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The Commercial Real Estate Laws of the People's Republic of China and Shenzhen: An Overview

David S. Kerzner

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The Commercial Real Estate Laws of the People's Republic of China and Shenzhen: An Overview

David S. Kerzner*

ABSTRACT

This Article surveys the changes in real estate laws that have occurred in China since 1980. It provides a comprehensive and specific overview of the foreign investment process, which should prove particularly useful to United States investors. The Article first provides general background on the evolution of Chinese real estate law, focusing on the granting and subsequent alienation of land use rights, as well as the recent development in the area of large parcels of land. The Article then examines the current state of real estate law in Guangdong Province, specifically in Shenzhen, and explains details such as transfer and leasing of land use rights, land use fees, and regulations on mortgagees within special economic zones. The author returns to a more general discussion of foreign investment in Chinese real estate and the corresponding vehicles by which this investment takes place. He concludes that China has taken a logical and meaningful approach to enhancing real property rights and promoting foreign investment, albeit an approach the ultimate success of which is presently unclear.

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* LL.M. in International Law, New York University, 1993; Candidate for LL.M. in Taxation, New York University; LL.B., Queen's University, 1990; B.A., University of Western Ontario, 1987. The author wishes to thank Professor Jerome A. Cohen of New York University School of Law for his invaluable support. This article is dedicated to the author's parents.

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I. INTRODUCTION

In the wake of unprecedented economic growth in the People's Republic of China (PRC),¹ land development has proceeded at a heightened rate with the building of infrastructures, industrial centers, and commercial property complexes.² An important source of funding and

1. See *The Titan Stirs*, ECONOMIST, Nov. 28, 1992, at 3. Since the initiation of Deng's economic reforms in 1978, real GNP has grown by an average of almost 9% a year. By 1994, the PRC's economy is expected to be four times larger than it was in 1978. Further, it is estimated that by 2002, the PRC's economy will be eight times larger than it was in 1978, at which point the PRC will have matched the performance of Japan, Taiwan, and South Korea during their first quarter century of economic growth.

2. *An Investment Blessing in Disguise*, SOUTH CHINA MORNING POST, July 15, 1993, at B4. In the first five months of 1993, property investment in the PRC is reported to have jumped 115%. In 1992, more than 240,000 hectares of land were set aside for

expertise for this development comes from foreign investment.³ To encourage this investment, the PRC has promulgated almost an entirely new set of laws governing land use rights. The establishment of long term leasehold rights, which are protected by legislation, marks a significant departure from the traditional Marxist doctrines relating to property. This Article attempts to provide an integrated and analytical overview of the enormous volume of macro-level national and micro-level local Shenzhen⁴ real estate laws promulgated over the past five years. While this Article addresses many of the important issues and questions derived from a collection of the primary sources of the new real property law in the PRC, it does not cover all of the legislation existing on this subject. This Article, by discussing a field wherein little English commentary exists, serves to inform its reader of important legal developments on a subject of critical relevance to the future of the PRC—land use and resultant wealth generation.

II. COMMERCIAL REAL ESTATE LAW IN THE PEOPLE'S REPUBLIC OF CHINA

A. *Changing Real Property Rights in the 1980s*

Until the middle of the 1980s real estate law in the PRC could be summed up in two words: the state. Simply speaking, the state owned all the land in the PRC. Nevertheless, the concept of private ownership of land, although considered by the Communists to be bourgeois and decadent, was not unknown in China. Prior to the 1949 Communist Revolution, private ownership of land had existed in China for hundreds of years as an element of a complex feudal society.⁵ Starting in 1957, however, the new communist state abolished private rights in land ownership.⁶ The Marxist doctrines adopted by the PRC—that urban land is under the ownership of the whole people, and rural land is under collec-

land development, grossly exceeding the government's official target of 100,000 hectares.

3. See *infra* part IV.

4. Shenzhen is a special economic zone geographically adjacent to Hong Kong and situated in Guangdong province. The Guangdong province, in which the Shenzhen Special Economic Zone is located, experienced an average annual growth of 20% during the 1980s. N.Y. TIMES, Mar. 25, 1993, at A23.

5. See Chen Tung-Pi, *Emerging Real Estate Markets in Urban China*, 8 INT'L TAX & BUS. LAW. 78, 79 (1990); BASIC PRINCIPLES OF CIVIL LAW IN CHINA (William C. Jones ed., 1986).

6. Chen, *supra* note 5, at 80.

tive ownership⁷—did not alter the reality that the state effectively held and controlled all land rights. To date, the ownership rights to all land in the PRC still reside ultimately in the state. With the recent passage of the Law of the PRC on Land Management (Land Management Law), however, two monumental changes concerning the estates of land in China have occurred: The right to hold an estate in state-owned land now may be granted to an individual, and this estate in state-owned land now also may be transferred to another party.⁸ The PRC's promulgation and subsequent amendment of its land use legislation thus has established a new framework for real property law conducive to foreign investment.

The PRC has embarked on an expansion of its real estate laws as part of its larger program of socialist modernization,⁹ which began in the early 1980s with a series of reforms intended to make agriculture and industry more efficient and productive. Towards that end, the PRC began encouraging the much needed transfer of technology and investment.¹⁰ While this law does not specifically mention foreign investment as its purpose, the new legislation, when juxtaposed against almost forty years of the exclusion of private land rights, clearly signalled a key change in Chinese policy. The Land Management Law purposely gives the PRC real estate laws more capitalistic characteristics, which the Deng regime realizes are essential to any attempts at increasing foreign investments involving land use.

