a mandatory enforcement of the court shall comply with the following conditions: (1) the expropriation plan has been approved by competent agencies in accordance with law; (2) the expropriation plan has been implemented by the acquiring authority in accordance with law; (3) the affected party has received compensation and/or has been resettled or refused to accept the compensation and resettlement without proper reasons, and refused to hand over the land, which affected the normal expropriation process; (4) other conditions that have to be met concerning the mandatory enforcement of an administration act.

³⁶³ The Law of the PRC on the Mediation and Arbitration of Rural Land Contracting Disputes, Paragraph 2 of Article 2 (The disputes arising from expropriation of collectively owned land and the compensations therefor do not fall within the scope of acceptance by the rural land contract arbitration commission, they may be settled by means of administrative reconsideration or lawsuits).

³⁶⁴ The APL (2014 Amendment), Article 12. The full text of this law (Chinese version) is available at: <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=239820>.

procedure in China. These improvements in the new APL and their effect on the judicial protection of the affected farmers in expropriation will be discussed in detail in chapter 9 (9.4.2).

To sum up, measures that may secure a full, fair and prompt compensation and resettlement for affected parties do exist in law and especially in various central policies. However, they are too simple and dispersed, and the overall efficiency of expropriation is the focus of the whole system. As shown in Table 8.1, there is plenty of scope for China to adopt the international framework in the expropriation of collective land, regarding the making and implementation of the expropriation plan (the first three phases). Besides, the design of a four-phase participation framework also requires the reform of other related systems, such as land use planning, the disclosure of government information and the judicial system.

As emphasized above, a well-governed expropriation procedure involves not only the planning and the implementation of the plan, but also the use of the expropriated land. It can be imagined that after the 29 years application of the current expropriation system,³⁶⁵ a large quantity of collective land has been expropriated and transformed into state-owned construction land. A critical issue concerns whether those construction lands have been used efficiently or not.

8.3.4 Participation of farmers in monitoring the use of expropriated land

As stated by the 2009 Outline, the area of idle land and the desired land that has been approved for expropriation but not yet supplied until 2009 is nearly 266,700 ha. This number increased to 937,500 ha by the end of September 2014,³⁶⁶ which is more than a seventh as big as the built-up area of Beijing. The 2009 Outline also shows that the floor area ratio (FAR) of the land for industrial projects nationwide is only from 0.3 to 0.6, which signifies a low efficiency of land use.³⁶⁷ Nevertheless, the low use efficiency of expropriated land in practice does not mean that there is no regulation on it. In fact, two significant institutional systems have been established and improved in terms of dealing with idle land. One focuses on the disposal of idle land. The other one concerns an *ex-post* supervision of the idle land, which is included in the State Land Supervision system created in 2006.

³⁶⁵ In the 1982 Constitution, Article 10 endows the state with a power to requisition (equals to the current 'expropriate') land in the public interest for its use in accordance with the law. In the 1986 LAL, Article 2 further clarifies that the state may requisition collective land in the public interest for its use according to the law. That is, after 1986 any constructions that may need collective land (except the collective land used for the construction of farmers' houses, the approved township and village enterprises and public infrastructure in specific collectives) must go through an expropriation process. Until now, it has already been 29 years.

³⁶⁶ The Announcement of the Chief Inspector of State Land (*guojia tudi ducha gonggao* 国家土地督察公告), No.1, 2015, available at: http://www.gjtddc.gov.cn/gggs/201504/t20150428_1349192.htm (Chinese).

³⁶⁷ For an explanation of the FAR, see <http://www.carfree.com/far.html>.

First, in accordance with the 1998 LAL, no units or individuals are allowed to leave farmland unused or let it lie waste. Otherwise, certain charges have to be paid or the land has to be taken back. Moreover, if the land is not used for two consecutive years, the original landholders — collective or individual households — are entitled to reacquire and use the land after it is taken back (Article 37). This right to reacquire the unused land is further confirmed in the former Measures for Disposal of Unused Land (*xianzi tudi chuzhi banfa* 闲置土地处置办法) issued by the MLR in 1999 (Article 4). However, it is greatly restricted in the new Measures for Disposal of Unused Land issued in 2012.³⁶⁸ To be specific, first with the aim of better disposing of the idle land, situations that the idle land can be attributed to governments are provided. In particular, in the case of the land use planning or urban and rural plans is modified later which affects the development of acquired land, the conditions for land development agreed in the contract can be updated according to the new plan. In other words, the developer/the transferee is permitted to continue to use the expropriated land if the expropriation purpose is changed along with new land use plans.³⁶⁹ Secondly, in the cases where the developer shall take responsibility for the idle land, 20% of the transfer fee has to be paid if the development has not been started within one year after the land is transferred. Alternatively, the idle land has to be taken back freely by the government, if the development has not been started within two years after the land is transferred (Article 14). Thirdly, recovered idle land can be transferred to a new developer to use, or it can be included into the land reserve of local governments. Only if the farming condition is unspoiled and no recent construction projects can be arranged for the recovered land, the recovering agency may entrust the former collective or individual farmers to resume farming (Article 19). It can be said that once the land has been expropriated, it is rather difficult for the collective or individual

³⁶⁸ The full text of this document (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/zytz/201206/t20120607_1107632.htm.

³⁶⁹ As stated by Article 8 of the 2012 Measures for Disposal of Unused Land, situations that the actions of governments make the land development according to the original contract impossible include governments' delay in delivering the expropriated land to land users; modifications of land use planning or urban and rural plans which affect the development of acquired land; conditions of developing land have to be changed due to new land policies; the land cannot be developed because of objections from affected farmers, military control or protection of cultural relics; and so on. Apart from these cases, land developers/transferees must take responsibility for the idle land. In the case of land idle caused by the government, the government can decide to extend the time limit to commence the development, update the conditions for land development agreed in the contract according to the new planning, buy back the transferred land use rights, or replace the land concerned with another piece of land with the same value and purpose, based on a negotiation with the land users (Article 12). The full text of this document (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/zytz/201206/t20120607_1107632.htm.

households involved to reacquire their land. This does not meet the requirements of the international framework, as shown in Table 8.1.

It is worth noting that a Regulation on the Land Saving and Intensive Use (*jieryue jiyue liyong tudi gui'ding* 节约集约利用土地规定) is issued by the MLR in March 2014, which provides a systematic regulation on promoting land saving, as well as an intensive use of land. As it concentrates on a total control of the land for construction and a revitalized use of the existing construction land, the prevention and disposal of the expropriated land that has been left idle or unused is surely included in this regulation. In terms of the control over the total amount of construction land, the overall land use planning involving the land use quotas and the optimization of land use layout has to be followed first. Besides, a standard control system for the land used for construction projects (*jianshe xiangmu yongdi biaoazhun kongzhi zhidu* 建设项目用地标准控制制度) is created in the Regulation for the first time. Through developing the land use control indicators for the construction projects involving engineering construction, industrial projects and real estate development, a land access system for the users of construction land is expected to be established. More notably, the decisive role of market in the allocation of land resources is finally embodied in specific measures, such as the expansion of the scale of a paid use of land and the bidding, auction and listing of land used for profit-oriented purposes. In terms of the revitalized use of the existing construction land, especially the idle land caused by expropriation, the dynamic land inspection, the publish of information on the use of expropriated land, a general investigation into the use of construction land, and an assessment of land saving and intensive use of land in certain regions based on the general investigation are provided. Although the formulation of this Regulation is based on the successful experience from several local pilots,³⁷⁰ the measures mentioned above still focus on an administrative control, instead of an inherent economic incentive. In other words, if the local government cannot get rid of the dependence on the income from the direct sale of expropriated land, these administrative measures will not make a difference in improving the use efficiency of the expropriated land.

The second institutional system concerning the monitoring of land use is the State Land Supervision system, which focuses on an *ex-post* supervision of the land use and administration of provincial governments.³⁷¹ Based on the Measures

³⁷⁰ For example, in Guangzhou city, Guangdong Province, indicators like land productivity, consumption of land, area of protected farmland and detected cases of illegal land use are included in the assessment system for a conservative and intensive use of land. The assessment result will be used for evaluating the party and government leaders of local governments.

³⁷¹ According to the Notice of the General Office of State Council on Issues Related to the Establishment of the State Land Supervision System (*guowuyuan bangongting guanyu jianli guojia tudi ducha zhidu youguan wenti de tongzhi* 国务院办公厅关于建立国家土地督察制度有关问题的通知) in 2006, based on the authorization of the State Council, the MLR is entitled to supervise and inspect the land use and administration of provincial governments. The Office of Chief Inspector of the State Land is established in the MLR, which is in charge of the administration of land supervision nationwide. Besides, 9 Bureau of State Land Supervision are accredited to local areas in different regions. Their main responsibilities include the supervision and inspection of the farmland protection of provincial governments, law enforcement relating to land issues, and their exercise of the approval power in land administration, and so on. The provincial

on the Supervision of Farmland Conversion and Approval of Land Expropriation (*nongyongdi zhuanong he tudi zhengshou shenpi shixiang ducha banfa* 农用地转用和土地征收审批事项督察办法) issued in 2008, the farmland conversion and expropriation projects approved by the State Council and provincial governments will be supervised by the state supervision agency.³⁷² Although the punishment that the agency may impose on the government involved in violations of the approval power is quite limited, this system does play a role in inhabiting illegal land use, as stated by the Announcement of the Chief Inspector of State Land from 2007 to 2015.³⁷³ Meanwhile, through this series of announcements, the public becomes more familiar with the land supervision system, and actually has been provided with a formal channel to help the supervision agency monitor the land use of local governments. For instance, among the seven illegal uses of land disclosed in the No.2 Announcement in 2008, three of them were found as a result of tip-offs from local people. However, there is still no specific regulation on the supervision of the use of expropriated land by the public, including the affected people. In order to strengthen the effect of the supervision of the State Land Supervision system, a draft for a Regulation on State Land Supervision is expected to be published in the near future (Li, 2015). If the role of the public in monitoring the

governments here includes the governments of provinces, autonomous regions and municipalities directly under the central government, as well as the current 5 cities specifically designated in the state social and economic development plan (Dalian, Qingdao, Ningbo, Xiamen and Shenzhen City). Salaries, office expenses and other costs of the staff in these 9 bureaus are afforded by the central government. They are independent national authorities of supervising local governments.

³⁷² Besides, In the 2010 Notice of the MLR, a feedback system for land expropriation is promoted. More specifically, within six months since the approval of an expropriation project, the land and resource departments in county governments shall submit the progress of the approved project, including the scope and scale of the expropriated land, the fulfillment of its obligations to announce and organize the expropriation, the payment of the compensation, and the resettlement of landless farmers, to the provincial land and resources department through an online reporting system. This is further developed into a dynamic inspection system for land use (*tudi liyong dongtai xuncha zhidu* 土地利用动态巡查制度), which is piloted in local areas from 2012. In June 2013, a formal inspection system is established through the Notice of the General Office of the MLR on Establishing a Dynamic Inspection System for Land Use and Strengthening the Overall Supervision of the Development and Utilization of the Supplied Construction Land (*guanyu jianli tudi liyong dongtai xuncha zhidu jiaqiang jianshe yongdi gonghou kaifa liyong quancheng jianguan de tongzhi* 关于建立土地利用动态巡查制度加强建设用地供后开发利用全程监管的通知). What is more important is that, a clarified and shared responsibility is assumed by a four-level land and resources departments. To be specific, the responsibility of implementing this dynamic inspection system is mainly assumed by the land and resources departments in the city and county level. A special position is established to deal with the assignment of inspection tasks and the feedback of inspection results. The land and resources departments in lower level of governments are in charge of on-site verification and the report of results to the higher level of departments. The provincial department is responsible for the supervision of the inspection. The overall situation will be informed by the MLR — the central department on a regular basis.

³⁷³ Available at: <http://www.gjtddc.gov.cn/gggs/> (Chinese).

land use, especially the use efficiency of expropriated land, can be confirmed in this coming Regulation, it will be a great step forward.

To some extent, the participation of the public, including the affected people, in monitoring the use efficiency of expropriated land is emerging in China. However, this is not clearly recognized by a unified regulation. Together with the lack of participation in the first three phases of land expropriation, full and effective participation of the affected people in expropriation projects is not secured under the Chinese legal system. Although under the newly amended APL the affected farmers may directly sue the acquiring authority in local courts, if they disagree with the expropriation decision and the compensation decision, effective participation from the beginning of the expropriation process is more meaningful to the protection of their legal rights. To sum up, there is a big space for the application of the four phases of participation under the international governance structure of land expropriation in China.

8.4 The participation framework for the expropriation of houses on state-owned land

The discussion above primarily refers to the procedure for expropriating collective land. It is clear that this procedure is far from being satisfactory compared to the international framework. In accordance with the 2011 Regulations for Expropriation and Compensation for Houses on State-owned Land (the 2011 Expropriation Regulations) issued by the State Council, the regulations on expropriation of state-owned land is more mature than the collective land (L. Chen, 2014). However, the adoption of this international framework can still help to improve the expropriation concerning state-owned land.

As shown in Table 8.1, certain elements of the international framework have been included in the 2011 Regulations, especially in terms of the list of public purposes and the social stability risk assessment (SSRA). Although there are no detailed rules on how to conduct this assessment in this regulation, several relevant documents have been issued by the NDRC since 2012 (X. Ma, 2013). Moreover, regulations regarding the SSRA in expropriations of private houses on state-owned land begin to appear in local areas, such as the Trial Opinion of Nantong City (Jiangsu Province) on the Implementation of SSRA in Land Expropriation Projects in 2010, the Measures of Huai'an City (Jiangsu Province) on the Implementation of SSRA in Land Expropriation Projects in 2012, and the Measures of Zibo City (Shandong Province) on SSRA in Land Expropriation in 2013. Nevertheless, compared with the SIA in India, the independence and the accountability of the SSRA have to be strengthened, together with the participation of the affected people (X. Zhang, 2014). The judicial protection provided by this Regulation and

the new APL also contributes to the adoption of the international framework in expropriations concerning state-owned land.

In the meantime, two issues should be further considered by the Chinese legislature in future reforms of the expropriation of (houses on) state-owned land. One is the attempt of the acquiring authority to obtain the desired houses through voluntary purchase before starting an expropriation process. The other one concerns the right of the original landholders/house owners to reacquire their expropriated houses, if later the land use is changed for private use, or the land is not needed due to the changes of land use plans. Moreover, this right to reacquire the expropriated houses should be secured by the judiciary. These issues should also be well considered in the design of the participation framework for the expropriation of rural collective land.

Table 8.1 Comparison between the international framework, the participation framework for the expropriation of collective land and the one for the expropriation of houses on state-owned land

	The international framework	Expropriation of collective land	Expropriation of houses on state-owned land
(1) Participation prior to the expropriation decision	1. Public purposes should be <u>clearly enumerated</u> in the law 2. In the case of an open-ended article, an <u>SIA</u> and/or a developed land use planning system should be available 3. Even if it is for a public purpose, attempts to acquire the land through <u>voluntary transactions</u> should be tried by the authority 4. If the voluntary purchase failed, power imbalances, provision of related information, people who can participate and forms of participation should be well considered 5. Judicial review	1. Not listed 2. No <u>SIA</u> ; <u>government-dominated</u> planning 3. No such attempts 4. No effective participation; only one public hearing <u>either</u> in phase 1 or phase 2 (not compulsory) 5. In the case of disagreements, may sue the authority directly (<u>the new APL</u>)	1. An <u>inclusive list</u> (Article 8) 2. A <u>SSRA</u> has to be conducted; the expropriation shall <u>comply with the socioeconomic development plan, overall land use plans, and the urban and rural plan</u> (Article 9 and 12) 3. No such attempts 4. A <u>public consultation</u> for the proposed plan; and a <u>public hearing</u> if more than 50% of the affected people object to the plan (Article 10 and 11) 5. Objections can be lodged through an administrative reconsideration <u>or a lawsuit</u> (Article 14 and the new APL)
(2) Participation prior to the	1. Fair valuation and fair compensation (<u>market value</u>)	1. Not market value (based on original land	1. <u>Market price</u> of the acquired house (Article 19) 2. A property appraisal

<p>approval of compensation and resettlement plans</p>	<p>2. The affected party may hire their own valuers and <u>independent</u> valuation agencies 3. Be compensated with <u>alternative land</u> first 4. Judicial review</p>	<p>use) 2. Only valued by the authorities 3. Yes 4. If disagree, may sue the authority directly (<u>the new APL</u>)</p>	<p>agency is selected through a <u>negotiation of affected people</u> (Article 20) 3. Compensation in money, or another house with an equivalent value (Article 21) 4. Objections can be lodged through an administrative reconsideration or a lawsuit (Article 26 and the new APL)</p>
<p>(3) Participation in the implementation of the expropriation plan</p>	<p>1. Only after the <u>entire</u> compensation or a <u>substantial</u> part of it has been received by the affected party, may the authority take possession of the land 2. Clear rules on the distribution of the compensation between landowners and actual land users 3. <u>Enough</u> time to vacate land or recoup his investment in land 4. Judicial review</p>	<p>1. Yes 2. No clear rules 3. No clear rules 4. May sue the acquiring authority if it breaks the compensation agreement (<u>the new APL</u>)</p>	<p>1. Yes (Article 27) 2. Only the house owner is entitled to be compensated 3. After the authority paid the compensation, the affected people <u>shall vacate their houses in time</u> (Article 27) 4. May sue the acquiring authority if it breaks the compensation agreement (<u>the new APL</u>)</p>
<p>(4) Participation in monitoring the use of the expropriated land</p>	<p>1. A special monitoring agency 2. The affected party can help to supervise <u>if and how the expropriated land is used</u> 3. The original landholders should have <u>a right to reacquire the expropriated land</u> if the land is not needed due to changes of plans_ 4. Judicial review</p>	<p>1. Yes — the State Land Supervision system 2. Emerging, but no clear channels 3. Rather difficult to reacquire the land 4. No judicial review</p>	<p>1. The upper-level government is responsible for supervising the acquiring authority (Article 6); the State Land Supervision system 2. Any organizations or individuals may <u>report violations</u> to local governments or the acquiring authority (Article 7) 3. <u>No</u> rules on the right to reacquire the expropriated houses 4. No judicial review</p>

8.5 Lessons for the improvement in the expropriation of collective land

On the whole, three distinctive characteristics of China's land expropriation system can be summarized. First, under the strict land use control system, expropriation of the collective land, especially the farmland, has to comply with local land use plans, which define the land use purpose and the amount of farmland that can be converted into construction land. The functional control is for the prevention of farmland use change through the execution of a top-down land use planning, in which farmland redline and construction land boundaries are key approaches. The quantity (supply) control refers to the annual land supply quotas for urban constructions. The central government holds the highest power in approving the farmland conversion, which leads to an extremely centralized and complex administrative examination and approval system. More notably, in order to control the supply of construction land, the collective construction land is prohibited to enter into the land market. Only through state expropriation can newly added construction land be created (S. Zhong, 2012). Second, as the main tool of controlling land use, land use planning in China does not play its due role in regulating the government expropriation of land. In essence, it is a planning system consisting of various land quotas like the annual quotas for construction land set from top to bottom. Third, in terms of the concrete procedure for expropriation, the participation of the affected parties is greatly limited. In particular, as the main basis for expropriation, public interests are poorly defined in law. Together with the restrictions imposed on the transfer of collective land, governments become the only supplier of land in the primary land market. In order to improve the expropriation system of collective land, and develop a sound and equal land transfer market, several issues have to be addressed in a timely manner.

First, the collective land owner and land users shall be endowed with an equal right to use and transfer their land rights. In accordance with the 2013 Decision of the CCCPC, after an effective local land use plan is made, the construction land planned for profit-oriented use can be transferred, including sold, directly to investors with a market price. This is primarily aimed at developing a unified and equal market for land in both urban areas and rural areas. With the transfer of such rural collective construction land, the scope of land expropriation is supposed to be reduced. More specifically, the 'expropriation mainly for private interests' mentioned above will decrease and might disappear one day. In practice, a direct transfer of such collective land starts emerging, such as the marketization of collective land in Shenzhen (Zou et al., 2014).

Second, the various planning systems shall be integrated, which shall be centered on a well-functioning land use planning system. As a major approach to balancing the private property rights and the public interests involved in land use, a strict and highly participatory land use planning shall be the main basis for initiating any expropriations. Although public participation has been recognized as a part of the urban and rural planning process in the 2007 URPL, no detailed procedural rules are provided.³⁷⁴ In the near future, a special law on land use planning should be issued by the legislature (the National People's Congress or its Standing Committee), in which the participation of all affected parties shall be secured through specific procedural rules. More importantly, the planned land use control system, characterized by various quotas for controlling the amount of land use, shall be abandoned gradually. Under the permission of the central government, a land quota market has emerged in certain areas like Chongqing and Chengdu. Moreover, the transaction of land quotas in both cities allows a direct transaction between the collective (farmers) and the investor (Xiao, 2014; Deininger et al., 2013). This is clearly a marked improvement in the planned land use control system. As the removal of the restrictions on the transfer of collective land rights, however, such transactions of land quotas may disappear.

Third, a rigid definition of public interests, which determines whether an expropriation can be proceeded or not is critical. Before an effective land use planning system is established, the adoption of an SIA before the expropriation is submitted for approval may stop the expropriations that not for a truly public purpose. Together with the right to apply for a public hearing for the SIA, participation of the affected parties in determining the public purpose of expropriation projects can be guaranteed. This is especially significant for China where there is no clear definition of the public purpose in expropriation law or the Constitution.

Fourth, a fair representative mechanism on the basis of the free will of affected farmers is supposed to be established. In comparison with the expropriation of

³⁷⁴ In accordance with the URPL, the making of township or village planning shall respect the will of the villagers and be consented to by the villagers' meeting or the villagers' representative meeting before it is filed for examination and approval (Article 18 and 22). Furthermore, a nationwide pilot of village planning is initiated by the Ministry of Housing and Urban-Rural Development of the PRC (MOHURD) since February 2013. According to the Notice on National Pilots of Village Planning in 2013 and the Notice on Pilots of Village Planning, Town Planning and County Planning System in 2014 issued by the MOHURD, the wishes of the public shall be respected in the planning process. During the investigation, preparation and approval of planning, public opinions shall be solicited through consultation in an easily understandable manner; planning results must be shown in public; and the plan shall be propagated widely. Although the requirement for broad participation is clearly imposed on the making of village planning, more detailed procedures for realizing such participation are needed. The full text of the URPL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471595.htm.

houses on state-owned land, a special issue in the expropriation of collective land including farmland is the representative of affected farmers. Due to the adoption of collective land ownership and the lack of an effective representative mechanism, individual farmers' land rights and interests are easily intervened by (village) collective leaders and local officials.³⁷⁵ Individual farmers cannot and do not have much say in the expropriation of their land. According to the Provisions of the SPC on Several Issues concerning the Trial of Administrative Cases Involving Rural Collective Land in 2011, if the (representative of) collective does not sue the expropriation decision of local governments, more than half of the collective farmers may take a legal action in the name of the collective. Moreover, the individual land user can bring an action against the expropriation decision concerning his own land use right (Article 3 and 4).³⁷⁶ That is to say, in the case of collective land rights are violated in expropriation process, farmers themselves can protect their own land rights through legal means, instead of relying on the (representative of) collective such as the villagers' committee or villagers' groups.

The fifth issue concerns the compensation for land expropriation. On the one hand, although the formulation of a unified annual output value of agricultural land or an integrated land price within districts provides relatively fair compensation for affected parties living in a certain area, effective participation of the people from this area shall be ensured in the formulation process. In the meantime, the establishment of independent valuation agencies is equally important for ensuring fair compensation. On the other hand, regarding the distribution of the compensation, shares that should be paid to the affected collective and collective farmers should be clear. As mentioned above, the provincial government is responsible for providing a fair distribution mechanism for the compensation. Due to the complexity of expropriation practices, a basic principle that the compensation is mainly used for landless farmers shall be maintained.

Last but not least, a right to reacquire the expropriated land that is not used or the use is changed afterwards should be established for the original landholders. Whether it can be attributed to the government or the transferee/the new land user, the original land user is entitled to reacquire the expropriated land and resume farming if the land is unused or used for other (especially private) purposes.

³⁷⁵ The People's Daily (owned by the Central Committee of the Communist Party of China/the CCCPC) continuously reported problems appeared in the transfer process of contracted farmland in different local areas from 7 January, 2014 to 18 March, 2014. The forceful transfer of land is one of the five tricky problems in current transfer practice in China. This has been discussed in chapter 5 (5.6.2).

³⁷⁶ The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=8940&CGid=>

8.6 Concluding remarks

It is evident that in addition to a vague public interest and a low compensation standard, the lack of participation of the affected people in the expropriation process is also a critical issue in China. In this case, innovations in improving farmers' participation in expropriations in local practice and central policies are important. These local innovations mainly focus on the diversity of the compensation, such as the compensation with retained land (*liuyongdi* 留用地) to the collective involved in Lingshui County in Hainan Province (6.2.3). Besides, in accordance with the 2013 Decision of the CCCPC, the collective construction land that planned for profit-oriented use can be transferred directly on the market, provided that it is in line with local land use planning. In practice, a direct transfer of such collective land starts emerging (Zou et al., 2014). More notably, a pilot project concerning a comprehensive reform in the current expropriation system in 33 counties and districts is being conducted by the central government.³⁷⁷ However, there are still two downsides of these innovations. First, the implementation of these new policies is limited. In the near future, it is only limited to the pilot areas. Second, there is no significant improvement in specific expropriation procedures. An overall participation framework for the affected people in the expropriation process is absent in China. Under the circumstances, the inspiration from the international governance structure for land expropriation may lead to a better solution.

The international structure of participation in land expropriation is actually a combination of all the good experience from different countries. As the legal system, economic development and the political regime are different in individual countries, even developed countries cannot realize every single aspect of this comprehensive participation framework. Nevertheless, the core criterion for evaluating an expropriation system is whether the affected parties can really have a say in all major decisions concerning their vital interests. As repeatedly emphasized in this research, a well-governed expropriation procedure can better

³⁷⁷ In order to better protect Chinese farmers' collective land rights, 33 counties and districts across China were chosen by the State Council as pilot areas for further reforming the property-rights system of collective land on 31 December, 2014. It mainly involves the market transfer of certain collective construction land, reforms in the current land expropriation system (a better definition of public purpose, a transparent procedure and diversified safeguards for landless farmers) and the transfer of rural homestead. Regarding the conflict between the pilot plan and the current law on the transfer of collective land, the suspension of a number of provisions in the Land Administration Law (Article 43, 44, 47, 62 and 63) and the Law on the Administration of the Urban Real Estate (Article 9) in selected counties and districts has been approved by the Standing Committee of the National People's Congress (NPC) at the end of February 2015. According to the approved plan, this pilot is only limited to the 33 counties and districts, which will end at the end of 2017 (Xinhua, 2015).

guarantee the participation of the affected parties. More importantly, through the full and effective participation of the parties involved, a right balance between the private rights and the public powers concerned can be achieved. In the case of China, the main problem in expropriation is the decisive intervention of governments, which results in a severe lack of participation of the affected parties. In the meantime, the central government keeps improving the land rights of Chinese farmers. However, the key question is that the procedural rules which can secure this participation are not enough, and sometimes not available. In addition to the deficiency in substantial rights, Chinese farmers do not have sufficient procedural rights either. In future legal reform, more procedural rules should be established to enforce the substantial, as well as the procedural rights of farmers in the expropriation process.

Like the making of new rules for establishing a balanced governance structure of the market transfers of farmland in chapter 7, the making of new rules for a well-governed land expropriation procedure also concern three issues. The difference lies in that more rules in public law are involved in the governance of land expropriation. Under the current expropriation system, the government is involved not only as the regulator of the expropriation process, but also as a manager of land transactions. The creation of a well-governed expropriation procedure requires that the government can only keep its regulatory function. The monopoly of governments in land market guaranteed by public law, such as the Constitution and the Land Administration Law, should be ended. That is, the design of a well-governed expropriation procedure firstly involves a change in the relevant public law. Second, the focus of this well-governed expropriation procedure is on better defining the public interests involved, and striking a proper balance between the public interests and the private land rights and interests. The public interest primarily refers to the purpose of expropriation. Besides, it signifies a fair distribution of the added value of the expropriated land. According to the latest central policy and local practice, the main innovation lies in the increased compensation for the affected people. Also, as the direct transactions of the collective construction land that planned for profit-oriented use, the scale of expropriation will be reduced. Compared with the market transfers of farmland, the construction of an equal bargaining process in expropriation is more complicated and time-consuming, as it concerns restrictions on the public powers. The third issue concerns the making of new procedural rules for full participation of the affected people. In this respect, the international model of a four-phase participation framework for land expropriation provides a good reference.

As shown in the case study in Chengdu City in Chapter 6 (6.5.4), a viable route to further land reforms in China is clear. It concerns the empowerment of the

collective farmers with a complete right to the land that is collectively owned in the first place. This means certain collective land may be directly transferred to the investors without state expropriation. However, the direct transaction of certain collective construction land is not unconditional. In addition to compliance with an effective local land use planning, a property tax system for such transactions shall be established accordingly, to protect the interest that should be enjoyed by the whole society. This concerns the third dimension of a balanced government regulation from a governance perspective — the empowerment and participation of private parties should not damage the public interest concerned. The establishment of this property tax system and a balanced benefit-sharing system in land expropriation will be further analyzed in chapter 9. In the meantime, the adoption of this well-governed expropriation procedure characterized by full participation of the affected parties restricts the exercise of the expropriation power of the government. Furthermore, an appropriate supervision over the regulating power of the government over farmland transfer is still needed, while private land rights are secured through those participatory rules above. This refers to the fourth dimension of a balanced government regulation from a governance perspective.

9 Barriers to make and implement the rules on balanced governance of farmland transfer

On the basis of relevant international experience and local innovations concerning the establishment of a well-governed procedure for farmland transfer, a balanced governance structure is proposed for the market transfers of farmland and land expropriation in Chapter 7 and chapter 8 respectively. It concerns not only further improvements in private law, but also substantial changes in related public law. Moreover, this well-governed procedure is mainly based on a series of procedural requirements and participatory rules, and aimed at establishing an equal bargaining procedure for the parties involved. On the basis of the related law and central policies, it is obvious that the central government strongly supports local experiments in improving both the market transfers of farmland and the land expropriation system. It also issues a number of policies to guide such improvements. However, there is no real progress in updating the relevant law, especially the Land Administration Law. Even if the central policy may be better implemented in the current political environment, a long-term delay in updating the law is not conducive to the formation of a society with the rule of law and the cultivation of people's legal awareness. On the one hand, this reflects a strong commitment of the central government to reform the current farmland transfer system, yet it lacks confidence in initiating and deepening this reform. On the other hand, this considerable delay in updating the legal system highlights the difficulties in further reforms, especially when it comes to restricting the public powers of governments.

These difficulties involve the establishment of an effective and highly participatory land use planning system, the reform of local financial systems, the establishment of a balanced benefit-sharing system, and judicial reform. Improvements in these four aspects primarily require the establishment of a well-governed land expropriation procedure. Also, they can facilitate the establishment of a balanced governance of the market transfers of farmland, especially in terms of the making of an effective and highly participatory land use planning system and the improvements in the judicial system. This chapter mainly focuses on the difficulties or barriers to make and implement the rules for a balanced governance of the land expropriation system. More precisely, the making of the procedural and participatory rules involved in farmland transfer requires the removing of certain institutional barriers. In essence, it concerns the fourth dimension of the government regulation from a governance perspective — monitoring of the public powers over land use and transfer.

9.1 Decentralized management of land use and transfer

9.1.1 A law-based decentralization of powers concerning land use?

The previous chapters have discussed the lack of participation of the affected farmers in the farmland transfer process both in law and in practice under the government regulation system, and the making of new procedural rules for this participation from a governance perspective. In order to facilitate the making and implementation of these procedural rules, a proper decentralization of relevant public powers in the governance of land resources is needed. More accurately, the decentralization primarily refers to the interactions between the central government and local governments, or between the central authorities³⁷⁸ and local authorities. In addition to the improved decentralization of the legislative power and the tax power discussed below, the devolution of powers to manage the use of different types of land is also significant. For instance, the power to determine the purpose of land use through land use planning directly affects the exercise of private land rights. The power to compulsorily acquire/expropriate land may also reduce farmers' land tenure security, if it cannot be rightfully exercised.

In countries like the Netherlands, where a well-regulated planning system is established, local zoning plans are the primary basis for expropriation projects. In addition to the high involvement of the interested groups in the making of different levels of plans, municipalities — the lowest level of governments — are given more autonomy with a view to accelerating the decision-making process of spatial planning since July 2008 (MLIT, 2014). Through a quota-based regulation system, the allocation and use of important (natural and financial) resources in China are strictly controlled by the central government through various planning. However, the land use planning system in China cannot secure an effective and efficient use of land, which can be attributed to the administration-based regulatory regime in the first place.

Based on the highly centralized personal control of the Communist Party of China (CPC) and a highly decentralized administrative implementation and resource allocation, all legal-economic matters, including the use of land resources in local areas, are controlled by the local governments, which are led by the communist party at that level. In other words, the overall control of the central government does not exclude the considerable autonomy of subnational

³⁷⁸ In China, many ministries of the State Council/the central government have a power to manage different types of land resources. For example, the Ministry of Land and Resources (MLR) is responsible for an overall control over the management and use of land resources. The Ministry of Agriculture (MOA) is in charge of the management of farmland and grassland. Forestland is managed by the State Forestry Administration. Therefore, the decentralization concerning land management involves several central authorities, instead of only the central government.

governments in managing local affairs. Moreover, the regulatory regime in China is administration-based, instead of law-based (Xu, 2013). This so-called ‘Regionally Decentralized Authoritarianism’ (RDA) regime³⁷⁹ brings about a great economic performance of local governments, based on a relatively rich land reserve through expropriation. Nevertheless, this regulation system, originating from the planned economy cannot guarantee a sustainable growth of economy and a sustainable use of land resources. Neither can it make local governments accountable to their constituencies (C. Xu, 2007).³⁸⁰ Furthermore, such a decentralized regime is not conducive to encouraging public participation and thus the formation of a democratic consciousness. A law-based regulatory regime — a legalized relation between the central and local governments — has to be established in China. In terms of the land management, although there are a series of controls from the central government — functional control, supply control and development control, local governments are given enough autonomy to determine the allocation of the approved land (quotas) within their own jurisdictions (8.5). Also, due to the lack of public participation and effective supervision, local governments have nearly absolute control over the making and change of local land use planning and the use of local land revenue. A great number of violations in land use caused by local governments are thus not surprising.