The recent amendments to the 1982 Constitution reflect the bold new position taken by the PRC and enhance the real property rights of individuals. Under these amendments, the right to use land may be assigned in accordance with the provisions of the law. However, the revised version also provides a small note of caution: "No organization or individual may appropriate, buy, sell, or unlawfully transfer land in other

7. See PRC Constitution Article 10 (Dec. 4, 1982), amended Apr. 12, 1988, *reprinted in* 1988 CHINA LAWS FOR FOREIGN BUSINESS (CCH Austl. Ltd) 4-500 [hereinafter PRC Constitution].

8. The Law of the PRC on Land Management, adopted on June 25, 1986 by the 16th session of the sixth NPC Standing Committee and amended on December 29, 1988, by the fifth session of the seventh NPC Standing Committee according to the "Decision on the Amendment of the Law of the PRC on Land Management," arts. 2, 7 [hereinafter Land Management Law].

9. *Id.* art. 1. This Article specifies that the law is formulated to meet the requirements of socialist modernization.

10. Professor Chen Tung-Pi (Queen's University, Canada), Lectures on Chinese Legal Studies (Fall Term, 1988).

ways."¹¹ In addition to the newly enacted legislation on real property reform, the PRC Civil Code of 1986 also contains provisions on property law, though this Code does not reflect the changes in the law which subsequently have taken place.¹²

B. Control of Land Use Rights

1. The Right to Hold a Leasehold Interest

The largest bundle of rights a holder may acquire under the PRC's real estate law is the right to use land for a predetermined period of time: a leasehold. Outright private ownership of land and unrestricted alienability remain inconsistent with Chinese Communist philosophy, and until the leadership of China decides otherwise, complete ownership of land in China under the Land Management Law is expressly reserved to the state by the "whole" people and collectively by the "working people."¹³ The right to use state-owned land and collectively-owned land may be granted to a "unit" owned by the whole people, a unit under collective ownership, or to an individual, and this right, in turn, may be transferred according to law.¹⁴

The PRC's new laws governing land use demonstrate a profound concern to maintain, under the guidance of proper urban planning processes, orderly land development. The provision for both specific organs and mechanisms to promulgate controlling legislation and administer urban planning demonstrates the long-term seriousness and commitment of the Chinese with respect to land use in their country. A three-tier system of land use regulation in China has evolved as a result of the new laws. Forming the first tier, the State Council department is responsible for uniform land management throughout the PRC. The second tier consists of the provinces, autonomous regions, and municipalities di-

11. PRC Constitution, *supra* note 7.

12. General Code of the Civil Law of the PRC, adopted on April 12, 1986, at the Fourth Session of the Sixth national People's Congress. Article 80 states, "Any purchase, sale, lease, mortgage, or illegal assignment of land is strictly prohibited." If not by the time of this Article's publication, it is likely that the code soon will be amended to reflect the changed circumstances permitting transfer of land use rights.

13. Land Management Law, *supra* note 8, art. 2.

14. *Id.* art. 7. It should be noted that the new land use laws do not confer any rights to natural resources that may be located underground. Interim Regulations of the People's Republic of China on Sale and Transfer of the Right to Use Urban State Owned Land, issued by the State Council on May 19, 1990, in Beijing XINHUA Domestic Service in Chinese 0199 GMT May 24, 1990, translated by Foreign Broadcast Information Service, FBIS-CHI-90-121, June 22, 1990.

rectly under the central authorities. The second-tier jurisdictions oversee the uniform management of land by local people's government departments at county and higher levels. The third tier consists of people's governments at town levels, which have responsibility for the uniform management of land within their administrative jurisdiction.¹⁵

The provisions of the law establish a Western-style, modern urban planning system that is replete with land surveys, statistics systems, land utilization plans, conservation programs, and reclamation of land following certain soil-depleting usages.¹⁶ The combination of these legislative measures and reforms illustrates the new, radical approach to land use taken by the Chinese leadership. A prospective foreign investor should draw confidence from these changes to the extent that they demonstrate progress, stability, and responsibility.

In the PRC, entitlement to the legal use of land owned by the whole people, collectives, or individuals is subject to confirmation, registration, verification, and the issuance of a certificate by the local people's government at the county or higher level.¹⁷ Users of state-owned land must apply for land registration to local people's governments above the county level. People's governments above the county level register and record state-owned land used by units and individuals and issue "State-owned Land Use Certificates." Pursuant to the Regulations for PRC Land Management Law (Land Management Regulations), the State Land Administration shall be exclusively responsible for determining the forms of land certificates.¹⁸ Those who seek to change the use of land in accordance with the law or to transfer the premises and attached structures on land must apply to the land administration of local people's governments above the county level to register the change of land use right. The latter shall allow reasonable changes in the land certificates.¹⁹

Significant legal problems may arise whenever one deals with the grant or transfer of land use rights, which may in turn affect these land use rights. It is therefore crucial to check the chain of title to ensure that approval for the land use rights was duly obtained, either in the initial grant or in the subsequent transfer, in order to avoid the risk of invalidation of the approval documents.²⁰

15. Land Management Law, *supra* note 8, art. 5.

16. *Id.* arts. 14-18.

17. *Id.* art. 9.

18. Regulations for PRC Law of Land Management, promulgated January 4, 1991, as State Council Order No. 73, effective February 1, 1991, in CHINA ECON. NEWS, No. 23, June 22, 1992, at 9, art. 4 [hereinafter Land Management Regulations].