With the aim of controlling the total amount of construction land, an approval for the conversion of farmland use is required before the approval of expropriation projects that may occupy farmland since the promulgation of the 1998 Land Administration Law (LAL). The basis for such an approval is primarily the overall land use planning and the annual plans for land use made by governments at different levels. That is, only when the application for farmland conversion complies with the overall land use planning and the annual plans for land use of local areas may the conversion of farmland and the ‘later’ expropriation be approved. In accordance with the 1998 LAL, the way of supplying construction land is shifted from the previously dispersed supply of land for specific projects to a centralized supply of land. Thus, based on the approved land use planning and especially the annual plans of land use, applications for the conversion of certain amount of farmland will be prepared and submitted by county governments level by level to provincial governments or the State Council/the central government. Within the approved area of farmland that used for construction — the quotas for farmland

³⁷⁹ Xu (2013) considers the Chinese political system as a regionally decentralized authoritarianism regime, which means highly centralized politics controls all top positions via the monopolistic ruling party; no separation of powers and no judicial independence; unchallenged monopolistic ruling party; and highly decentralized administrative implementation and resource allocation.

³⁸⁰ Although under the RDA regime, an incentive to economic growth created by regional competition (including the quota system) is provided for local governments, it is not a sustainable mechanism. At this time, economic growth is the leading criteria for the promotion of local officials, and an aggressive pursuit of increases in fiscal revenue becomes the priority of local governments. In accordance with Xu (2013), there is no better solution for incentives than regional competition in this regime.

conversion, the construction land used by specific projects may be subject to the approval of the city or county-level governments. In other words, under a stricter and centralized approval of land use planning and annual plans for land use, the approval of farmland conversion is comparatively decentralized with this new way of supplying construction land.³⁸¹ Besides, in order to simplify the expropriation procedure, the application for expropriating certain piece of farmland will be approved together with the application for the conversion of the farmland involved, if it is within the power of the approval authority concerned.³⁸² If the central government has the power to approve the conversion of farmland in certain projects, the approval of expropriation of the farmland concerned will be handled at the same time. This is also the same for provincial governments. However, if the expropriation (the conversion of farmland has been approved by provincial governments first) concerns basic farmland, regular farmland that exceeds 35 hectares, and other land that exceeds 70 hectares, another application for approving the expropriation of land has to be submitted to the central government. In practice, as the approval power of farmland conversion in specific projects is actually allocated to city (and county-level city) governments with a previously centralized approval of the State Council, provincial or city governments that are divided into districts or the autonomous prefectures, it is the city (and county-level city) governments that prepare the materials for farmland conversion, farmland supplement and land expropriation,³⁸³ and submit them to the provincial or the central government level by level for approval. It can be said that the design of the land

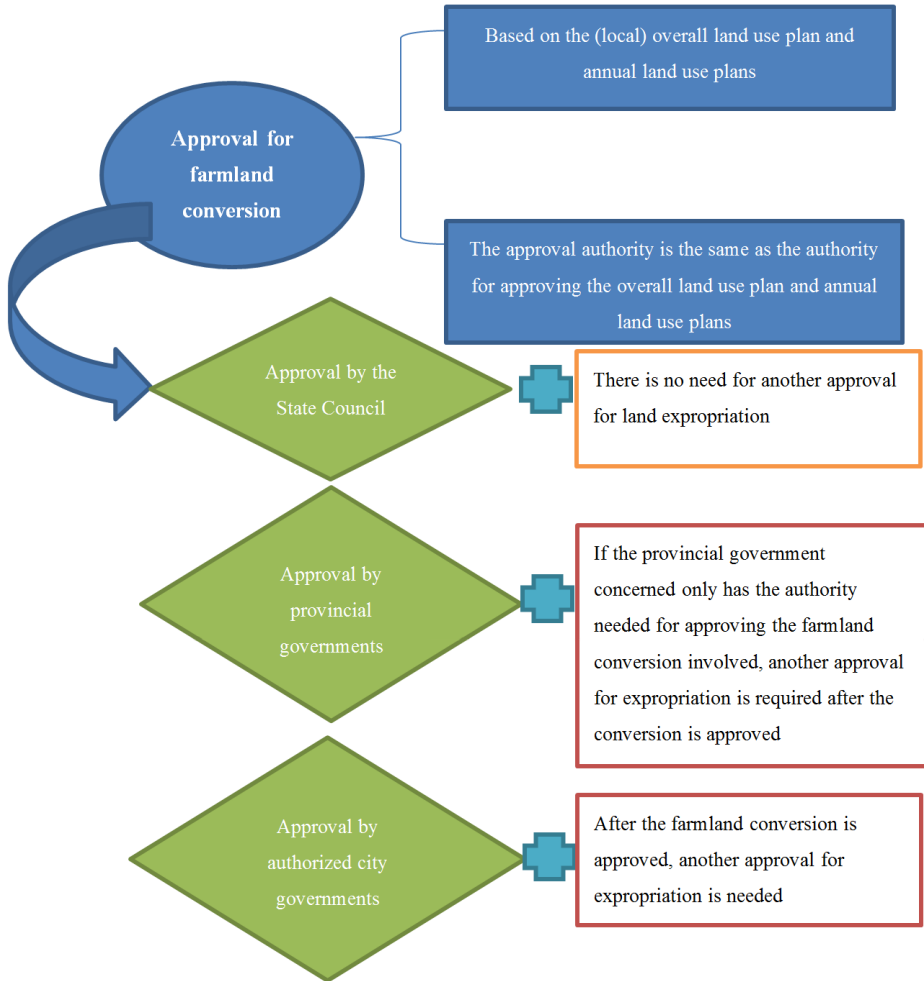
³⁸¹ According to Article 21 and 24 of the 1998 LAL, the overall land use planning drawn up by provincial governments (provinces, autonomous regions and municipalities directly under the central government) shall be submitted to the State Council for approval. The overall land use planning drawn up by cities, where governments of provinces or autonomous regions are located or where the population is over one million, and cities earmarked by the State Council shall be examined for consent by governments of the provinces or autonomous regions, before they are submitted to the State Council for approval. The overall land use planning other than the ones mentioned above shall be submitted for approval level by level up to the provincial governments. Among these, the ones drawn up by town (ship) governments may be submitted for approval to the city governments that are divided into districts, or the autonomous prefectures, as are authorized by the provincial governments. The procedure for the examination and approval of the annual plans for land use is the same as the one for the overall land use planning. In short, the approval authority of land use planning and annual plans of land use can only be exercised by the central and provincial governments, and sometimes by the city governments that are divided into districts, or the autonomous prefectures, as are authorized by the provincial governments. The full text of the 1998 LAL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383939.htm.

³⁸² According to Article 45 of the 1998 LAL, expropriation of basic farmland, regular farmland that exceeds 35 hectares and other land that exceeds 70 hectares shall be subject to approval by the State Council; expropriation of land other than that above shall be approved by provincial governments, and submitted to the State Council for the record. That is, the approval power of land expropriation can only be exercised by the central and provincial governments.

³⁸³ See Article 20 of the Regulation on the Implementation of the Land Administration Law (RILAL), which is issued in 1998. Besides, since the 1998 LAL, a balance between the area of farmland used for other purposes and the area of reclaimed farmland is introduced and required (Article 19). Thus, in the expropriation projects concerning conversion of farmland, a plan for supplementing the same amount of converted farmland is needed, and approved by the same approval agency as the plan for farmland conversion. The full text of the RILAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1118&CGid=>.

expropriation system in China strongly emphasizes an overall efficiency, based on a simplified procedure for approvals.

Figure 9.1 Approval power exercised by different governments concerning farmland expropriation



In order to improve the land management system, a vertical management system of land and resources under the provincial level is adopted in 2004 by the State Council/the central government.³⁸⁴ It is mainly aimed at reducing the illegal use of land through constraining the land management powers of local governments. The

³⁸⁴ In 2004, the State Council issued the Notice on Related Issues on the Reform of the Land and Resource Management System under the Provincial Level (*guanyu zuohao shengji yixia guotu ziyuan guanli tizhi gaige youguan wenti de tongzhi* 关于做好省级以下国土资源管理体制改革的有关问题的通知). A goal to realize a vertical management of land under the provincial governments is established.

land and resources department under the provincial level used to be led by the party committee at that level, now is mainly led by the land and resources department at the higher level, as it is transformed from a main government department into a government agency (Q. Zhang, 2010). Compared with the 1986 LAL, the approval authority of land use planning and annual plans of land use has been centralized in the 1998 LAL.³⁸⁵ However, these measures did not completely stop the violations of local governments in land use. A fundamental reason lies in the lack of effective means to handle the heavy reliance of local governments on revenues from land transactions. This will be further discussed in the second section (9.2).

Another crucial issue concerning the interactions between the central and local governments in the decentralized management of land is the allocation of land use quotas. It is evident that the strict control over land supply through the quotas stipulated in the overall land use planning and the annual land use plans did not bring an effective use of land. As mentioned in chapter 6 (6.5.2), the transaction of land quotas in certain local experiments shows the inflexibility of such a quota-based management. These local experiments indeed create a preliminary market for the transfer of collective land to a certain extent. However, the scaling-up of such experiments is limited. More notably, the transactions of land quotas are still under an overall government control. In essence, it is just an alternative measure generated under the existing system, which is attempted to create a unified market for both urban state-owned land and rural collective land. The fundamental solution, in my opinion, is to recognize the right of collective farmers to transfer their land through a market mechanism. With the development of a rural land market, the quota-based management of land is expected to be replaced by a more legalized macro-control of the central government. The legal effect of a sound land use planning system will be the key to realizing this law-based management of land.

³⁸⁵ Specifically, in the 1986 LAL, the county government had a power to approve expropriations concerning less than 3 *mu* (1 *mu* equals to 0.0667 ha) of farmland and expropriations concerning less than 10 *mu* of other land. The approval power of the city government (the governments of cities that are divided into districts, or the autonomous prefectures, as are authorized by provincial governments) was decided by the provincial governments. All these powers are cancelled in the 1998 LAL. Besides, the provincial government used to have an approval power over expropriations concerning 500 *mu* of basic farmland, expropriations concerning 1,000 *mu* of farmland, and expropriations concerning 2,000 *mu* of other land in the old law. Now it cannot approve expropriations concerning basic farmland. Neither can it approve expropriations concerning more than 35 ha (almost 525 *mu*) of farmland or other land that exceeds 70 ha (almost 1,050 *mu*). See Article 25 of the 1986 LAL and Article 45 of the 1998 LAL. The full text of the 1986 LAL (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=12916&CGid=>.

9.1.2 Public participation in the making of local land use planning

In addition to a proper division of powers between the central and local governments, another level of decentralization concerns the interactions between local governments and other parties involved in or affected by land management, especially the local people. As the change of the central government's thinking in the macro-control of land use, the right to transfer collective land may be returned to the collective land owner — the collective farmers as a whole. This should be further recognized in law, as the landholders can only be encouraged to participate in the management of land use based on a legal right to transfer their land use rights. This contributes to a more effective and efficient use of land, on the basis of a self-governance structure. That is to say, the second level of decentralization signifies a right balance between the private land use rights and the public powers involved. By and large, a proper decentralization in terms of land management not only helps to establish a good governance structure for land management, but also provides more opportunities for the parties involved to participate in this management system. From my perspective, the most important issue of this governance structure is the making of highly adaptive and highly participatory land use planning in local areas.

Based on the two-level meaning of decentralization, improvements in the current land use planning system can be achieved from two aspects. First, the relationship between the central authority and local authorities concerning land management has to be further clarified. The decentralization of planning powers cannot destroy the overall control of the central government over land use. As the weakening of the quota-based management of land, objectives set in this planned planning system can be accomplished through a more unified and legalized planning system. For instance, goals like farmland protection can be realized through the establishment of farmland protection zones. Stricter rules should be provided by the central government for the use of land inside the protection zones, compared with other types of land. Except basic farmland, local authorities may be given more autonomy in the use of other land, which shall be in line with local planning. As mentioned in chapter 8 (8.3.1), the making and modification of local land use plans in practice are not well regulated in China. Local governments actually have an independent power to make and change local plans under the approved amount of construction land and farmland in local areas. On the basis of a control over the quantity of construction land and farmland in specific areas, the quality and the use efficiency of land are ignored to some extent. In my opinion, in order to improve the legal effect of local land use planning, a requirement for a final approval from the people's congress at the same level, instead of the

government should be available in law.³⁸⁶ The deliberation of the people's congress can improve the enforcement as well as the compliance with the planning. Meanwhile, the decentralization of planning powers is a common practice in developed countries, although it differs in degrees.³⁸⁷ Overall, the devolution of more planning power to local governments is a major trend.

Second, the making of highly adaptive land use plans has to rely on full and effective participation of the affected landholders. In other words, the rights of the private parties have to be strengthened, in order to balance the private rights with the regulatory power of governments in land use planning. Currently, although public participation in the making of land use planning has been emphasized in the central document, it is still not recognized as a legal right by relevant legislation.³⁸⁸ What is worse is that there is no remedy provided for the affected parties, if their participation is not accepted or even ignored by the government concerned. In the only legislation on the planning system — the 2007 Urban and Rural Planning Law

³⁸⁶ In the 2007 Urban and Rural Planning Law (URPL), the deliberation of the standing committee of the people's congress at the same level is required, before the provincial urban system planning or the overall planning established by city governments or county governments is submitted to the government at the next higher level for examination and approval. In the case of the overall planning established by town governments, it shall be deliberated by the people's congress at the town level before it is submitted for approval (Article 16). Meanwhile, governments at local levels shall report the implementation situation of urban and rural planning to the standing committee of the people's congress at the same level or the people's congress at the town level, and shall be subject to the latter's supervision (Article 52). The full text of the URPL (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471595.htm.

³⁸⁷ This is especially obvious in certain European countries where the planning system is relatively developed. For instance, in the Netherlands, according to the new Spatial Planning Act (be effective from 1 July, 2008), the former national, provincial, and basic municipal government plans were all replaced by structural visions which lay down the basic spatial policies. Moreover, the structural visions in the national and provincial level are not binding on the lower levels of governments. With regard to the local zoning plans, the municipalities are allowed to make local zoning plans without an approval of the provincial governments. The provincial and national government, though, can devise an adaptation plan regarding the zoning plans that affect their interests. In the UK (England and Wales), before the promulgation of the Localism Act in November 2011, the Planning Policy Statements of the central government, the Regional Spatial Strategy and the Local Development Frameworks made by local councils constitute a top-down and bureaucratic planning system. As the enactment of the Localism Act, a local plan and a neighborhood plan are allowed to be established under the National Planning Policy Framework of the central government. Nevertheless, the content in the national framework has to be considered in the making of the local plan and neighborhood plan. In France, a decentralization progress in land use planning is also made recently. For more information, please visit the website of the Ministry of Land, Infrastructure, Transport and Tourism of Japan (http://www.mlit.go.jp/kokudokeikaku/international/spw/index_e.html), accessed on 01-10-2014.

³⁸⁸ In accordance with the Outline of an Overall National Land Use Plan (2006-2020) issued in 2009, a public participation system has to be established in land use planning. The public participation shall be expanded during the preparation and modification of the overall land use planning. As regards the county and township overall land use planning, public opinions have to be solicited in terms of specific arrangements of land use and land reclamation and development. The approved overall land use planning shall be published in accordance with law and subject to public supervision.

(URPL), even though the opinions from experts and the general public are required to be solicited by way of argumentation, hearing or other before the drafted planning is submitted for approval, no detailed procedure is provided for the public to actively participate in the preparation process of the planning.³⁸⁹ Besides, even if the affected parties consider the approved planning to be an invalid decision, no right is given to them to claim that the plan is invalid. In this case, the community participation practice in government planning in Japan may provide inspiration for the local governments in China.³⁹⁰

In addition to the improvements in the land use planning system, a more important issue concerns the unification of the dispersed socioeconomic development plans, national spatial plans (land use plans), and urban and rural plans. As mentioned in chapter 8 (8.3.1), these three plans are under the charge of the National Development and Reform Commission (NDRC), the Ministry of Land and Resources (MLR) and the Ministry of Housing and Urban-Rural Development (MHURD), respectively. It is also the same at the local level. As they do not belong to each other, contents of these plans often overlap and sometimes conflict in terms of the use of a certain piece of land (Su et al., 2014). This affects an efficient use of local land. The unification of plans here does not mean that only one plan will be maintained in local areas. It primarily means that all the existing plans in certain areas will be coordinated and applied to the same space.³⁹¹ In fact,

³⁸⁹ According to the URPL, the 'urban and rural planning' includes urban system planning, city planning, town planning, township planning and village planning. The city or town planning includes overall planning and detailed planning. Detailed planning includes regulatory detailed planning and site detailed planning. As stated by its Article 26, before filing an urban or rural planning for examination and approval, the organ establishing it shall announce the draft of the planning and collect opinions from experts and the general public by way of argumentation, hearing or other. The draft shall be announced for at least 30 days. The organ establishing the planning shall fully consider the opinions of experts and the general public, and attach an explanation on the adoption of the relevant opinions and an explanation to the materials filed for examination and approval. A similar regulation on the collection of the affected parties' opinions is also provided for the evaluation of the implementation of the planning, and the modification of a regulatory detailed planning or a site detailed planning (the URPL, Article 46, 48 and 50).

³⁹⁰ In Japan, the participation of residents has become an indispensable part in the making process of local government planning, and a number of means of participation by local residents have been put into practice. Meanwhile, a series of bylaws concerning the basic local autonomy and the citizen participation have been issued, in order to guarantee that the participation is effective and the views of local residents are reflected in the drafted plans. In addition to strengthening the autonomy of local citizens in the preparation of local plans, land use plans in particular, relevant departments or bodies in local governments are encouraged to contribute their respective capabilities and resources to improve such participations. In other words, an active collaboration between the administration of local governments and the residents involved is the final objective of all these pro-participation measures above. More notably, the control over planning administration by both local assemblies and heads of local governments plays a very important role in promoting this public-private collaboration (Ohsugi, 2010).

³⁹¹ In local practice, there are mainly two means to achieve this unification. One focuses on the harmonization of various plans through the coordination of different departments, which means the current

the harmonization or even integration of various plans has been tried by both the central and local governments, since the implementation of the 1998 LAL.³⁹² The National Plan for Major Function-Oriented Zones (*quanguo zhuti gongnengqu guihua* 全国主体功能区规划) — a national strategy for a sustainable development of land and other resources — released by the NDRC in June 2010,³⁹³ further increases the need for a more harmonized planning system. It is noteworthy that on 26 August, 2014, a notice on the pilots of the unification of multiple plans in specific cities including county-level cities (*guanyu kaizhan shixian duoguiheyi shidian gongzuo de tongzhi* 关于开展市县‘多规合一’试点工作的通知) was jointly issued by the NDRC, the MLR, the Ministry of Environmental Protection (MEP) and the MHURD. This pilot is primarily aimed at solving the lack of coordination between different plans and the conflict of their contents. It also concerns a reform of the government planning system, which is a prerequisite for establishing an efficient and sustainable spatial planning system.³⁹⁴ Meanwhile,

multiple-plan system will continue. The other one refers to the dominance of one department in preparing a unified plan based on the multiple plans, which means a more comprehensive plan will be prepared through the cooperation of different departments. From a practical perspective, the second method is harder to be adopted as it involves an integration of administrative departments. For most local areas, the harmonization of various plans through unifying the standards of preparation and the reference data of different departments is more feasible.

³⁹² According to Paragraph one of Article 17 and Paragraph two of Article 22 of the 1998 LAL, governments at all levels shall draw up overall land use plans on the basis of the requirements of the plans for national economic and social development, the need for improvement of national land and for protection of the natural resources and the environment,.....; the overall plans of cities and the plans of villages and towns shall be dovetailed with the overall land use plan, and the area of land to be used for construction fixed in the former shall not exceed the area fixed in the latter for the cities, villages and towns. For a more detailed introduction of the efforts of both the central and local governments to integrate these plans, please see Unification of Multi-planning Memorabilia (*duoguiheyi dashiji* 多规合一大事记), wechat of the Planning Institute of China Center for Urban Development (PICCUD), accessed on 23 September, 2014.

³⁹³ The National Plan for Major Function-Oriented Zones is the latest approach to the national land space layout determined by the 11th Five-Year Plan for National Economic and Social Development. According to this layout, the national land space will be divided into four main function-oriented zones — optimized development zones, key development zones, restricted development zones and prohibited development zones.

³⁹⁴ It is noteworthy that in the Exposure Draft of the National Plan for Major Function-Oriented Zones (2009-2020) (全国主体功能区规划 (2009-2020) 征求意见稿) issued in April 2009, a unified planning system is proposed based on a clear positioning of various plans. In detail, under the unified planning system, the national economic and social development plan will be an overall guide; the national plan for major function-oriented zones will be the basis; and the land use plans, urban and rural plans and other special plans will be the backbone of this unified system. Although the finally approved Plan in 2010 does not keep this statement, it does emphasize that the future reform of the planning system shall adapt to the requirements of the National Plan for Major Function-Oriented Zones. To some extent, this national plan, which provides a more sustainable land use pattern, will be the core of the unified planning system in the future. From my perspective, with the aim of simplifying the current planning system, the national plan for major function-oriented zones shall be made in accordance with the national economic and social development plan,

obligations and the accountability of local governments in the planning they made should be clarified in the unified planning system. The judiciary, instead of the higher level of governments, shall play a crucial role in ensuring this accountability.

It can be said that the adoption of a more participatory farmland transfer process in China not only concerns a significant change of relevant laws and regulations, but also necessitates a series of reforms in the land administration system. In addition to the change in the planned land use control system and the establishment of a legal and highly participatory land use planning system, a reform in the financial system of local governments is also needed.

9.2 Reform in the financial system of local governments

9.2.1 Causes for the land finance of local governments

As discussed in chapter 4 (4.4.1), local revenue in China is mainly composed of the income from granting the expropriated land obtained with low compensation to investors with a much higher price. A special ‘land finance’ is established with the growing popularity of land expropriation and the huge profits generated from such an acquisition of land. Based on the case study in Chengdu City in chapter 6 (6.5) and the latest central policy, a direction for the further land reform has been provided. In particular, regarding the reform of land expropriation, it includes a gradually narrowed scope of expropriation, a diversified mode of resettlement, and a fair distribution of the value-added benefits of land among the state, collectives and individual farmers. Nevertheless, when it comes to the amendment of relevant legislation, especially the Land Administration Law, there is no substantive progress. An apparent reason for this stalled reform in updating the outdated law lies in the vested interests of governments in obtaining the price difference in granting the expropriated land to investors. This heavy dependence on the income from transacting collective land not only encroaches on the (part of) added-value of land deserved by the collective landholders, but also results in a twisted structure of the financial revenue of local governments. On the one hand, this income from transactions of land — mainly land transfer fee — has become an important part of the disposable financial resources of local governments; on the other hand, using the expropriated land as collateral, local governments usually apply for loans from banks or even ask for loans before the desired land is expropriated (Zhou, 2014 a:

based on the cooperation of relevant ministries of the State Council, instead of being formulated by the NDRC alone. This National Plan made through multi-cooperation provides the basic spatial policies in the national level. In the local level, a unified plan which centers on the land use planning shall also be made, on the basis of the cooperation of relevant departments in local governments. Means to improve the public participation in the making of this unified plan shall be explored at the same time.

95). That is, most of the increased value generated by the change of collective land use is owned and controlled by governments. Moreover, this absolute monopoly of such great benefits did not make local governments rich, but rather they became burdened with heavy debts.³⁹⁵

There are mainly two reasons that may explain the rapidly increased local debts. First, the role of the government as a provider of services needed by market transactions is not well fulfilled. On the contrary, government at all levels in China is directly involved in economic activities and act as a company.³⁹⁶ As a participator in market competition, being burdened with certain debts is normal for local governments. The second reason for the heavy dependence of governments on land finance and the mounting burden of local debts concerns the lack of taxation power of local governments. Since the adoption of the tax sharing system (*fenshuizhi* 分税制) in 1994, the central fiscal revenue has been increasing as a part of the national fiscal revenue, while the financial expenditure of the central government has been decreasing in comparison with the local expenditure.³⁹⁷ This means more financial resources have been assigned to the central government, accompanied by a reduced responsibility of spending. As the reduction in tax revenue — the most important source of local revenue — and the imbalance in the

³⁹⁵ A correlation between the land finance and local debts is the land reserve system, which is named the land banking system in certain Western European countries. The original intention of establishing a land reserve system in the late 1990s was to revitalize the urban construction land in built-up areas, and strengthen the government control over the land market. It initially referred to the acquisition of state-owned land, which means the state — the owner of the land — regains the land ownership through market transactions. However, the acquisition of collective land was included soon after its establishment. The reserve system then evolves into a unified system which covers the planning, the acquisition of land, the pre-development of land and the land supply of local governments, instead of being a prior step of supplying land of the government. This is confirmed by certain local regulations, such as the Implementation Measures of Hangzhou City on Land Reserve (2000 revision), the Administrative Measures of Wuhan City on Land Reserve (2002), and the Measures of Shanghai City on Land Reserve (2004). The Measures for Land Reserve Administration (*tudi chubei guanli banfa* 土地储备管理办法) of the MOF, the MLR and People's Bank of China in 2007 finally confirms that the expropriated land belongs to the reserved land. Combined with the thriving development of urbanization and the fascination of local governments with land finance, expropriation becomes a primary way to reserve land. Meanwhile, the land reserve agency may apply for a mortgage to the bank using the reserved land as a guarantee.

³⁹⁶ On the one hand, through directly funding the establishment of an investment agency, such as an Urban Construction Investment Company, the government may start and promote the construction of urban infrastructure, the development of local real estate, and the development of local businesses. On the other hand, based on the various preferential conditions, like the low land price and tax relief provided by governments, investments in local areas may be influenced and the willingness of governments to invest in certain industries may be realized indirectly (J. Li, 2014).

³⁹⁷ In accordance with the statistics released by the Ministry of Finance (MOF), proportions of the central revenue and the local revenue in the national fiscal revenue in 1993 were 22% and 78% respectively. In 1994, these proportions became 55.7% and 44.3%. For a detailed introduction of the tax sharing system reform in 1994, please see Loo and Chow, 2006.

central-local fiscal relationship, local governments have to find off-budget revenue sources to satisfy their needs for economic development (Rosen and Bao, 2014). The land transfer revenue, in this case, becomes the backbone of local government revenue.

More notably, the revision of the LAL in 1998 facilitates the fanatical pursuit of the land transfer revenue, and thus the inevitable local debts. The prohibition on the transfer of collective construction land for profit-oriented use, more accurately, the totally government-controlled expropriation system, ensures that the state represented by specific acquiring authorities/local governments actually controls the final use of collective construction land. This prohibition is in essence unconstitutional, in accordance with the 1988 Amendment to the 1982 Constitution (Zhou, 2014 b). As shown below, a constitutional basis for making specific regulations on the transfer of collective land use rights has been available in the Constitution. Relevant rules in the 1998 LAL should be revised in order to facilitate the making of such new regulations.

According to Article 2 of the 1988 Amendment to the 1982 Constitution, the fourth paragraph of Article 10 of the Constitution shall become ‘no organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law’. As it does not explicitly state that only the state-owned land use right can be transferred, the transfer of collective land use right is also covered by this constitutional amendment. This constitutional norm is then followed by the 1988 Amendment to the 1986 LAL, which provides that the right to use state-owned land and collective-owned land may be transferred according to law, and specific measures for the transfer of these two rights shall be formulated separately by the State Council. With the promulgation of the Interim Regulations of the PRC Concerning the Transfer and Retransfer of the Right to the Use of the State-owned Land in the Urban Areas (*chengzhen guoyou tudi shiyongquan churang he zhuanrang zanzing tiaoli* 城镇国有土地使用权出让和转让暂行条例) in 1990,³⁹⁸ the State Council has finished half of its tasks entrusted by the law.³⁹⁹ However, a specific regulation on the transfer of collective (construction) land

³⁹⁸ Later, several administrative approvals required by this Regulation have been cancelled by the decision of the State Council to cancel the first and the fifth batch of administrative approval items in 2002 and 2010 respectively. For instance, the approval of a split transfer of the state land use right and its ground buildings and other attachments was cancelled in the 2002 decision. The approval of the mortgage of the state-allocated land use rights was cancelled in the 2010 decision.

³⁹⁹ According to Article 8 and 19 of the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, the assignment (*chu rang* 出让) of the land use right refers to the act of the state as the owner of the land who, within the term of a certain number of years, assigns the land use right to land users, who shall in turn pay fees for the transfer thereof to the state; the transfer (*zhuan rang* 转让) of the land use right refers to the land user’s act of transferring the land use right, including the sale, exchange, and donation thereof. In other words, a relatively comprehensive regulation has been made to confirm and protect the assignment and transfer of the state-owned land use rights. The full text

use rights is far from being done. What is worse is that in the 1998 LAL, the collective land use right is prohibited from being transferred, retransferred or rented out for non-agricultural constructions. Even with certain exceptions, most of collective (construction) land cannot be used by outsiders, unless it is expropriated by the state and converted into state-owned land.⁴⁰⁰ This contradicts with the 1988 Amendment to the 1982 Constitution.

The corporate operation of local governments has close ties with the orientation of their functions. As a legal person, the government can engage in market transactions under certain restrictions in accordance with law. Its main function, however, is a provider of services needed by the participators in market transactions and a supervisor of such transactions. In the case of being restricted by limited sources of finance, the government's excessive participation or even intervention in the market competition is to some extent 'the best of a bad bunch', such as the land finance.⁴⁰¹ In this perspective, it seems that the tax sharing system should be blamed. However, in my opinion, although the formation of local land finance is triggered by the implementation of the tax sharing system, the current land tenure system characterized by a discrimination against the transfer of rural collective land, more precisely, the current land expropriation system exacerbates this process. Drawbacks in the existing legal system and the inappropriate tax and central-local fiscal system together led to this heavy reliance of local governments on land finance.

The tax sharing system was originally aimed at addressing the downturn in the central revenue since the 1980s. Through centralizing the taxing power and devolving the spending responsibility to local governments, the central revenue accounts for more than half of the national fiscal revenue since 1994. With the increase in the central revenue, the macro-control of the central government over the national economy is strengthened. It is also conducive to implementing central policies. A stated objective of the 1994 tax reform is to re-centralize the decision-making power, and enable the central government to better control policy implementation across the country (Wang and Herd, 2013: 17). It is noteworthy that the central revenue is not entirely used for the expenditure of the central government. A large part of it is sent back to local governments, and becomes local revenue through tax refund and transfer payments. With the aim of making a better use of the transfer payment program, a general transfer and an earmarked transfer are distinguished as of 2009 (Wang and Herd, 2013: 18). However, this transfer payment of

of this regulation (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1320&CGid=>.

⁴⁰⁰ The Law on the Administration of the Urban Real Estate (LAURE), Article 9 and the 1998 LAL, Article 63. The full text of the LAURE (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383755.htm.

⁴⁰¹ According to one survey concerning the root of the land financing behavior of local governments conducted from 2005 to 2007, the emergence of land finance in local governments is 'the best of a bad bunch', instead of a purely competitive impulse for local revenue (Lu et al., 2011).

the central government is far from meeting the actual needs of local governments. The heavy reliance on land finance also weakens the macro-control of the central government. A series of measures have been proposed and adopted to deal with this problem.

9.2.2 Measures for alleviating the land finance and local debts

According to the Minister of the MOF, three core issues that have to be settled relating to the fiscal and tax reform are the improvement in the budget management of local governments, improvement in the taxation system and rationalization of the central-local fiscal system (Rosen and Bao, 2014). The last two measures have a more direct effect on reducing the dependence on land finance and alleviating local debts, based on the increased tax power and decreased spending responsibilities of local governments. Unlike these two positive incentives, improvements in the budget management are aimed at ensuring a legal and a more reasonable use of the land revenue. With the revision of the Budget Law in August 2014, a first step in improving the management of land finance and local debts, through a much more open and supervised budget management has been made by the central government (Hu, 2014). In terms of the tax reform, the pilot practice of levying value-added tax (VAT) in lieu of business tax (*yingyeshui gaizheng zengzhishui* 营业税改征增值税), the set-up of new property and resource taxes, and the increase in the local governments' share of the existing consumption tax, are expected to fill the local revenue gap and reduce local government's reliance on land financing and inefficient investment (Rosen and Bao, 2014). More importantly, the introduction of a property tax concerning the use and transfer of collective land is possible, as the liberalization of the transfer of certain collective land. This helps to realize a fair distribution of the added value of the transferred collective land, which is currently not allowed to be transferred directly to outside investors in law.

Regarding the reassignment of financial resources to match the responsibilities assumed by the central government and local governments, certain measures are also being designed (Koch-Weser, 2014: 17-22). Based on the piecemeal reforms, a unified regulation in dealing with the land finance and local debts is expected to be formulated. However, as all these measures concerns a substantial reform of the current fiscal and tax system, it takes time to break the vested interests, especially the interests of local governments. In the meantime, reforms in the budget management of local governments and the tax system may help to alleviate the fascination of local governments with land financing, and thus reduce the violations in land management. Appropriate responsibilities shall also be devolved downwards, together with the devolution of the tax power. That is to say, local governments should be accountable for the misuse of the new entitled powers.

9.3 Establishment of a balanced benefit-sharing system in land transfer

In fact, the establishment of a balanced benefit-sharing system is not only significant in land expropriation projects, but also indispensable for the market transfers of farmland, especially for the large-scale transfers involving various companies. In the large-scale transfers of farmland or investments concerning a large area of land, the benefit-sharing depends on the viability of alternative agricultural business models. Compared with the distribution of benefits in such transfer programs which mainly concerns a private relationship, the benefit-sharing in land expropriation is more complicated as it involves certain public interests. Therefore, the focus below is on the establishment of a balanced benefit-sharing system in land expropriation programs.

9.3.1 Current distribution of the added value of the expropriated land

As analyzed in chapter 8, the expropriation under a governance perspective should be a balanced procedure. It involves a balance between a maximum efficiency and a maximum fairness of the whole procedure. In terms of the fairness, apart from effective participation of the affected parties in the making of the expropriation decision, fair compensation is also included. The question is how to measure the fairness of the compensation in specific expropriation projects. Currently, the value-added benefits from the expropriated land is managed and controlled by local governments, together with the other parts of the land revenue. In the near future, the dominance of governments in the land expropriation process will continue (Ding, 2007). Even if a transfer market can be established later for the collective land, transfer of the land use rights involved has to be consistent with an effective and participatory local land use planning. Moreover, the added value of the expropriated land in a market transaction mechanism cannot be enjoyed by the affected collective and individual farmers alone. A balanced benefit-sharing system has to be established.