19. *Id.* art. 6.

20. Land Management Law, *supra* note 8, art. 48.

2. Disputes Relating to Encroachments

Land use rights in the PRC now are protected by law so that no unit or individual can infringe upon these rights.²¹ While the term "unit" nominally includes any governmental unit, these land use rights nevertheless are still subject to government cancellation or expropriation. In cases of infringement upon land ownership or land use rights, the holder of the right may obtain an order to halt the infringement from the department of the local people's government in charge of land management at the county or higher level. Such an order may also require compensation from the infringer for losses caused by his actions.²² The term "infringement" is imprecisely defined in the legislation, though it may reasonably refer to trespass, unlawful easements, encroachments, or other actions that infringe upon the rights of a holder of land use rights. If a party disagrees with the disciplinary decision, it may file a suit with the People's Court within thirty days of receiving notice of such a decision. An aggrieved party may also file a suit directly with the People's Court,²³ and his foreign nationality will not serve as a bar to his case.

3. Expropriation of Land Use Rights

Notwithstanding the protection conferred upon the holder of land use rights, the PRC's real estate laws also empower the government to expropriate these land use rights. The government may expropriate collectively-owned and state-owned land for public policy reasons, including economic, cultural, defense, and state construction considerations.²⁴ In addition to the compensation fee, the unit that uses the land is required to pay a resettlement allowance.²⁵ When land is expropriated for state construction, the unit using the land is obligated to pay compensation for the right of use.²⁶ Unfortunately, the land user may not then use this

21. *Id.* art. 11.

22. *Id.* art. 53.

23. *Id.*

24. *Id.* art. 21. This Article provides that any state-owned land may be expropriated for state construction purposes.

25. *Id.* art. 28. For agricultural land, the amount is based on the population and the produce output. For other types of land, the resettlement subsidies are to be set by the relevant province, autonomous region, or municipality directly under the central authorities. It is unclear what application this provision would have, for example, on a developer who constructs a factory.

26. *Id.* art. 27. The compensation fee depends on the type of land being expropriated. Where the land is cultivated, the fee shall amount to between three to six times the value of the average annual output of the land for the three years prior to expropriation. For other types of land, the amount of compensation is based on a sale to be determined

compensation with discretion. Article 30 provides that all compensation and resettlement subsidies for land which is expropriated for state construction, apart from compensation paid for fixtures, shall be used to develop the scope of production of the unit from which the land was expropriated, arrange employment for the surplus labor displaced as a result of the expropriations, and to pay living allowances for those who cannot be re-employed. These subsidies shall not be diverted for any other purpose, nor shall any unit or individual seize them.²⁷

While the Land Management Law specifically addresses the expropriation of land for state construction, the Interim Regulations of the People's Republic of China on the Grant and Transfer of the Right to Use Urban State-Owned Land, issued by the State Council on May 19, 1990 (PRC Law on the Grant and Transfer Right) deal with the subject of appropriation generally.²⁸ Under this set of regulations, the State shall not prematurely recover the land use rights obtained by land users through a legal grant or transfer. In accordance with need or social public interest, however, the State may appropriate land and provide corresponding compensation in accordance with the term that the land users have already used and the actual circumstances regarding the development and the utilization of the land.²⁹ These regulations do not provide further detail about the means for determining proper compensation, nor do they indicate any specific restrictions to be imposed on the land user with respect to disposition of the compensation.

In discussing the rights of land users, one should note the circumstances under which the government may cancel these land use rights. The Land Management Law provides that a department in charge of land management may, after obtaining approval by the people's government at the county or higher level, withdraw a land user's right to use state-owned land and cancel the land use certificate if: (1) the land user unit has been dismissed or has moved; (2) the land has remained unused for two successive years without the authorization of the original approving organ; (3) the approved land use purpose is not allowed; and (4) transportation routes are abandoned subsequent to verification and

by the relevant province, autonomous region, or municipality.

27. *Id.* art. 30. The concept of using funds to develop the production of the unit whose land was requisitioned is unclear. One does not know who is entitled to these funds and what specifically one can do with them.

28. Interim Regulations of the People's Republic of China on the Grant and Transfer of the Right to Use Urban State-Owned Land as issued by the State Council on May 19, 1990 [hereinafter PRC Law on Grant and Transfer].

29. *Id.*

approval.³⁰

These stringent rights of cancellation are consistent with the high level of control that the Chinese seek to maintain over the development of their land. They are designed to maintain city planning and resemble North American urban planning practices. Of course, the key difference is that in North America a party may simply lose its zoning or planning approval; but in China, the government also removes the estate rights.

4. Disputes Relating to Ownership

Disputes arising out of the ownership of land use rights among individuals, between individuals and state-owned units, or between individuals and collective units are to be settled first by the parties themselves through consultation and "friendly negotiation." When this fails, the people's governments at the applicable township or county level handle the matter. If a party to a dispute disagrees with the decision of the people's government, the party may file a suit with the People's Court within thirty days of receiving a notice of that decision. From the time a holder of land use rights becomes a party to a dispute over the land use rights until the point of settlement, he may not alter the existing conditions of the land or destroy any fixtures on the land.³¹

C. Grant of Land Use Rights

1. Acquisition of Land Use Rights from the Government

The PRC maintains a dual conception of property rights whereby the state reserves ownership, and collectives or individuals reserve leasehold rights. Under this division of estates, China has enacted specific legislation to deal with the granting and transferring of the right to use urban state-owned land.³² This legislation confers upon companies, enterprises, organizations, and individuals both within and without the PRC's territory the opportunity to obtain land use rights³³ and the right to transfer, lease, pledge, or otherwise use the land in economic activities with the protection of the laws of the PRC.³⁴ The exercise of land use rights with

30. Land Management Law, *supra* note 8, art. 19.

31. *Id.* art. 13.