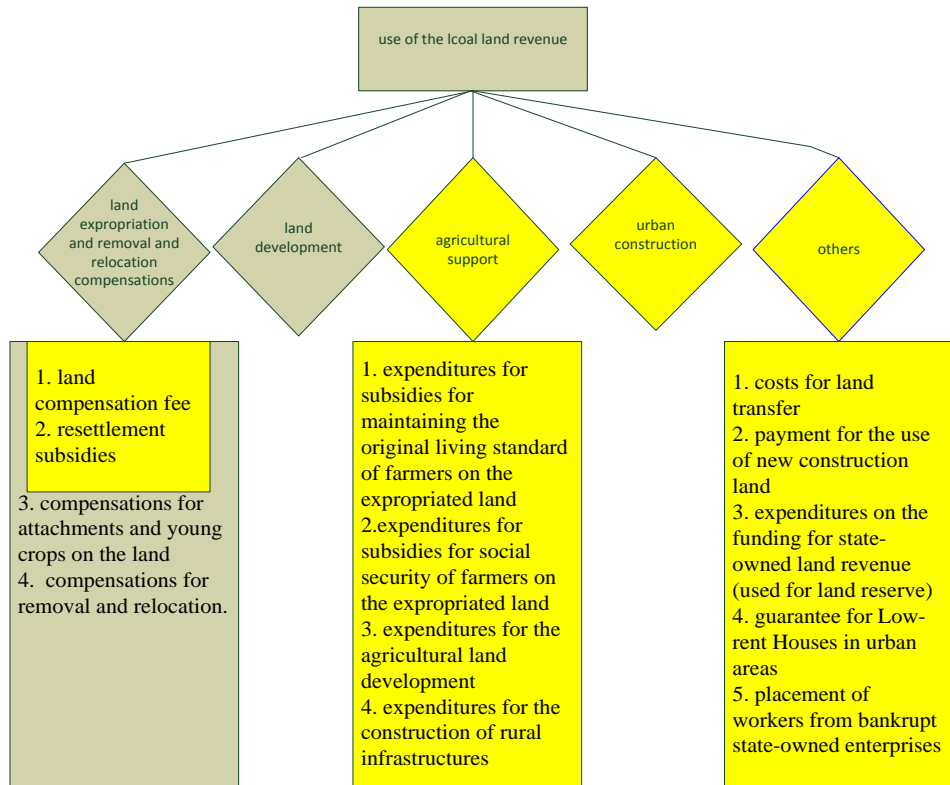
The value-added benefit of the expropriated land is a part of the land revenue of local governments. The land revenue or the income from the transfer of the (state-owned) land use rights refers to all land price incurred from the transfer of the state-owned land use right by governments. It includes the land expropriation and relocation compensations, the fees for initial land development and the land transfer proceeds as paid by the transferee. Generally, after deducting the compensation for attachments and young crops on the expropriated land, the compensation for demolition, the fees for initial land development and relevant costs, the rest is the added value of the expropriated land. As shown in Figure 9.2, it includes the land compensation fee, resettlement subsidies, social security costs paid to the farmers involved, and the land transfer proceeds as paid by the transferee. In accordance with Article 47 of the 1998

LAL, compensation for the expropriated farmland shall include the compensation fee for the expropriated land, the subsidies for resettlement, and the compensation for ground attachments and young crops on the expropriated land. That is, the affected collectives and individual farmers only enjoy a quite small part of the value-added benefit from their land, which has been expropriated through the compensation for the expropriated land.⁴⁰²

Actually, in the 1998 LAL, rules on the distribution and use of the land revenue in each expropriation project have been provided. In accordance with its Article 55, 30% of the land transfer fee paid for the use of the newly added construction land shall go to the central government, and 70% goes to the local governments concerned, both of which shall exclusively be used for developing farmland. Then, in the Notice of the General Office of the State Council on Regulating the Management of Income and Expenditure from the Transfer of the Right to Use State-owned Land (*guowuyuan bangongting guanyu guifan guoyou tudi shiyongquan churang shouzhi guanli de tongzhi* 国务院办公厅关于规范国有土地使用权出让收支管理的通知) issued in December 2006 and the following notice on the Measures for the Management of Income and Expenditure from the Transfer of the Right to Use State-Owned Land (the 2006 Measures for the Management of Income and Expenditure), the income and expenditure from the land transfer shall be fully included in the fund budgetary management of local governments. All incomes shall be turned in to the local treasuries, and expenditures shall be arranged out of the land transfer income through the fund

⁴⁰² According to Article 13-18 of the Measures for the Management of Income and Expenditure from the Transfer of the Right to Use State-Owned Land (*guoyou tudi shiyongquan churang shouzhi guanli banfa* 国有土地使用权出让收支管理办法) in 2006, the land transfer income shall be used for land expropriation and removal and relocation compensations, land development, agricultural support, urban construction, and the like. The expenditures for land expropriation and removal and relocation compensations include the land compensation fee, resettlement subsidies, compensations for attachments and young crops on the land, and compensations for removal and relocation. The expenditures for land development include the expenditures for the early land development and the expenses related to the early land development. The expenditures for agricultural support include the expenditures for subsidies for maintaining the original living standard of farmers on the expropriated land, expenditures for subsidies for social security of farmers on the expropriated land, expenditures for the agricultural land development, and expenditures for the construction of rural infrastructures. The expenditures for urban construction include the expenditures for the construction of facilities to improve the state-owned land use functions and the construction of urban infrastructure. The full text of this document (English version) is available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=6057&CGid=>.

Figure 9.2 The use of local land revenue and the composition of the added value of the expropriated land (the yellow part)



budgets of local governments. Moreover, a certain percentage of the gross deal prices for the transfer of the rights to use state-owned land determined by the provincial governments have to be appropriated to establish a fund for the state-owned land proceeds, which is mainly used for land acquisition and land reserve.⁴⁰³ That is, most of the land revenue is actually owned and used by local governments through budgetary management. In practice, however, the management of the huge land revenue is not transparent and a great degree of land transfer income was misappropriated by local officials.⁴⁰⁴

⁴⁰³ The 2006 Measures for the Management of Income and Expenditure, Article 4 and 11.

⁴⁰⁴ According to the audit report of the State Council on the implementation of the central budget and other financial revenue and expenditure from 2010 to 2013 (*guowuyuan guanyu 2013 niandu zhongyang yusuan zhixing he qita caizheng shouzhi de shenji gongzuo baogao* 国务院关于2013年度中央预算执行和其他财政收支的审计工作报告), the poor management and the misuse of local revenue are primary problems detected by the debt audit of local governments. This report (Chinese version) is available at: <https://www.google.nl/url?sa=t&crct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.audit.gov.cn%2Fn1992130%2Fn1992165%2Fn2032598%2Fn2376391%2F3602645.html&ei>

9.3.2 How to secure a balanced benefit-sharing in land expropriation

To some extent, the final distribution and use of the land revenue are decided solely by the local government concerned. In the newly amended Budget Law, participation of the public in supervising the revenue and the expenditure of local governments is ensured.⁴⁰⁵ On the one hand, through the disclosure of relevant information on local budget and a classified preparation of the budgetary expenditure, the public may better understand how the local budget is allocated, and thus better participate in monitoring the use of local revenue, including the land transfer income.⁴⁰⁶ On the other hand, in addition to the public supervision through an all-inclusive budgetary management (*quankoujing yusuan guanli* 全口径预算管理),⁴⁰⁷ supervision from the People's Congress at all levels is also emphasized.⁴⁰⁸ It can be said that the use of local land revenue may be improved, based on this more transparent and supervised management of local budget. With this improved budget management, especially the improved distribution and use of the land revenue, a fairer and more reasonable compensation is expected to be provided to the affected parties in land expropriation projects. As the use of the land revenue, including the value-added benefits from the expropriated land, will not be decided by local governments alone, the public, including the potentially affected parties, are provided a chance to strive for a more balanced distribution of this value-added benefit.

In practice, there are mainly three approaches to improving the distribution ration of farmers in the added benefits. The first is to directly increase the overall compensation or raise the compensation multiple. As the calculation of the compensation is based on a multiple of the average annual output value of the expropriated land, rise in the multiple means an increase in the final compensation.⁴⁰⁹ The second approach is to unify the compensation standard within specific districts. As the original use of the expropriated

=6cMuVeSiGYqtsgG1oYCQCQ&usg=AFQjCNEQ6fP4zOpiwNdu48Iq5ugjMsOgQg&sig2=PC0cnS73Intm2Z5tYJCJD-w&bvm=bv.90790515,d.bGg.

⁴⁰⁵ The Budget Law of the PRC is passed in March 1994 and effective since January 1995. The full text of this law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383623.htm.

⁴⁰⁶ Article 14 of the Budget Law (2014 Amendment) provides clear requirements for the scope, the subject and the time limits of the information disclosure. Moreover, the legal liabilities for failing to meet this obligation are provided in Article 92. In order to better monitor the spending of local revenue, a classified preparation of the budgetary expenditure based on its functions and economic nature shall be available according to Article 32, 37 and 46.

⁴⁰⁷ The Budget Law (2014 Amendment), Article 4 and 5.

⁴⁰⁸ The Budget Law (2014 Amendment), Article 44 and 47.

⁴⁰⁹ According to paragraph 6 of Article 47 of the 1998 LAL, if land compensation and resettlement subsidies paid are still insufficient to enable the farmers needing resettlement to maintain their original living standards, the resettlement subsidies may be increased upon approval by provincial governments. However, the total land compensation and resettlement subsidies shall not exceed 30 times of the average annual output value of the expropriated land calculated on the basis of three years preceding such expropriation.

land will not be taken into account when the transfer price is determined, a unified compensation standard may improve the overall share of farmers in the distribution of the increased benefits.⁴¹⁰ The third approach has been discussed in chapter 6 (6.2.3), when the compensation and resettlement with a return of land development rights in Lingshui County, Hainan Province is introduced. With the retained land, the collective may develop industries, and distribute the benefits generated to individual farmers. This approach, however, may only be applied to the expropriations for commercial and industrial development, not for the expropriations for purely public purposes. It should be noted that the application of these three approaches depends heavily on the willingness of local governments, and there is little correlation with the market land price. Meanwhile, with the enormous increase in the compensation paid to the affected farmers in certain areas, especially in areas where a market price has been used, doubts about whether the public interest was injured appeared. Therefore, the establishment of a reasonable distribution mechanism for the value-added benefits of the expropriated land is one of the core issues in future land reforms (Liao, 2013).

Among the three approaches, the development of a unified compensation standard within specific districts may better secure a fair compensation for the affected parties. Moreover, the determination of this unified compensation standard should be highly participatory. No matter for what kind of purpose the expropriated land will be used, a unified standard will be applied to calculate the final compensation. The purpose here is not limited to the pure public interests, such as the construction of infrastructure and the need of national defense. Even it is for a commercial development of the land, a public interest may be served at the same time. In other words, provided that effective participation of the affected parties can be secured in the making process of an expropriation decision, a public purpose is justified. The compensation standard within a certain district can be based on the compensation standard for farmland — usually the highest one compared to the other collective land. In accordance with the scope of the use of land transfer income provided by the 2006 Measures for the Management of Income and Expenditure, the compensation for land, resettlement subsidies, and the expenditure for agricultural support, urban construction and other expenditures constitute the added value of the expropriated land. If the expenditures for agricultural support (mainly refer to the expenditure for the agricultural land development and the expenditure for the construction of rural infrastructures), urban construction and other expenditures can be met through a transparent budgetary management, (part of) the public interests involved thus can be secured.

⁴¹⁰ For example, the government may expropriate a piece of farmland, construction land and unused land from the same area with a price of 60,000 Yuan per mu, 20,000 Yuan per mu and 10,000 Yuan per mu, respectively. Later, when these lands are transferred, the selling price will be the same. Therefore, if the compensation standard for all types of land is based on the one for farmland, the overall proportion of farmers in the distribution of the value-added benefits of the expropriated land will be increased.

Meanwhile, the adoption of an all-inclusive budgetary management also lays a foundation for further reforms of the land expropriation system. Specifically, along with the reduced scale of land expropriation generated by a more participatory procedure, more collective land, the construction land for profit-oriented use in particular, may be transferred directly on the market. As a market transaction, the land transfer income is clearly owned by the collective and individual farmers concerned. As argued above, this income cannot be owned by the landholders alone. A collective land transfer tax should be introduced, with the development of a collective land transfer market. Via setting up a transfer tax for collective land, which corresponds to the transfer tax imposed on the state-owned land, benefits that should be enjoyed by the public can be secured on the basis of a market price paid for the landholders. The collection as well as the use of this tax will be disclosed and strictly supervised as a part of the local budget. Like the determination of the compensation standard, the determination of the tax rate, as the key to achieving a balanced distribution of the land proceeds, should be transparent and participatory.

It is evident that the improvement in establishing a participatory expropriation procedure has close ties with the devolution of powers to local governments. Decentralization of the legislative power and certain tax power mentioned above is a prime example. In other words, reform of the land expropriation system under a governance perspective concerns not only the strengthening of the affected parties' rights, but also a proper allocation of the public powers concerning land management. It is widely acknowledged that a decentralized management of land may better realize a sustainable use of land resources, as it may improve the flow of information and resources between and among various levels of government. It also requires broad participation and an active partnership of a wide range of actors (UNDP, 2006: 1). However, a decentralized governance of land does not merely involve the devolution of powers. Certain accountability and transparency must be ensured at the same time. In this case, the judiciary reform may directly contribute to the restriction on the public powers involved and the protection of private land rights.

9.4 Reform of judiciary system for further participation of affected parties

Whether in the establishment of a balanced governance structure for the market transfer of farmland, or the adoption of an international model of a well-governed expropriation procedure in China, the protection of private participation provided by judicial review is indispensable. In particular, in the four phases of participation involved in a well-governed expropriation procedure, the importance of the judicial

system is more obvious (8.3). Therefore, the discussion below mainly focuses on the judicial review in the expropriation process. More precisely, it concerns whether the judiciary in China can take on the responsibility of protecting private land rights from the violations of public authorities.

9.4.1 Prevalence of ‘Letters and Visits’ in practice

A well-governed expropriation system is based on a proper balance between the efficiency and fairness of the overall process. In an ideal situation, the judiciary shall play an important role in ensuring the legitimacy and the fairness of land expropriation, especially in terms of the hypothetical public purpose and the determined compensation, such as the judicial review in the Netherlands (Verstappen, 2014: 11). However, the judiciary in China, particularly the court, does not play a real role in coping with disputes as to land expropriations (Alsen, 1996: 18-19). Instead, a special system called ‘Letters and Visits (*xinfang* 信访)’ was used as a last resort by most affected farmers for a long time. In essence, the emergence of the letters and visits system relates closely to the society under the rule of man. In China, thousands of years of feudal rule leads to a strong concept of the rule of man. As a result, ‘suing in front of the King (*gao yuzhuang* 告御状)’ and ‘finding honest and upright officials for help (*zhao qingtian* 找青天)’ become a part of Chinese tradition in terms of resolving unfairness. Even after the foundation of the New China in 1949, due to the underdevelopment of the legal system, the legal remedy has to rely on administrative means, namely the ‘letters and visits’ system. Although with the construction of the rule of law, the judicial authority is gradually improved, the explosive disputes caused by social transformation still need the assistance of such a deep-rooted system. In 1995, the State Council issued the Regulation on Letters and Visits (*guowuyuan xinfang tiaoli* 国务院信访条例), which was revised and replaced by a new one in 2005. The new development better combines the ‘letters and visits system’ with the current judicial system, which aims for improving the rule of law in practice.⁴¹¹

The MLR also issued the Regulation on Letters and Visits concerning Land and Resources (*guotu ziyuan xinfang gui'ding* 国土资源信访规定) in 2002, replaced by a new regulation in 2006. Like the Regulation of the State Council on Letters and Visits, it strengthens the protection of the legal rights of the letter-writers and

⁴¹¹ According to Article 2 of the 2005 Regulation, the term ‘letters and visits’ means that citizens, legal persons or other organizations give information, make comments or suggestions or lodge complaints to the governments at all levels and the relevant departments of the governments at or above the county level. It can be done through correspondence, E-mails, faxes, phone calls, and visits, which are dealt with by the relevant administrative departments according to the law. The full text of this regulation (Chinese version) is available at: http://www.gjxfj.gov.cn/2006-03/07/content_6399309.htm.

visitors, while guiding them to resolve disputes in a right way. For instance, if the issue concerned is about the standard of compensation for expropriation, and it has been accepted by local governments, the land and resources department will make a notice of dismissal, showing that this issue cannot be resolved by writing letters or visiting the department (Article 29).⁴¹²

9.4.2 Changes in the judicial system to improve the transfer system of farmland

In addition to the development in the ‘Letters and Visits’ system, the judicial system itself is also improved in several aspects. This may help to secure the participation of private parties in the farmland transfer process.

First, the administrative intervention in judicial trial is severely constrained in accordance with the latest law. The administrative intervention in judicial trial is a long and outstanding problem. As the expenses of local courts (and procuratorates) are covered by specific local governments, it is hard to guarantee a fair judgment, especially when the government is involved. As an important component of the political system, judicial reform was proposed in 2002 at the 16th National Congress of the CPC. In the 2013 Decision of the CCCPC (Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform), a unification of the management of staff, funds and property of courts and procuratorates below the provincial level is proposed to reform the judicial management system. In detail, the unified management of staff means that the judges and prosecutors under the provincial level will be nominated by a provincial agency,⁴¹³ and still appointed and dismissed by the local People’s Congress or its standing committee at various levels.⁴¹⁴ The unified management of funds and property implies that the expenditure of local courts and procuratorates will be managed by the financial departments of provincial governments. In order to implement such new measures, 6 provinces are chosen as pilot areas for the new

⁴¹²The full text of this regulation (Chinese version) is available at: http://www.mlr.gov.cn/zwgk/flfg/gtzybl/200606/t20060609_644587.htm.

⁴¹³ According to the work plan of the judicial reform pilot in Shanghai, a committee for selecting and punishing judges and prosecutors is established. It is composed of people from the government, local people’s congress, judiciary agency, and certain legal scholars. That is, it is a rather professional committee.