32. See PRC Law on Grant and Transfer, *supra* note 28. Urban state-owned land "refers to land belonging to the population as a whole within given areas of cities, county towns, established townships, and industrial and mining areas." *Id.* art. 2.

33. *Id.* art. 3.

34. *Id.* art. 4.

respect to the grant, transfer, leasing, pledging, and termination of the rights must be carried out under the supervision and with the approval of the land administrative departments of the people's governments at or above the county level or higher.³⁵ Such government interference with the transfer or pledging of land use rights (while uncapitalistic in its intrusiveness) is not peculiar to the PRC and indeed occurs (albeit to a lesser extent) in North America as well.³⁶ Once again, any transfer of property, including the pledging, termination, and transfer of land use rights, or removal or alteration of relevant surface structures, must be registered with the appropriate government land administrative departments and real estate administrative departments. These registration documents are a matter of public record, and nonparties may examine them freely.³⁷

Individuals initially may acquire land either by a Land Grant of the government or through a transfer of land previously granted by the government. Even though individuals, including foreign corporations, may now obtain land use rights, the land rights are not available on an open market basis for purchase. Under the PRC's method of government-controlled land use grants, an individual must approach the people's governments of municipalities and counties to obtain a grant of a land use right.³⁸ The grant of land which the individual may seek must conform with the land plots, usages, term of years, and other local conditions such that the grant is consistent with the urban plan in question.³⁹ In many ways, this is similar to the zoning and urban planning requirements with which developers must deal in United States urban centers. After acquiring land, developers in the United States can encounter a multiplicity of problems and no end of aggravation in obtaining requisite approvals from the numerous city departments before being able to embark on their project. Sometimes, the approvals are not forthcoming. In the PRC, by contrast, the developer may have an advantage in knowing whether the development plans will be approved before it commits itself financially to the land. The real difference between the two systems of urban planning approval, however, is in the aftermath of approval. In China, once the land user obtains the grant, he is required by law to

35. *Id.* art. 6.

36. See Ontario Planning Act, R.S.O. 1980, § 49, which requires government approval prior to any form of land conveyance, including the mortgaging of land in certain circumstances, for an example of strict planning measures affecting land transfers.

37. PRC Law of Grant and Transfer, *supra* note 28, art. 7.

38. *Id.* art. 9.

39. *Id.* art. 10.

utilize and manage the land in strict accordance with the provisions of the contracts for the grant of land use rights and with the requirements of urban planning.⁴⁰ Indeed, in cases in which the land user fails to develop and utilize the land in accordance with the time period and conditions stipulated in the contracts, the land administrative authorities can intervene to correct the matter. Depending on the circumstances, these authorities may issue warnings, fines, and even recover the land use rights without compensation.⁴¹ Hence, before investing in land use rights in the PRC, the investor should not only be committed to the specific project plans but be competent to develop the project in a timely manner or willing to risk losing the entire investment. The developer or investor may always seek approval both from the government granting authority and the respective planning and urban departments to change the use or zoning of the land. If the approval is granted, the change will be subject to an adjustment fee.⁴²

2. Terms of a Grant

The grant of land use rights comprises a grant for a certain term of years by the State in its capacity as owner of the land in return for the payment of fees by the land user.⁴³ To be valid, a grant contract must be in writing and signed.⁴⁴ Contracts for the grant of land use rights shall be signed between the land administrative departments of the municipal and county people's governments as the grantor, and the land user in accordance with the principles of equality, voluntarism, and compensation.⁴⁵ The maximum term of years for the grant of land use rights is determined in accordance with the respective use of the property.⁴⁶

40. *Id.* art. 17.

41. *Id.*

42. *Id.* art. 18.

43. *Id.* art. 8.

44. *Id.* art. 8. The statute fails to mention whether or not such contracts must be notarized. In many civil law jurisdictions, failure to notarize a conveyance of real estate can render the grant holder's rights unenforceable. Adjunct Professor M. Schwartz, New York University, Lectures on Comparative Commercial Law (Fall Term, 1992).

45. PRC Law on Grant and Transfer, *supra* note 28, art. 11.

46. The grant terms vary as follows: Seventy years for residential use; fifty years for industrial use; fifty years for educational, scientific/technological, cultural, health, and athletic use; forty years for business, tourism, and recreational use; and fifty years for multiple or other uses. *Id.* art. 12.

3. Acquisition of a Grant Through Agreement, Tender, and Auction

A land use grant may be obtained from the government by one of three means: agreement; bidding; or auction.⁴⁷ The first way, agreement, occurs by simple contract to purchase the land use rights. The second method, bidding, resembles a tender process whereby the tender is made through the public process pursuant to a set of criteria and is subject to a time limit and other conditions. The third method is the standard auction process. Land users must close the deal by making full payment of the fees for the grant of the land use rights within sixty days after signing a contract.⁴⁸ While this is certainly the case with the agreement method, it is unclear whether this payment requirement also applies to acquisitions through the bidding or auction processes. If a land user fails to pay the full amount within the sixty-day window, the grantor shall have the right to rescind the contract and may demand compensation for breach of contract.⁴⁹ It is uncertain whether, under applicable Chinese laws, the government grantor could compel specific performance by the purchaser of land use rights.

4. Concept of Warranty

The PRC laws incorporate a measure of warranties on the grant of the rights in the land. Specifically, the grantor must provide the land user with the rights that they have granted in accordance with the provisions of the contracts. If the grantor fails to provide land use rights in accordance with the provisions of the contract, the land user will have the right to rescind the contract and may demand compensation for breach of contract.⁵⁰

The newness of the PRC's Land Management Law starkly contrasts with the laws of more developed states. Real estate transactions in the United States, for example, can be complicated by difficulties such as encumbrances on title, property encroachments and easements, zoning and other municipal infractions, defects in title, and latent physical defects.⁵¹ Typically, a deed of land may contain particular types of warran-

47. *Id.* art. 13.

48. *Id.* art. 60.

49. *Id.*

50. *Id.* art. 15.

51. Chinese real estate transactions are complicated by the country's relatively recent revolutionary past. In a discussion with Owen Nee, Esq. of Coudert Bros., at the Asia Hour Lecture Series, New York University (Fall, 1992), Nee pointed out that one problem existing in China today is the registry system and what to do when officials are confronted with a dispute between a recent purchaser of land rights and a holder whose

ties to be given to the grantee by the grantor to cover these sorts of problems. It is entirely uncertain to what extent the grantor is in this instance covenanting with the user of land rights to make the latter whole from any damages he may suffer from breach of contract. Absence of express or implied warranties in the contract for the grant or the actual certificate should concern the investor. This same concern would also be relevant in the subsequent transfer of the grant of land to a third party. It is unclear to what extent, if any, the contracting parties to either the grant or transfer of land use rights in the PRC may structure their transaction to include the requisite warranties which could protect a purchaser from some of the aforementioned problems.

D. *Transfer of Land Use Rights*

1. Requirements and Rights Involving the Transfer of Leaseholds

By legal definition, the transfer of land use rights refers to sale, exchange, and gift transactions.⁵² To be able to transfer land use rights, the land user wishing to transfer must have adhered to the contractual provisions of the initial grant of land use rights with respect to investment capital and to use and development of the land in accordance with the stipulated time period.⁵³ The requirement that a certain amount of money must have been invested actually may restrict the ability to buy land with the intention of making a quick resale for profit. It is conceivable to transfer ownership of land use rights without actually reconveying the property, since an owner instead could sell the shares of the company that owns the rights of the land use contract. Based upon the specific conditions of the original grant contract and the approvals to be obtained for the transfer of equity of a company holding such land rights, it is not certain, however, whether such a sale really could succeed.⁵⁴

When land use rights are transferred, the rights and responsibilities specified in the contract for the grant of the land rights are transferred along with the land use rights and the registration documents.⁵⁵ The

rights predate the 1949 revolution.

52. PRC Law on Grant and Transfer, *supra* note 28, art. 19.

53. *Id.*

54. As will be discussed in part IV, foreign investors seeking to acquire land use rights in China must do so by one of the three prescribed methods: Chinese Foreign Joint Venture Company, Cooperative Joint Venture, or Wholly Foreign-Owned Enterprise Company. Depending on which vehicle an investor selects, certain laws will govern the actions of that corporation that may inhibit the transfer of its equity.

55. PRC Law on Grant and Transfer, *supra* note 28, art. 21.

person acquiring the land use rights acquires the rights for the same period as specified in the original grant, less the time already expired.⁵⁶ The regulations also allow land use rights to be inherited.⁵⁷

Of particular concern to foreign investors is the apparent pricing controls that exist with respect to land use transfers. Under the current law, when the transfer price for land use rights is obviously lower than the market price, the municipal and county people's governments enjoy a statutory right of first refusal. The disturbing aspect of the law is that if the municipal and the market price for the transfer of land use rights are deemed to be unreasonably inflated, the local people's governments may take "necessary measures;" implicitly, these bodies may alter the asking price.⁵⁸ While it is unknown what degree of unfettered discretion the Chinese may have with respect to approving or altering a transfer price, this provision nevertheless is further evidence of the PRC's effort to control speculation and to maintain a real estate market with socialist characteristics. Upon the completion of a transfer of land use rights, the new holder of the rights is entitled to seek a land use change.⁵⁹

2. The Transfer of Leaseholds and Surface Structures

A further complication, which relates to the ownership of surface structures and other attached objects on the land, arises in the context of the conveyance of leasehold estates. Normally, when conveying the ownership of land, transferors also convey buildings and fixtures along with the real property. When conveying a leasehold estate, however, the holder of the leasehold rights and the owner of any structures on the leased land may not necessarily be the same party. The Chinese address this situation by providing for contemporaneous transfer of the land use rights and the rights to the surface structures thereon and other attached objects.⁶⁰ Seemingly under this proviso, an individual transferring land use rights is required to transfer the ownership rights of structures and fixtures attached thereon as well. Nevertheless, the law also provides for situations when the structures and fixtures are sold independently of the

56. *Id.* art. 21.

57. *Id.* art. 48.

58. *Id.* art. 26. "[N]ecessary measures" is not defined in this legislation.

59. *Id.* art. 27. It should be noted that a person seeking a land use change will similarly be required to seek the necessary zoning and urban approvals as required in Article 18, *supra* part II.C.1.