⁴¹⁴ In accordance with Article 11 of the Judges Law of the PRC, the presidents of the local courts at various levels shall be elected or removed by the local People’s Congresses at various levels. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the People’s Congresses at the corresponding levels upon the recommendation of the presidents of those courts. For the appointment and dismissal of the procurators, see Article 12 of the Public Procurators Law of the PRC. The full text of the Judges Law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383686.htm; and the full text of the Public Procurators Law (English version) is available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383688.htm.

reform of judicial system in June 2014.⁴¹⁵ Moreover, a specific program of work on piloting the reform of judicial system has been issued in those provinces to apply the central guide to local situations. It can be expected that with the deepening of this reform, the interference of local governments in judicial trial may be reduced. More notably, the newly amended Administrative Procedure Law of the PRC (APL) clearly requires that, the administrative organs and their staff should not interfere with or hinder the acceptance of administrative cases of the court. A detailed procedure for accepting the lawsuit against an administrative organ is also established for the court system.⁴¹⁶ Moreover, the leading official of the respondent organ should appear in court, and if this is infeasible, other appropriate staff from the same organ may be commissioned to appear in the court.⁴¹⁷

Regarding the function of courts in hearing administrative cases, including the expropriation cases, a recent case in Shanxi Province may show the difficulties involved in practice. In 2003, the contracted lands of the 15 plaintiffs were occupied by a car company, who paid a rent every year. In 2004, the county government submitted an expropriation plan to the city government and provincial government, in which the land of plaintiffs are included. In 2005, the county government signed a compensation agreement with the village involved for the expropriated land. In August 2006, the provincial government approved this expropriation, and the land concerned was transferred to the car company in June 2007. It is only until on 27 August, 2007 when the change of registration is announced, the plaintiffs know that their land has been expropriated and transferred. It is rather obvious that the local government in this case failed to announce the expropriation plan before it was submitted and approved, and failed to inform the affected farmers of their rights to know and rights to request for a hearing for the compensation and resettlement. Unexpectedly, in the first instance the Intermediate People's Court of Changzhi City overruled the two claims of the plaintiffs — require the county government to fulfill its duty to announce the compensation and resettlement scheme and publish the expropriation plan. The reason of the court is that, as the county government already signed a compensation agreement with the village collective and the plaintiff also received certain compensation from the collective, their acts demonstrated that they actually accepted the compensation agreement. There is no practical significance for the announcement of the agreement. Therefore, their first claim was not supported. Meanwhile, as the land concerned has been converted into construction land with the approval of the provincial government in 2006, the plaintiff knew that their land had been expropriated and occupied by the car company, so the

⁴¹⁵ These pilot provinces are Shanghai, Guangdong, Jilin, Hubei, Hainan and Qinghai Province, which are correspondingly from the eastern, central and western China. Four issues are involved in this first round of pilot program: a classified management system of legal personnel; guarantee of the job security of judges, procurators and the police; standardization of the legal and social supervision over judicial activities; and unification of the management of staff, funds and property of courts and procuratorates below the provincial level discussed here.

⁴¹⁶ The APL (2014 Amendment), Article 53. The full text of this newly amended law (English version) is available at: <http://www.lawinfochina.com/display.aspx?id=18268&lib=law>.

⁴¹⁷ *Ibid*, Article 3.

requirement for publicizing the expropriation plan is not necessary either. This verdict is clearly partial to the local government.⁴¹⁸

In the second instance, the Higher People's Court of Shanxi Province did not focus on these facts presumed in the first instance, but the duties of the local governments to safeguard the affected farmers' rights to participate in land expropriation under the existing legal system. In accordance with the relevant regulations above, it is clear that the whole expropriation procedure in this case is seriously flawed. Besides, the rent received by the appellant from the village cannot be regarded as compensation. Therefore, in the second instance, both claims of the affected farmers were supported by the court. After the judgment takes effect, a new compensation scheme is achieved through a mutual negotiation. The final judgment of this case surely can encourage the affected parties in later expropriation projects to defend their own rights and interests. More importantly, it highlights the duties of the local governments to respect and protect these procedural rights of the affected parties. That is why it was chosen as a typical case for safeguarding legal rights of ordinary citizens by the Supreme People's Court in 2014.

Second, the disputes concerning the transfer of farmland, including market transfers of the contracted farmland and the land expropriation, can be directly accepted by local courts. As the transfer of land, especially the expropriation, concerns the exercise of an administrative power, rules in the APL will be applied to the trial of expropriation cases. However, difficulties in filing the expropriation cases caused by the limited scope of accepting cases directly affect its litigation rate. In accordance with Article 11 of the APL issued in 1989, there is no direct legal-basis for the affected parties to sue the acquiring authority, except for an indirect basis provided by Item 8 of the first paragraph.⁴¹⁹ In order to better protect the land rights and the litigious rights of the affected farmers, the APL is amended in November 2014. In accordance with the APL (2014 Amendment), the affected party who has objections to the expropriation decision and the compensation decision may file a lawsuit directly with local courts. If the acquiring authority fails to adhere to the compensation agreement or illegally modifies or terminates the agreement, the affected party may also file a lawsuit against the agency.⁴²⁰ Besides,

⁴¹⁸ This is a common phenomenon in the trial of administrative cases in local courts. On the one hand, local governments explicitly require that this type of cases cannot be accepted by courts; on the other hand, even if the case is accepted, it is difficult to get rid of the administrative intervention in the course of trials. This is the most important reason for the numerous complaint letters and visits nationwide.

⁴¹⁹ According to this Item 8, the court shall accept the lawsuits brought by citizens, legal persons or other organizations, in cases where an administrative organ is considered to have infringed upon other rights of the person and of property. Besides, Article 2 of the new APL stipulates that a citizen, a legal person or other organizations have the right to file a lawsuit to the courts in accordance with this law, once they consider that a concrete administrative action by administrative organs or personnel infringe their lawful rights and interests. Although the private party is endowed with a legal right to sue the administrative organ, including the acquiring authority, it is not clear and strong enough to let the court decide to accept an expropriation case.

⁴²⁰ Item 5 and Item 11, paragraph 1 of Article 12 of the APL (2014 Amendment).

for the holders of the farmland use right (FUR) — the individual households, a right to sue the administrative organ is available, if they consider that their land use rights have been infringed by the organ.⁴²¹ However, it is still too early to say if these new amendments will help to improve the litigious rights of the affected parties in farmland transfer or not. In the meantime, a clearer definition of the actionable expropriation decision is needed. More accurately, the question regarding whether a judicial review is provided for objections to the public purpose declared by the acquiring authority, or it is just limited to the compensation standard offered by the agency should be clearly answered. Otherwise, the significance of this new amendment to stop the random expropriation of local governments may be reduced. This further explanation can be provided by the Supreme Peoples' Court through a judicial interpretation, or in the special legislation on land expropriation in the future.

Third, the link between the non-litigation mechanism, such as the administrative reconsideration, and litigation is strengthened in cases concerning land expropriation. As mentioned in chapter 5 (5.5.1), disputes generated by expropriation cannot be settled through reconciliation, mediation or even arbitration, but an administrative reconsideration or litigation. With regard to the reconsideration of the administrative decisions, including the expropriation decision, the reconsideration agency — an administrative organ at the next higher level — usually chooses to sustain the original decision in order to avoid the risk of being sued.⁴²² In the APL (2014 Amendment), the reconsideration agency can be sued together with the administrative organ that initially made the decision, if it decides to maintain the original decision.⁴²³ This may prod the reconsideration agency into playing its due role — correcting the wrong decisions made by the lower levels of organs. Another noteworthy change concerns the application of mediation in the trial of administration cases. In the newly amended APL, the prohibition on mediation is still a basic principle of handling administrative cases for courts.⁴²⁴ However, exceptions are made for cases involving damages that should be paid by administrative organs, compensation that should be provided by administrative organs, and other cases that administrative organs are given certain

⁴²¹ Item 7, paragraph 1 of Article 12 of the APL (2014 Amendment).

⁴²² According to Article 25 of the 1989 APL, for a reconsidered case, if the reconsideration agency sustains the original administrative decision, the administrative organ that initially made the decision shall be the defendant. If the reconsideration agency has amended the original decision, the reconsideration agency shall be the defendant.

⁴²³ The APL (2014 Amendment), Article 26.

⁴²⁴ According to Article 50 of the 1989 APL, the court shall not apply mediation in handling an administrative case.

discretion by laws or regulations.⁴²⁵ That is, in cases concerning the compensation for the expropriated land by the acquiring authorities, mediation can be applied before the court makes a final judgment.⁴²⁶

Overall, with an appropriate handling of the numerous complaint letters and visits concerning the illegal land expropriation, together with the increasing independency of local courts, the role of the judiciary in securing effective participation of the affected parties in expropriation will be improved. Although these new amendments to relevant laws and regulation came a bit late, they are necessary for reducing further violations of the acquiring authorities.

9.5 Concluding remarks

As mentioned in previous chapters, plans for amending the rules on land expropriation in the LAL, and the making of a special regulation on the expropriation of collective land have been postponed several times by the legislature. This means there must be certain barriers that need to be broken down before the adoption of these new rules. Otherwise, even if the legal rules concerning a well-governed expropriation procedure later can be updated by the legislature and the central government, they will be dead letters. Due to the great and long-term reliance on land financing, the role played by local governments in the land market is a monopoly operator of land assets. Its due duty as a 'night watchman' of the market economy, more specifically, as a supervisor of the market activities and a provider of services needed by market transactions, is not well performed. Reforms in the budget management of local governments, and the tax and financial system mainly concern an improvement in the administrative system of governments. More importantly, certain inherent and vested interests under the current system are expected to be jeopardized with the deepening of such reforms. It can be imagined that the difficulties involved in reforming the farmland transfer system, especially the expropriation system, are enormous. However, without these administrative reforms, further improvements in land management and relevant

⁴²⁵ The APL (2014 Amendment), Article 61.

⁴²⁶ In practice, mediation as a more peaceful way to resolve administrative cases has been applied in certain areas. In accordance with the Judicial Review Report of Beijing Court on Administrative Cases in 2013 (White Paper) (*2013 nian Beijing fayuan xingcheng anjian sifa shencha baogao* 2013年北京法院行政案件司法审查报告(白皮书)) issued on 13 August, 2014, in the 809 administrative cases which were settled by all the courts in Beijing through mediation in the first instance, 50 % of them concern the expropriation of houses on state-owned land, labor and social security and disclosure of certain information by governments. From the perspective of courts, the use of mediation in the trial of administrative cases is more conducive to resolve the real issues, on the basis of a coordinated relation between the government and private parties (Sun, 2014).

laws cannot be promoted. Recent reforms in the judicial system also contribute to the restriction of the excessive public powers over land use and transfer.

In the meantime, an effective and highly participatory land use planning system is a necessary prerequisite for establishing a balanced governance structure for farmland transfer. First, it limits the illegal developments of land, including the expropriation of land for non-public purposes and the non-agricultural use of the transferred farmland, especially in large-scale transfers involving companies. Second, through a proper devolution of the planning powers to local governments and broad participation of local people in the planning process, the land in local areas will be used more efficiently. Third, the devolution of the planning power should not remove the overall government control over the non-agricultural use of farmland. The approval system for farmland conversion is still necessary to protect farmland resources. Last but not most importantly, the making of effective and legally binding local land use plans provides a direct legal basis for the transfer of the collective construction land that is planned for profit-oriented use. This facilitates the establishment of a unified market for both urban land and rural land, which is the final objective of the land reform in China.

10 Conclusion

The topic of this research is the establishment of a balanced regulation of farmland transfer in China, on the basis of a governance perspective. In essence, it concerns the establishment and implementation of a good governance structure for the transfer process, including both market transfers of farmland and land expropriation. As governance is an interdisciplinary concept, a clear definition of the governance perspective is the first issue of this research (chapter 2). Based on the systems approach and the reflexive-law approach, four dimensions to the application of this newly defined governance perspective are proposed. Furthermore, this governance perspective focuses primarily on the making and implementation of a series of procedural rules, which can secure an equal bargaining process for all parties involved in the transfer process. In the meantime, sufficient empowerment of private landholders shall be available in law, which is an essential prerequisite for an equal bargaining power of the private landholders. The sufficient empowerment does not necessarily mean that only under private land ownership can an equal bargaining power be possible. Also, it does not mean that the public control over farmland use should be abandoned for the sake of private autonomy. However, in countries where private land rights are severely suppressed by the public control, certain restrictions and supervision over the exercise of such public powers should be established.

In the case of China, the exercise of private land rights is directly controlled and restricted by public power, with a view to ensuring food security and the social security function of farmland to Chinese farmers (4.5). In accordance with the four variables in balancing private rights and government regulation in farmland transfer (2.3.4), the current system for regulating the farmland transfer in China is obviously unbalanced. Limited private land rights suppressed by the enormous public power, the lack of private rights in land use planning, the absolute control of local governments over the added value of the expropriated land, and the ineffective legal remedies provided for the affected farmers, especially in the expropriation process, require further and comprehensive reforms in the government regulation system (4.4.2). The lack of adequate empowerment of collective landholders, together with the poorly defined collective land ownership, result in a conspicuous absence of participation of individual farmers in the transfer practice (5.4.2 and 5.6.2). To some extent, the growing land tenure security of Chinese farmers, brought by the increased legal protection and the actual control over farmland under the HRS, is being threatened by the disordered expropriation system and the increasing large-scale transfers of farmland involving commercial investments. Both of them are dominated by local governments and local cadres in

practice. Therefore, before the making of the procedural rules concerning the establishment of an equal bargaining process, rights enjoyed by the collective and the individual farmers under the collective land ownership should be clarified and further strengthened in law (chapter 3). The redefinition of the collective ownership as divided co-ownership and the reorganization of the collective in accordance with a joint-stock cooperative system contribute to a better structure of the collective organization (3.4). The farmland use right (FUR) of individual farmers, however, should not be diminished in this reorganization process.

With a clarified and strengthened FUR, the participation of individual farmers can be realized through specific procedures. This is exactly what is lacking in the current laws and regulations concerning farmland transfer. Although a series of laws and regulations have been issued for farmland transfer, especially regarding market transfers of farmland, they mainly rely on an ultimate control over a fair outcome. Furthermore, the protected land rights of individual farmers in the transfer process are limited to basic principles of transfer and a series of administrative control over the whole process (4.2.4). The substantive rights of farmers to their contracted farmland are not secured through specific procedures for exercising those rights. This is more evident in land expropriation, in which government control prevails throughout the whole procedure. The adoption of a governance perspective in the government regulation of farmland transfer is aimed at protecting the exercise of individual farmers' land rights, especially their participation in the whole transfer process through a series of procedural rules. It is worth noting that the making of these procedural rules does not change the ownership of land. Under the collective land ownership, it focuses on the protection of the land use rights of individual households in the farmland transfer process through specific procedures (3.5.2). In the case of land expropriation, it firstly concerns the reinforcement of the collective land ownership. More specifically, certain collective land is expected to be transferred out for profit-oriented purposes in accordance with local land use planning (4.4.1 and 6.6.1).

With regard to the sources of such procedural rules, the experience from local experiments is noteworthy. For instance, the trading rules of Wuhan Comprehensive Agriculture Equity Exchange provide a relatively detailed procedure for the market transactions of contracted farmland. In particular, the participation of individual households is secured through a series of procedural requirements in large-scale transfers involving industrial and commercial enterprises (ICEs). Regarding the local experiments in reforming the land expropriation system, the coordinated reform concerning both urban areas and rural areas in Chengdu City provides a comprehensive plan and a viable route to change

the expropriation system fundamentally (6.5). To some extent, the final objective of the reforms in the expropriation system lies in the establishment of a unified market for both urban land and rural land. In detail, based on a highly participatory registration of all collective land, rights over collective land can be officially conferred on the collectives and individual farmers in rural areas. With the market-led transactions of land quotas (TLQ) under the planned land use control system, farmers may receive more profits from the transactions of their own land rights. More importantly, on the basis of the returned development rights to collective land and an effective land use planning system, collective land that is planned for profit-oriented use can be transferred directly on land market (6.5.4). In addition to such local experiments, international documents concerning the participation of individual farmers in the transfer process also provide great inspiration for the making of such procedural rules. For example, the adoption of a free, prior and informed consent (FPIC) in the large-scale acquisition of farmland, and the adoption of the international model of four-phase participation of the affected farmers in land expropriation, contribute to the establishment of a balanced and well-governed procedure for farmland transfer (chapter 7 and 8).

On the whole, apart from the direct intervention of the state through legislation — ‘hard law’, more ‘soft law’ is taken into account under this governance perspective. Furthermore, in a balanced regulation of farmland transfer based on a governance perspective, these ‘soft’ rules will play a bigger role than the hard ones. This means that more private parties will be involved in this issue that traditionally is strictly regulated by the government. With good progress in local experiments and the considerable experience from the international society, the relevant law shall be improved in terms of the specific transfer procedures, to better protect the land rights of individual farmers in practice. Regarding the rules that are involved in the governance perspective, the improvement concerns not only contract rules, but also rules on property rights. Moreover, in addition to these changes in private law, rules concerning the unreasonable restrictions on the exercise of private land rights in public law need to be abandoned in the first place (7.6 and 8.5). As regards the line of thinking in making the rules for a balanced regulation of farmland transfer, three steps are included:

First, the land rights of the collective and individual farmers should be confirmed by law and respected by the transferee of the desired land. This can be achieved through the basic principles of private law, such as good faith or public policy. In specific countries, the communal (the collective in China) land rights are protected as one of the human rights of communal farmers. As a result, certain statutory obligations are imposed on the potential transferee to respect this basic right in the contractual relationship. This helps to expand the capability of the

communal farmers to strive for equal bargaining power in the transactions. Although the confirmation of the collective land rights of Chinese farmers as fundamental (human) rights is not feasible in China, a constitutional protection of farmers' collective land rights should be available.