60. PRC Law on Grant and Transfer, *supra* note 28, art. 23.

leasehold rights in Article 24.⁶¹ This Article implies that when structures are sold independently from the leasehold, the holder of the leasehold must transfer the right to use a certain amount of land around the structure that is "within the scope of the use of the structure," in addition to providing the owner of attached objects with the appropriate rights of egress and ingress to that structure.⁶² This requirement is troubling because it is unclear the extent to which the leaseholder's rights can be interfered with by the owner of the building. For instance, the nature of the building owner's business may be manufacturing, and this provision may entitle the owner to use the surrounding land for the transfer of heavy equipment or storage. These uses of land, depending on the aims of the leaseholder, may be detrimental to the leaseholder's interests. This infringement on the rights of the leaseholder also may affect the leaseholder's ability to obtain leasehold mortgage financing, given that the mortgagee may be unable to sell the leasehold on a foreclosure due to the encumbrances on the leasehold presented by the rights of the structure's third party owner. Moreover, this third party owner's business and presence may not be compatible with the aims of a prospective purchaser. For similar reasons, the holder of the leasehold itself may suffer undesired difficulties in a future transfer of the land use rights.⁶³ It is unclear whether the transfer by approval mandated under Article 25 concerns a transfer made at a separate time or a transfer made to a separate individual. Furthermore, Article 25 contradicts Article 23. Article 23 man-

61. Article 24 provides:

Owners or joint owners of surface structures and other attached objects shall enjoy the right to the use of the land that is within the scope of use of the structure and attached object in question. *When the ownership of surface structures and other attached objects is being transferred by land users, the right to the use of the land that is within their scope of use shall be transferred along with them, with the exception, however, of cases where surface structures and other attached objects are being transferred as movable property.*

Id. (emphasis added).

62. *Id.* The definition of "within the scope of the use of the structure" is unclear. It may pertain to some form of easement by necessity. One scholar, W. Sun, China expert, attorney, and visiting scholar at New York University School of Law, has suggested that this language refers to all of the land surrounding the building.

63. Article 25 provides in part:

When land use rights and the ownership of surface structures and other attached objects are being transferred separately, the matter shall be approved by the land administrative departments and real estate administrative departments of the municipal and county people's governments, and the registration of the transfer of ownership shall be handled in accordance with provisions.

Id.

dates that leaseholds and surface structures thereon be transferred together, whereas Article 25 provides that they may be transferred separately.⁶⁴

E. *Termination of Land Use Rights*

Generally, land use rights terminate upon the expiration of the term of years of the grant contract. These rights also will terminate upon the destruction and loss of the land and for reasons of "early recovery."⁶⁵ Though not specifically defined, early recovery may refer to loss of land use rights through expropriation or to cancellation by the government for various breaches of the contract or laws. Upon the termination of the land use right, the right to use the land, surface structures, and all fixtures automatically reverts to the State without compensation. Land users must return the land use certificates and cancel their registration in accordance with the applicable provisions.⁶⁶

An opportunity to renew the land use right exists, but unfortunately it may not be exercised until after the expiration of the right. Accordingly, an individual seeking to renew the land use right will have to go through proceedings similar to those used to procure the original grant.⁶⁷ This inability to renew prior to expiration presents a problem for the long-term oriented investor, because future planning and investment in the latter part of the grant period undoubtedly will be severely handicapped due to uncertainty over what rights, if any, the land user may revive after termination. Needless to say, uncertainty over renewal will inhibit financing of the leasehold and the marketability of both the leasehold and whatever business lies thereon. Investment opportunities would be enhanced measurably by providing for renewal negotiations and options in the original land use grant.

F. *Leasing of Land Use Rights*

Under the laws of the PRC, land users who have complied with the investment, development, utilization, and time period requirements may lease land use rights, along with surface structures, to lessees in return for payment.⁶⁸ Such a lease must be in writing and signed by the lessors and the lessees. The lease must not violate state laws and regulations or

64. *Id.* arts. 23, 25.

65. *Id.* art. 39.

66. *Id.* art. 40.

67. *Id.* art. 41.

68. *Id.* art. 28.

the contracts for the grant of the land use rights.⁶⁹ Additionally, the lessor must register the lease in accordance with local regulations.⁷⁰

G. *The National Law of Mortgages*

1. Pledging Leaseholds and Surface Structures

PRC mortgage law expressly allows individuals to pledge land use rights and structures found thereon.⁷¹ Under the law, when a holder pledges his land use rights, he must also pledge the surface structures and other objects found on the land. Conversely, this law also provides that when a holder pledges surface structures, he must also pledge the right to the use of the land that is "within the scope of the structures."⁷²

No problems appear to arise from these provisions when the holder of the land use rights and the owner of the buildings thereon are the same, but this scenario can become considerably more complicated when the holder of the land use rights and the owner of the building structures are not the same party. Under the above described laws, the owner of a leasehold or the structure desiring to obtain financing would have to obtain consent from the other party, given that the law requires both leasehold and structure to be pledged together. Compounding this potential problem is the additional need to determine the amount of the charge to be levied on the respective properties. Caution, therefore, would advise the investor in land use rights not to sell the surface structures to a separate entity, or to at least attempt to take his own financing measures first.

Both the mortgagor and mortgagee must sign all mortgage contracts. These contracts may not violate the provisions of state laws and regulations and the contract for the grant of land use rights.⁷³ All contracts for the mortgage of leasehold rights or buildings must be duly registered in accordance with these same provisions.⁷⁴

2. Rights of Mortgagor and Mortgagee

In the event of a default by the mortgagor, the mortgagee should know what remedies are available. The common remedy for default in the

69. *Id.* art. 29.

70. *Id.* art. 31.

71. *Id.* art. 32.

72. *Id.* art. 34; *see supra* note 62 and accompanying text.

73. PRC Law on Grant and Transfer, *supra* note 28, art. 34.

74. *Id.* art. 35.

United States is foreclosure, whether by judicial or by nonjudicial sale (power of sale).⁷⁵ When a mortgagor defaults on debt obligations or declares dissolution or bankruptcy during the term of the mortgage, the PRC mortgage laws permit the mortgagee to dispose of the pledged properties in accordance with provisions of state laws, regulations, and the pledge contracts.⁷⁶ The mortgagee then receives a statutory preferential right with respect to income generated from the disposition of pledged properties.⁷⁷ The terminology used in this law fails to make clear whether the concept of "properties" encompassed under the statute applies to the surface structures and the leasehold rights or only to the surface structures. Upon the discharge of the mortgage through repayment of the full amount of the debt, or for other reasons, the mortgage registration must be cancelled in accordance with the required provisions.⁷⁸ The PRC national mortgage laws do not provide expressly for any mortgagor equitable redemption rights. The national mortgage laws also are silent as to whether a mortgagee is left with a deficiency after the foreclosure has recourse to sue the mortgagor for the outstanding amount. In addition to these national laws, some local mortgage laws exist at the province and regional levels.⁷⁹

H. *Development of Large Parcels of Land*

1. Investment in Large Scale Land Development Projects

The Chinese have promulgated separate legislation, known as the Provisional Administrative Measures Governing Commercial Land Development and Management by Foreign Investors (Regulations for Investments in Parcels of Land), to govern foreign investment in and development of large parcels of land with the stipulated goal of attracting foreign businesses.⁸⁰ This law envisages the building of infrastructures

75. See JOSEPH RASCH, *THE NEW YORK PRACTICE AND LAW OF REAL PROPERTY* (1992) for more detailed information on the laws of real estate practice.

76. PRC Law on Grant and Transfer, *supra* note 28, art. 36.

77. *Id.* art. 37.

78. *Id.* art. 38.

79. This paper will also examine the Guangdong Mortgage Laws that affect mortgages in the Shenzhen Special Economic Zone. See *infra* part III.

80. See generally Provisional Administrative Measures Governing Commercial Land Development and Management by Foreign Investors, Promulgated by the State Council, May 19, 1990, in *CHINA LAWS FOR FOREIGN BUSINESS*, 14-723 [hereinafter *Regulations for Investment in Parcels of Land*]. It should be noted that this legislation was promulgated on or around the same time as the PRC Law on Grant and Transfer, *supra* note 28, and indeed, the latter stipulates that when foreign businesses invest and

such as sanitation pipes, utility apparatuses, and roads to enable the establishment of high technology and export-oriented industries.⁸¹ The law expressly provides that development enterprises participating in this form of investment are to be governed by and protected by the laws of the PRC.⁸²

Upon obtaining the land use rights of land owned by the State, the investor must commence a comprehensive land development process. The kind of development work contemplated by the statute includes: the leveling of ground; the building of water, power, and heating supply facilities; the construction of transportation and communication systems; and the preparation of land for industrial and other construction uses.⁸³ Additionally, the statute regulates the transfer of land use rights after the completion of the improvement works. The regulations do not indicate to whom such a transfer may be made or what level of compensation is appropriate. After the transfer, however, the investor may continue the construction of the buildings and factories on the land and related housing facilities and thereafter may transfer or lease these surface structures.⁸⁴ The purpose of this legislation thus seems to be to attract large scale land developers to build industrial infrastructures, which in turn could be used by other foreign enterprises in starting businesses in the PRC.

2. The Transfer of Large Parcels of Land

Any investor surely will focus on the transferability of the land use rights, as prudent commercial developers do not arbitrarily sink tens of millions of dollars into land projects without some guarantee of compensation. As previously noted, an investor is not allowed to transfer a grant of land use rights without first making a specified percentage of the total investment. This requirement may pose difficulties for the apartment investor seeking to presell apartments prior to construction, or for a commercial developer seeking to lease a project prior to construction. In either of these cases, it is not clear at what stage of the investment the law will permit an investor to transfer land use rights or enter into a contract to transfer them at some later date.

engage in the development and management of parcels of land, the administration of their land use rights is to be implemented in accordance with the relevant provisions of the State Council. Regulations for Investment in Parcels of Land, art. 51.

81. Regulations for Investment in Parcels of Land, *supra* note 80, art. 1.

82. *Id.* art. 4.

83. *Id.* art. 2.

84. *Id.*

The PRC approach to parcels of land, codified in the Regulations for Investment in Parcels of Land, likewise suffers from a lack of clarity about when transfers may take place. Article 2 permits transfer after completion of the development, while Article 9 permits transfer after implementation of the development plan in accordance with conditions stipulated in the contract for the grant of land.⁸⁵

Arguably, the projects governed by the parcels of land legislation are larger in scale than other projects, and this scale naturally creates greater financial exposure. The risks associated with such exposure typically could be minimized, however, by signing leases before beginning construction.⁸⁶ Whatever course of action an investor chooses to pursue, the investor should come to some legal arrangement with the governing authorities so that a timely transfer of rights suitable to the investor's needs can take place.