Second, the establishment of an equal bargaining process finally relies on a series of procedural norms. On the basis of local experiments and the international experience, an effective organization of collective bargaining is crucial to secure an equal bargaining power for collective farmers, especially in large-scale acquisition of farmland (7.4). The adoption of a joint-stock cooperative system in reorganizing the collective may help to protect the land rights and interests of collective farmers, on the basis of an effective mechanism for representation. A good governance structure, such as the corporate governance structure, is expected to be established inside the cooperative at the same time (3.4.3). In collectives where a joint-stock cooperative system has not yet been established, a good governance structure is indispensable for the villagers' committee, which in most cases controls the allocation and disposition of the collective land.

Third, based on the respected private land rights and the specific procedures for participation, the final contract for land transfer is concluded through free negotiations. In short, under a preliminary allocation of rights and obligations of both parties in law, and an equal bargaining process built on certain procedural requirements, the regulatory objective can be better achieved without damaging private autonomy.

Compared with the market transfers of farmland, the making of rules for a balanced regulation of expropriation is more complicated and time-consuming, as it concerns more restrictions on the public powers involved (4.4.1). To some extent, the expropriation decision can be regarded as a compulsory contract between the affected collective farmers and the acquiring authority. However, before such a decision is made, the acquiring authority is obliged to purchase the desired land by paying a market price. Even if an expropriation decision has to be made at last, four-phase participation of the affected farmers (including participation prior to the expropriation decision, participation prior to the approval of compensation and resettlement plan, participation in the implementation of the expropriation plan and participation of the affected farmers in monitoring the use of the expropriated land) should be followed by the acquiring authority, to strive for a maximum degree of consensus between the public authority and the private landholders (8.3). Whether in terms of updating the relevant laws and regulations or in practice, reforms in the expropriation system are slower than the market transfers of farmland. Even with certain comprehensive reforms in local areas like the Chengdu City, the scaling-up of this experiment to other local areas is limited (6.5.4). More importantly, the

overall process of reforms in land expropriation depends heavily on the establishment of a better decentralized management of land, a more transparent financial system of local governments and a truly neutral judicial system (chapter 9). In other words, the creation of a balanced regulation of farmland transfer also necessitates a stricter supervision over the exercise of relevant public powers. Another special issue involved in this balanced regulation of farmland transfer is the establishment of a balanced benefit-sharing system. This is particularly important in the reform of the land expropriation system. Before the direct transaction of certain collective land on the land market is officially allowed by law, a taxation system for the use and transfer of the collective land is needed, which can be established by reference to the taxation system of urban land. For the benefit-sharing in specific expropriation programs, a market price is expected to be paid by the acquiring authority with the emergence of a rural land market. At this time, a unified annual output value of agricultural land and an integrated land price within districts are applied, which may secure a relative fairness in compensation in a certain region. The participation of local people in the formulation of such standards, however, needs to be strengthened (9.3).

On the basis of the four dimensions of a balanced regulation of farmland transfer from a governance perspective (including sufficient empowerment and full participation of the affected farmers, the design of a series of procedural rules which may secure an equal bargaining status for both parties, the realization of regulatory objectives for the sake of the public interest concerned and a strict supervision over the exercise of the relevant public powers), the unbalanced regulation system in China is supposed to be transformed into a balanced system with good governance structures. These four dimensions also conform with the four variables in balancing the private land rights and the government regulation in land transfer (including the delineation of property rights in land, the allocation of rights and powers in land use planning, the economic right in the land development process and the legal remedy provided for the parties involved) (2.3.4). It is obvious that the reform of the farmland transfer system in China calls for a comprehensive approach, instead of a piecemeal approach which focuses merely on one specific dimension. The direction of future reforms in both market transfers of farmland and a land expropriation system pointed by the latest central policies shows the commitment of the central government to comprehensive reform (chapter 7, 8 and 9). Furthermore, this reform eventually has to be intensified in the form of legal rules. The design of detailed procedures for the participation of the affected farmers in the transfer process can be regarded as a good starting point of the improvements in relevant laws. Therefore, the main significance of this research is the viable way of establishing a balanced regulation of farmland

transfer on the basis of certain procedural rules, provided by a newly defined governance perspective. In the meantime, the design of these procedural rules contributes to a transformation of the law on farmland transfer in China (5.7.2).

According to a long-lasting principle of legislation in China, central legislation shall primarily focus on the principles of dealing with specific issues, instead of the detailed procedures (*Yi cu bu yi xi* 宜粗不宜细). Under this principle, a large number of laws and administrative regulations have been issued in China since the 1980s. However, the increase in the total amount of laws and regulations is not accompanied by an increased quality of rules (van Rooij, 2006: 370-371). Reasons such as local protectionism (arising out of the condonation of violation of norms by local governments, enforcement agents and sometimes local communities), a lack of resources and close relations between enforcement agents and the regulated actors may explain the poor implementation and enforcement of relevant rules (van Rooij, 2006: 367). In this research, more attention is paid to the making and implementability of the rules involved. Furthermore, the poor enforcement of the laws relating to farmland transfer can be attributed to in the first place to the lack of procedural rules. The procedural rules here primarily refer to the procedural rules which are aimed at implementing the substantive rights confirmed by the substantive law. In the meantime, rules of procedural law such as administrative procedure law and civil procedure law are also included, in order to provide a prompt and effective legal remedy for the disadvantaged party. Specific to the transformation of the laws on farmland transfer, the change of the law involved mainly includes:

(1) Article 10 of the Constitution. The first paragraph of this article ‘land in the cities is owned by the state’ should be changed into ‘land in the urban area may belong to the state’ (4.4.1).

(2) A comprehensive revision of the Land Administration Law. First, after the ‘the state may, in the interest of the public, lawfully expropriate or requisition land and give compensation accordingly (paragraph 4 of Article 2)’, the public interest/purpose that can justify the expropriation or requisition should be enumerated (8.3.1). Second, the planned land use control system built on a series of land quotas in Chapter III is supposed to be replaced with a highly participatory land use planning system (9.1.2). Third, the prohibition imposed on the market transfer of the collective land and the administrative allocation of land resources in Chapter V shall be abolished (4.4.1). Moreover, the conspicuous absence of participation in the expropriation procedure in this chapter should be replaced with a detailed procedure of full participation of the affected parties. In the event that the land use purpose is not realized or the new land user acted in bad faith, the original land user is entitled to reacquire the expropriated land (8.4).

(3) The nature of the farmland use right (FUR) of individual households should be clearly defined in Chapter II of the Rural Land Contracting Law, which provides the acquisition, protection, and transfer of the right to contract and manage land (RCML, including the FUR) (3.3). In particular, the division of the RCML (including the FUR) into a right to contract land and a right to manage land, and the relation between these two split rights need to be clarified. Besides, rights to mortgage and inherit the FUR, more precisely the right to manage land, shall be confirmed (4.3).

(4) Clear rules on the exercise and the disposition of the collective land ownership and other property rights in the collective land shall be further provided in the Property Law. Rules on the application for registration of land transfer also have to be clarified (5.3.3).

(5) Rules in the relevant ministerial rules, such as the administration measures of the Ministry of Agriculture on the transfer of the FUR, need to be supplemented with specific procedures, through which effective participation of individual farmers can be secured (4.2.4). With the urgent need for comprehensive reform of the expropriation system, a unified regulation on the expropriation of collective land should be available, based on the relevant rules issued by the State Council and the Ministry of Land and Resources. As argued in this research, it can be structured in accordance with the international model of four-phase participation in expropriation.

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Samenvatting en conclusie

Het onderwerp van dit onderzoek is het tot stand brengen van evenwichtige regelgeving voor de overdracht van landbouwgrond in China, vanuit een bestuurlijk perspectief. In wezen gaat het hierbij om het opzetten en implementeren van een goede bestuurlijke structuur voor het overdrachtsproces, voor zowel de overdracht van landbouwgrond door markttransacties als de overdracht door onteigening van grond. Omdat bestuur een interdisciplinair concept is, is een duidelijke afbakening van het bestuurlijke perspectief het eerste onderwerp dat in dit onderzoek aan de orde komt (hoofdstuk 2). Op basis van de systeembenadering en het reflexieve recht worden vier dimensies van de toepassing van deze nieuwe afbakening van het bestuurlijke perspectief voorgesteld. Bovendien richt dit bestuurlijke perspectief zich in de eerste plaats op het opstellen en implementeren van een reeks procedurele regels, die een gelijkwaardig onderhandelingsproces voor alle partijen die betrokken zijn bij het overdrachtsproces kunnen waarborgen. Ondertussen wordt van rechtswege voldoende empowerment voor particuliere grondbezitters geboden. Dit is een vereiste voor gelijke onderhandelingskracht voor particuliere grondbezitters. Voldoende empowerment betekent niet per se dat gelijke onderhandelingskracht alleen mogelijk is in het geval van particulier grondbezit. Ook betekent het niet dat overheidszeggenschap over het gebruik van landbouwgrond moet worden losgelaten ten gunste van particuliere autonomie. In landen waar de landrechten van particulieren sterk worden beperkt door het overheidsgezag, zijn bepaalde restricties en toezicht op de uitoefening van dergelijk overheidsgezag echter noodzakelijk.

In het geval van China wordt de uitoefening van particuliere landrechten direct beheerst en beperkt door het overheidsgezag, met als doel de voedselzekerheid en de sociale zekerheidsfunctie die landbouwgrond heeft voor Chinese boeren (4.5) te waarborgen. Als we kijken naar de vier variabelen die bepalend zijn voor een evenwichtige verhouding tussen particuliere rechten en overheidsreglementering met betrekking tot de overdracht van landbouwgrond (2.3.4), is het huidige systeem voor het reguleren van de overdracht van landbouwgrond in China duidelijk niet evenwichtig. Beperkte particuliere landrechten die worden beknot door het enorme overheidsgezag, het ontbreken van particuliere rechten bij de planning van grondgebruik, de absolute controle van lokale overheden over de toegevoegde waarde van onteigende grond en de ineffectieve rechtsmiddelen die de getroffen boeren ter beschikking staan, vooral binnen het onteigeningsproces, vereisen verdere en

uitgebreide hervormingen op het gebied van de overheidsregelgeving (4.4.2). Het ontbreken van voldoende empowerment voor collectieve grondbezitters resulteert in combinatie met het slecht afgebakende collectieve grondbezit in een opmerkelijk gebrek aan participatie van individuele boeren in overdrachtsprocessen (5.4.2. en 5.6.2). Tot op zekere hoogte wordt de toenemende zekerheid die Chinese boeren genieten met betrekking tot grondbezit, dankzij de grotere wettelijke bescherming en de feitelijke controle over landbouwgrond op grond van het HRS-systeem, bedreigd door het wanordelijke onteigeningssysteem en het toenemende aantal grootschalige overdrachten van landbouwgrond waarbij commerciële investeringen een rol spelen. In beide gevallen spelen lokale overheden en lokale kaders in de praktijk de hoofdrol. Voordat wordt overgegaan tot het vaststellen van de procedurele regels voor het tot stand brengen van een gelijkwaardig onderhandelingsproces, moeten derhalve de rechten die het collectief en de individuele boeren genieten bij collectieve grondeigendom worden verhelderd en van rechtswege verder worden versterkt (hoofdstuk 3). De herdefinitie van collectieve eigendom als verdeelde gezamenlijke eigendom en de omvorming van het collectief tot een coöperatie op basis van aandelen (*joint-stock cooperative*) dragen bij aan een verbetering van de structuur van de collectieve organisatie (3.4). Dit reorganisatieproces mag echter niet ten koste gaan van het recht op gebruik van landbouwgrond (*Farmland Use Right, FUR*) van individuele boeren.

Verduidelijking en versterking van de FUR kan ervoor zorgen dat de participatie van individuele boeren door middel van specifieke procedures kan worden gerealiseerd. Dit is precies wat ontbreekt in de huidige wetten en regels met betrekking tot de overdracht van landbouwgrond. Er is een reeks wetten en regels uitgevaardigd voor de overdracht van landbouwgrond, vooral voor de overdracht van landbouwgrond op basis van markttransacties, maar deze zijn voornamelijk gebaseerd op het uitgangspunt dat er uiteindelijk sprake is van controle over een rechtvaardige uitkomst. Bovendien beperken de beschermde landrechten van individuele boeren zich binnen het overdrachtsproces tot de basisprincipes voor overdracht en een reeks administratieve controles over het hele proces (4.2.4). De materiële rechten van boeren aangaande de door hen gecontracteerde landbouwgrond worden niet veiliggesteld door specifieke procedures voor het uitoefenen van die rechten. Dit komt duidelijker tot uiting bij de onteigening van grond, doordat tijdens de gehele onteigeningsprocedure het overheidsgezag prevaleert. Het toepassen van een bestuurlijk perspectief bij

de overheidsregulering van de overdracht van landbouwgrond is gericht op het beschermen van de uitoefening van de landrechten van individuele boeren, met name hun participatie in het hele overdrachtsproces dankzij een reeks procedurele regels. Hierbij moet worden opgemerkt dat het maken van deze procedurele regels niets verandert aan de eigendom van grond. Bij collectief grondbezit richt dit zich op de bescherming van de grondgebruikrechten van individuele huishoudens binnen het overdrachtsproces voor landbouwgrond door specifieke procedures (3.5.2). In het geval van de onteigening van grond gaat het in de eerste plaats om de versterking van het collectieve grondbezit. Meer specifiek zullen naar verwachting bepaalde stukken collectieve grond in overeenstemming met de lokale planning voor grondgebruik met een winstoogmerk worden overgedragen aan externe partijen (4.4.1 en 6.6.1).

Met betrekking tot de bronnen van dergelijke procedurele regels is de ervaring die is opgedaan met lokale experimenten de moeite waard. De transactieregels van Wuhan Comprehensive Agriculture Equity Exchange bieden bijvoorbeeld een relatief uitgebreide procedure voor markttransacties in gecontracteerde landbouwgrond. In het bijzonder wordt de participatie van individuele huishoudens gewaarborgd door een reeks procedurele vereisten bij grootschalige overdrachten waarbij industriële en commerciële ondernemingen betrokken zijn. Wat betreft de lokale experimenten op het gebied van de hervorming van het grondonteigeningssysteem biedt de gecoördineerde hervorming met betrekking tot zowel stedelijke als plattelandsgebieden in de stad Chengdu een uitgebreid plan en een haalbare aanpak voor een fundamentele wijziging van het onteigeningssysteem (6.5). In zekere zin bestaat het einddoel van de hervorming van het onteigeningssysteem uit het stand brengen van één markt voor grond in steden en op het platteland. Op detailniveau kunnen de rechten met betrekking tot collectieve grond, op basis van een sterk op participatie gerichte registratie, officieel worden overgedragen aan de collectieven en de individuele boeren in plattelandsgebieden. In het geval van door de markt gestuurde transacties in grondquota's (TLQ) binnen het controlesysteem voor gepland grondgebruik kunnen boeren meer winst halen uit de transacties in hun eigen grondrechten. Belangrijker nog is dat op basis van de teruggegeven ontwikkelingsrechten voor collectieve grond en een effectief planningssysteem voor grondgebruik, collectieve grond die is bestemd voor op winst gericht gebruik rechtstreeks kan worden overgedragen via de grondmarkt (6.5.4). Naast dergelijke lokale experimenten bieden ook internationale documenten met betrekking tot de participatie van individuele

boeren in het overdrachtsproces veel inspiratie voor het opstellen van dergelijke procedurele regels. De invoering van het principe van vrije, voorafgaande en geïnformeerde toestemming (FPIC) bij de grootschalige aankoop van landbouwgrond en de invoering van het internationale model van vier-fasen participatie door de betrokken boeren bij de onteigening van de grond dragen bijvoorbeeld bij aan het tot stand brengen van een evenwichtige en goed beheerste procedure voor de overdracht van landbouwgrond (hoofdstuk 7 en 8).

Over het algemeen wordt bij de toepassing van dit bestuurlijke perspectief, naast de directe interventie door de overheid via wetgeving (de ‘harde wetgeving’), vooral de ‘zachte wetgeving’ in aanmerking genomen. Bovendien spelen bij een evenwichtige reglementering van de overdracht van landbouwgrond op basis van een bestuurlijk perspectief, deze ‘zachte’ regels een belangrijker rol dan de ‘harde’ regels. Dit betekent dat er meer private partijen betrokken zullen zijn bij dit onderwerp, dat van oudsher strikt wordt gereguleerd door de overheid. Doordat goede vorderingen worden geboekt met lokale experimenten en dankzij de aanzienlijke ervaring die aanwezig is binnen de internationale samenleving, zal de desbetreffende wetgeving worden verbeterd met betrekking tot de specifieke overdrachtsprocedures, zodat in de praktijk de landrechten van individuele boeren beter kunnen worden beschermd. Ten aanzien van de regels die een rol spelen bij het bestuurlijke perspectief, betreft de verbetering niet alleen de contractregels maar ook de regels met betrekking tot eigendomsrechten. Bovendien moeten, naast deze wijzigingen in het privaatrecht, in de eerste plaats ook de regels met betrekking tot de onwettige beperking van de uitoefening van private grondrechten binnen het publiekrecht worden losgelaten (7.6 en 8.5). Ten aanzien van de gedachtegang betreffende het maken van evenwichtige regels voor de overdracht van landbouwgrond zijn drie stappen opgenomen:

Ten eerste moeten de landrechten van het collectief en van de individuele boeren wettelijk worden bekrachtigd en worden gerespecteerd door de verkrijger van de gewenste grond. Dit kan worden bereikt door middel van de basisprincipes van het privaatrecht, zoals goede trouw of openbaar beleid. In specifieke landen worden de gemeenschappelijke landrechten (in China de rechten van het collectief) beschermd als een van de mensenrechten van collectieve boeren. Dit betekent dat de potentiële verkrijger, om dit fundamentele recht binnen de contractuele relatie te respecteren, bepaalde wettelijke verplichtingen moet nakomen. Dit vergroot de mogelijkheden van

collectieve boeren om bij een transactie een gelijkwaardige onderhandelingspositie te verkrijgen. Bevestiging van de collectieve landrechten van Chinese boeren als een fundamenteel (mensen-)recht is in China niet haalbaar, maar de collectieve landrechten van boeren moeten wel grondwettelijk worden beschermd.

Ten tweede is de totstandkoming van een gelijkwaardig onderhandelingsproces uiteindelijk afhankelijk van een reeks procedurele normen. Gezien de resultaten van lokale experimenten en de internationale ervaringen is een effectieve organisatie van het collectieve onderhandelingsproces essentieel om gelijkwaardige onderhandelingskracht voor collectieve boeren te realiseren. Dit geldt vooral bij grootschalige aankopen van landbouwgrond (7.4). De omvorming van collectieven tot coöperaties op basis van aandelen kan bijdragen aan het beschermen van de landrechten en belangen van collectieve boeren doordat dit een effectief vertegenwoordigingsmechanisme biedt. Er wordt vanuit gegaan dat binnen de coöperatie tegelijkertijd een goede bestuursstructuur, zoals de corporate governance structuur, wordt opgezet (3.4.3). Binnen collectieven waar nog geen sprake is van een coöperatief systeem op basis van aandelen is een goede bestuursstructuur voor het dorpscomité onmisbaar, omdat dit comité in de meeste gevallen de toewijzing en verdeling van het collectieve land bepaalt.

Ten derde komt op basis van de gerespecteerde particuliere landrechten en de specifieke procedures voor participatie het uiteindelijke contract voor de overdracht van grond tot stand door vrije onderhandelingen. Kortom, wanneer van rechtswege een voorlopige toewijzing van rechten en plichten aan beide partijen plaatsvindt en wanneer er sprake is van een gelijkwaardig onderhandelingsproces dat is gebaseerd op bepaalde procedurele vereisten, kan de regelgevingsdoelstelling beter worden bereikt zonder dat dit ten koste gaat van de private autonomie.

Het maken van regels die resulteren in een evenwichtige regelgeving voor onteigening is veel gecompliceerder en tijdrovender dan voor de overdracht van landbouwgrond via markttransacties, omdat er meer restricties ten aanzien van overheidsbevoegdheden meespelen (4.4.1). In zekere zin kan het besluit tot onteigening worden gezien als een verplicht contract tussen de betrokken collectieve boeren en de verkrijgende instantie. Voordat een dergelijke beslissing wordt genomen, wordt de verkrijger echter verplicht het gewenste land te kopen door een marktprijs te betalen. Zelfs als uiteindelijk een besluit tot onteigening moet worden genomen, moet de verkrijgende instantie ervoor

zorgen dat de betrokken boeren in vier fasen in het proces participeren (voorafgaand aan het besluit tot onteigening, voorafgaand aan de goedkeuring van het schadevergoedings- en herhuisvestingsplan, tijdens de implementatie van het onteigeningsplan en bij het toezien op het gebruik van het onteigende land), om te zorgen voor een maximale consensus tussen de overheidsinstantie en de particuliere grondbezitters (8.3). Of het nu gaat om het actualiseren van de betreffende wetten en regels of om de praktijk, de hervorming van het onteigeningsstelsel verloopt langzamer dan de markttransacties in landbouwgrond. Ondanks een aantal uitgebreide hervormingen in lokale gebieden, zoals de stad Chengdu, blijft de opschaling van dit experiment naar andere lokale gebieden beperkt (6.5.4). Belangrijker is dat het totale hervormingsproces voor grondonteigening sterk afhankelijk is van het opzetten van een meer gedecentraliseerd grondbeheer, een transparanter financieel systeem voor lokale overheden en een echt neutraal gerechtelijk apparaat (hoofdstuk 9). Met andere woorden, het opzetten van een evenwichtige regelgeving voor de overdracht van landbouwgrond vereist ook strenger toezicht op de uitoefening van het desbetreffende overheidsgezag. Een ander speciaal onderwerp dat speelt bij het ontwikkelen van evenwichtige regelgeving voor de overdracht van landbouwgrond is het opzetten van een evenwichtig systeem voor het verdelen van de voordelen. Dit is met name van belang bij de hervorming van het grondonteigeningssysteem. Voordat een directe transactie in bepaalde stukken collectieve grond op de grondmarkt officieel door de wet wordt toegestaan, moet er een belastingstelsel voor het gebruik en de overdracht van de collectieve grond zijn. Dit kan worden opgezet naar analogie van het belastingstelsel voor stedelijke grond. Naar verwachting zullen door de opkomst van een markt voor grond op het platteland verkrijgende partijen in het geval van specifieke onteigeningsprogramma's een marktprijs gaan betalen voor de verdeling van voordelen. Op dit moment wordt per district een vaste productiewaarde voor landbouwgrond en een geïntegreerde grondprijs toegepast, wat binnen een bepaalde regio kan zorgen voor relatief rechtvaardige schadevergoedingen. De participatie van lokale bewoners bij het formuleren van dergelijke standaarden moet echter worden geïntensiveerd (9.3).

Op basis van de vier dimensies voor een evenwichtige regelgeving voor de overdracht van landbouwgrond vanuit bestuurlijk perspectief (waaronder voldoende empowerment en de volledige participatie van de betrokken boeren, het ontwikkelen van een reeks procedurele regels die kunnen zorgen voor een

gelijkwaardige onderhandelingsstatus voor beide partijen, de realisatie van regelgevingsdoelstellingen ten behoeve van het betreffende publieke belang en strikt toezicht op de uitoefening van het betreffende overheidsgezag) zou het onevenwichtige regelgevingssysteem in China zich moeten ontwikkelen tot een evenwichtig systeem met een goede bestuurlijke structuur. Deze vier dimensies sluiten ook aan bij de vier variabelen die spelen bij het in evenwicht brengen van de particuliere landrechten en de overheidsregelgeving met betrekking tot de overdracht van grond (met inbegrip van de afbakening van eigendomsrechten op grond, de toewijzing van de rechten en bevoegdheden ten aanzien van de planning van grondgebruik, de economische rechten binnen het grondontwikkelingsproces en de rechtsmiddelen waarover de betrokken partijen kunnen beschikken) (2.3.4). Het is duidelijk dat de hervorming van het grondoverdrachtsysteem in China vraagt om een totaalaanpak, in plaats van een stapsgewijze benadering waarbij steeds slechts één aspect wordt aangepakt. De richting van de toekomstige hervormingen op het gebied van zowel markttransacties in landbouwgrond als het grondonteigeningssysteem die naar voren komt uit het meest recente centrale beleid, geeft blijk van de wil van de centrale overheid om het systeem compleet te hervormen (hoofdstuk 7, 8 en 9). Daarnaast moet deze hervorming uiteindelijk worden geïntensiveerd in de vorm van wettelijke regels. Het ontwikkelen van gedetailleerde procedures voor de participatie van de boeren die betrokken zijn bij het onteigeningsproces kan worden beschouwd als een goed uitgangspunt voor de verbetering van de desbetreffende wetten. Het belangrijkste punt dat uit dit onderzoek naar voren komt is dan ook de haalbare aanpak voor het invoeren van een evenwichtige regelgeving voor de overdracht van landbouwgrond op basis van bepaalde procedurele regels die een nieuwe afbakening van het bestuurlijke perspectief oplevert. Intussen draagt de opzet van deze procedurele regels bij aan een transformatie van de wet met betrekking tot de overdracht van landbouwgrond in China (5.7.2).

Volgens een oud Chinees wetgevingsprincipe moet de centrale wetgeving zich primair richten op de principes voor het omgaan met specifieke onderwerpen, in plaats van op gedetailleerde procedures (*yi cu bu yi xi* 宜粗不宜细). Op grond van dit principe is in China sinds de jaren '80 van de vorige eeuw een groot aantal wetten en administratieve regels uitgevaardigd. De toename van het totale aantal wetten en regels is echter niet gepaard gegaan met een verbetering van de kwaliteit van de regelgeving (van Rooij, 2006: 370-371). Redenen zoals lokaal protectionisme (als gevolg van het oogluikend

toestaan van de schending van normen door lokale overheden, handhavingsinstanties en soms lokale gemeenschappen), een gebrek aan middelen en nauwe relaties tussen handhavingsinstanties en de gereguleerde partijen kunnen een verklaring vormen voor de zwakke implementatie en handhaving van de betreffende regels (van Rooij, 2006: 367). In dit onderzoek wordt meer aandacht besteed aan het formuleren en implementeren van de betreffende regels. Bovendien kan de gebrekkige handhaving van de wetten met betrekking tot de overdracht van landbouwgrond ten eerste worden geweten aan het gebrek aan procedurele regels. De procedurele regels hebben in dit geval voornamelijk betrekking op de procedurele regels die gericht zijn op het implementeren van de materiële rechten zoals vastgelegd in het materiële recht. Intussen worden ook procedurele rechtsregels, behorende tot bijvoorbeeld het administratieve procedurele recht en het civiele procedurele recht, meegenomen om de benadeelde partij een snel en effectief rechtsmiddel te bieden. Specifiek met betrekking tot de transformatie van de wetten ten aanzien van de overdracht van landbouwgrond, betreft de wijziging van de betreffende wet met name:

(1) Artikel 10 van de Grondwet. De eerste paragraaf van dit artikel 'grond in de steden is eigendom van de staat' dient te worden gewijzigd in 'grond in de stedelijke gebieden kan eigendom zijn van de staat' (4.4.1).

(2) Een totale herziening van de Wet op het Grondbeheer (Land Administration Law). Ten eerste moeten na "de staat kan, in het publieke belang, grond legaal onteigenen of vorderen en daarvoor een schadevergoeding bieden (paragraaf 4 van Artikel 2)" de situaties waarin het publieke belang/doel de onteigening of vordering van grond kan rechtvaardigen worden opgesomd (8.3.1). Ten tweede wordt verondersteld dat het in Hoofdstuk III opgenomen controlesysteem voor het geplande gebruik van grond op basis van een reeks grondquota's wordt vervangen door een planningsstelsel voor grondgebruik met een hoge participatiegraad (9.1.2). Ten derde moet het in Hoofdstuk V opgenomen verbod op markttransacties in collectieve grond en de administratieve allocatie van grond worden afgeschaft (4.4.1). Bovendien moet het opvallende ontbreken van een bepaling aangaande participatie tijdens de onteigeningsprocedure in dit hoofdstuk worden gecompenseerd door het opnemen van een gedetailleerde procedure voor volledige participatie van de betrokken partijen. Wanneer de grond niet voor het geplande doel wordt gebruikt of de nieuwe gebruiker van de grond te kwader trouw heeft gehandeld,

is de oorspronkelijke grondgebruiker gerechtigd om de onteigende grond opnieuw te verwerven (8.4).

(3) De aard van het recht op gebruik van landbouwgrond (FUR) van individuele huishoudens moet duidelijk worden omschreven in hoofdstuk II van de contractwet aangaande grond op het platteland (Rural Land Contracting Law, RLCL), die betrekking heeft op de verkrijging, bescherming en overdracht van het recht om een grondcontract aan te gaan en grond te beheren (*Right to Contract and Manage Land*, RCML, met inbegrip van de FUR) (3.3). In het bijzonder moeten de opsplitsing van de RCML (met inbegrip van de FUR) in een recht om een grondcontract aan te gaan en een recht om grond te beheren en de relatie tussen deze twee opgesplitste rechten worden verduidelijkt. Daarnaast moeten het recht om een hypotheek af te sluiten op de FUR en het recht om de FUR te erven, en meer in het bijzonder het recht om grond te beheren, worden bevestigd (4.3).

(4) In de eigendomswetgeving (Property Law) moeten voorts duidelijke regels over de toepassing en organisatie van collectieve grondeigendom en andere eigendomsrechten met betrekking tot collectieve grond worden opgenomen. Ook moeten de regels aangaande de aanvraag van de registratie van grondoverdracht worden verduidelijkt (5.3.3).

(5) Regels die deel uitmaken van de desbetreffende ministeriële regels, zoals de administratieve maatregelen van het Ministerie van Landbouw ten aanzien van de overdracht van de FUR, moeten worden aangevuld met specifieke procedures, waardoor effectieve participatie van individuele boeren kan worden gewaarborgd (4.2.4). Gezien de dringende noodzaak van een uitgebreide hervorming van het onteigeningssysteem, is er behoefte aan universele regels voor de onteigening van collectieve grond, welke zijn gebaseerd op de desbetreffende regels die zijn uitgevaardigd door de Staatsraad en het Ministerie van Grond en Hulpbronnen. Zoals in dit onderzoek wordt beargumenteerd, kan dit worden gestructureerd volgens het internationale model voor vier-fasen participatie bij onteigening.

Summary

The main question of this research is how to balance the private land rights and the public powers involved in the farmland transfer (in China) from a newly-defined governance perspective. The confrontation between private land rights and regulatory power of the government is a critical issue in modern states, especially in countries like China where private land rights are suppressed by government regulation. The balance of private land rights and the regulatory power concerns not only the compulsory transfer of farmland or land expropriation, but also the market transfers of farmland, especially the large-scale transfer involving commercial investors. Overall, two topics are highlighted in this research. First, a governance perspective is introduced in government regulation of farmland transfer, with a view to striking a proper balance between private land rights and the regulatory power involved. Although (good) land governance has been promoted concerning the overall governance of land tenure as the development of a sustainable land administration system, the relationship between governance research and legal research has yet to be thoroughly discussed. Based on the systems approach and the reflexive-law approach, four dimensions to a balanced regulation of farmland transfer should be considered under the governance perspective. They are the empowerment and participation of private parties, the guarantee of an equal bargaining status for both parties through procedural rules, the recognition and protection of the public interest involved, and the limitation of the public powers. These four dimensions mainly concern the making of new rules or further improvements in current laws and regulations. Furthermore, with the emphasis on the design of procedural rules, the lawmaking process and the enforcement of related law are expected to be improved under this governance perspective. Therefore, the second central topic of this research concerns the transformation of the law on farmland transfer in China. Specifically, this transformation is mainly reflected in the content of the relevant laws and regulations. On top of a further confirmation of the substantive rights of collective landholders in China, more procedural rules are needed to secure the exercise of the substantive rights. Such procedural rules may originate from the central policies, the more advanced local experiments in land reform, and the relevant international documents. With the improvement in the relevant laws and regulations, especially with the deepening of the (local) land reform, a unified market will be established for both urban and rural land. A unified law concerning the transfer of both urban and rural land is expected to be formulated, based on this unified land market.

论文总结

本研究的主题是在土地流转的过程中怎样构建一个私人土地权利与政府公权力平衡的法律架构，同时该公私平衡的法律结构的构建主要基于一个重新界定的治理 (governance) 的视角。私人土地权利与政府管制权力的对抗是现代国家 (政府) 的核心问题之一。在私人土地权利被政府管制严重压抑的国家，如中国，该问题尤其重要。土地私权与国家管制权力的平衡不仅涉及强制性的土地流转或者说是土地征收程序，也涉及农地的市场化流转，特别是有商业资本介入的大规模的农地流转。整体上看，本研究突出强调了两个问题。首先，为了达到土地私权与政府土地管制权力的平衡，一个治理的视角被引入到政府对土地流转的管制体系中。尽管随着可持续的土地管理体系在具体国家的建立与发展，(好的)土地治理/善治 (good land governance) 已经被用来提升具体国家的土地权利体系，但是有关治理的研究与法律研究的关系尚未被深入讨论。也就是说，土地治理的研究与相关法律法规的完善没有很好地结合。在本研究中，基于系统的方法 (systems approach) 以及反思法的方法 (reflexive-law approach)，一个全新的治理视角被提出。在这一新的治理视角下，一个平衡的政府管制包括四个层面的内容：私权利主体的赋权以及参与，通过一系列程序性规则为流转双方当事人建立平等的谈判地位，流通过程中涉及的公共利益的识别与保护，以及对政府相关土地管制权力的限制。这四个层面的内容主要侧重于新的程序性规则的制订，以及现有的有关土地流转的法律法规的完善。进一步而言，在这一治理视角下，通过强调新的程序性规则的设计，相关法律法规的制订以及实施过程将得以提升。因此，本研究的另一个中心问题涉及中国现有农地流转法律的转型。具体来说，这一转型主要体现在相关法律法规内容的变更上。除了对集体土地权利人享有的实体权利在法律上进一步确认外，需要制订更多的程序性以及参与性的规则以保障这些实体土地权利的实现。这些程序性规则可以来自于 (中央) 土地政策，在土地改革方面更超前的地方试验的成功经验，以及相关的国际性规定。随着相关法律法规的完善，特别是 (地方) 土地改革试验的深化，一个统一的城乡土地 (流转) 市场会建立起来。一部统一的规制城乡土地流转的法律也应该制订，以指导该统一的土地市场的运转。