Lastly, any foreign investor interested in developing parcels of land must do so through one of the approved corporate investment vehicles for foreigners: Chinese-foreign equity joint ventures; Chinese-foreign cooperative ventures; or wholly foreign-owned enterprises engaging in developmental management (development enterprises), and the investor must adhere to the relevant laws governing each sort of entity.⁸⁷

3. Approval for Development of Large Parcels of Land

Development enterprises must submit a detailed feasibility study and a plan for their proposed project. These studies should clearly stipulate the goals of the project and should include a description of the intended land use upon the project's completion. Naturally, the study should comply with relevant urban planning requirements.⁸⁸ The feasibility study then goes to the city or county people's government for review. Thereafter, the study goes to the provincial, autonomous regional, or municipal people's governments for further review and approval.⁸⁹ Approval must also be obtained from the proper authorities according to the size of the project. Proposals for parcel development encompassing 1,000 *mu* or less of cultivated land, or 2,000 *mu* or less of other land, must be submitted to the

85. *Id.* arts. 2, 9.

86. A developer who obtained a contract to build an industrial center for the use of a specific company would not have these concerns.

87. These entities would be governed respectively by: Law of the PRC on Chinese-Foreign Joint Ventures, Law of the PRC on Chinese-Foreign Cooperative Ventures, and Law of the PRC on Wholly Foreign-Owned Enterprises.

88. Regulations for Investment in Parcels of Land, *supra* note 80, art. 8.

89. *Id.* art. 7.

appropriate government body for approval.⁹⁰ Proposals for parcel development encompassing more than 1,000 *mu* of cultivated land, or more than 2,000 *mu* of other land or whose amount of investment for development is beyond the scope of authority of the people's governments, autonomous regions and municipalities directly under the central authorities, shall be submitted by these bodies to the State Planning Commission. The Commission will examine, verify, and coordinate the plans, which then will be examined by the State Council.⁹¹ Additionally, the investor intending to ultimately use the land should seek the requisite approval for the proposed business.⁹²

When the requisite approvals are in order, the grant of the right to use the state-owned land may be made by the people's governments of the municipalities or counties where the land is located, in accordance with the laws and administrative regulations governing the management of state-owned land. Furthermore, these governments should submit the relevant contracts pertaining to development to the proper authorities for their approval.⁹³ Investors who are interested in the development of power stations or ports should consult the specific articles addressing these matters in the Regulations for Investment in Parcels of Land.⁹⁴

I. *Allocated Leasehold Rights*

1. Allocated Leaseholds Defined

As previously indicated, an investor can obtain land use rights through a grant by the state, pursuant to the PRC Law of Grant and Transfer.⁹⁵ Investors also may obtain a grant of land use rights for parcels of land, known as allocated leasehold rights, under the Interim Regulations of

90. *Id.* art. 3. 1 *mu* = 0.1647 acres, so that 1,000 *mu* would be approximately 165 acres and 2,000 *mu* approximately 330 acres. The appropriate authority includes the people's governments of the provinces, autonomous regions, and municipalities directly under the central authorities, as well as the people's governments of the administrative committees for the special economic zones. *Id.* The amount of the investment will determine the appropriate government body from which approval should be sought. *Id.*

91. *Id.* Enterprises and technological investments under \$30 million may be approved by the local MOFFERT, but investments in excess of that amount require approval of Central MOFFERT. Interview with Xiao Yong, Attorney at Law and Section Chief, Department of Treaty and Law of the Ministry of Foreign Economic Relations and Trade (MOFFERT), in New York, N.Y. (Oct. 1992).

92. Regulations for Investment in Parcels of Land, *supra* note 80, art. 15. This is especially true when the business concerns export industries.

93. *Id.* art. 5.

94. See *id.* art. 12 for power stations and art. 13 for construction of ports.

95. PRC Law on Grant and Transfer, *supra* note 28, art. 3.

Foreign Investment in Parcels of Land. Under the Administration of Allocated Leaseholds Tentative Procedures (Allocated Leasehold Procedures) the term "allocated leasehold rights" refers to land use rights obtained according to law by an individual or corporation by means other than by a grant of leasehold and without payment of compensation.⁹⁶ Allocated leasehold rights most likely arise in the context of a joint venture. In this situation the state-owned enterprise assigns its allocated leasehold rights to the Chinese-foreign joint venture as part of its capital contribution.⁹⁷ Allocated leaseholds are regulated under the PRC Law of Grant and Transfer as well as through specific procedures codified under the Administration of Allocated Leaseholds.⁹⁸

2. Transfer of Allocated Leasehold Rights

Under the PRC Law of Grant and Transfer, the term "allocated land use rights" refers to land for which the user did not pay compensation.⁹⁹ These allocated land use rights may not be transferred, leased, or mortgaged unless the user complies with specific conditions.¹⁰⁰ These conditions are in addition to obtaining the approval of the administrative departments of land and real estate of the municipal or county people's governments.¹⁰¹ Once the leaseholder has met these conditions, he may

96. Administration of Allocated Leaseholds Tentative Procedures, promulgated by the State Land Administration Bureau on and effective from March 8, 1992, in CHINA LAW AND PRACTICE, July 19, 1992, at 42 [hereinafter Allocated Leasehold Procedures]. According to W. Sun, Member of the New York Bar and visiting Chinese Scholar at New York University School of Law, "allocated land use rights" refer to land which has been divided and given by the state to other state entities.

97. See Editor's Notes, *Leasehold Procedures*, CHINA LAW AND PRACTICE, July 19, 1992, at 48.

98. See Allocated Leasehold Procedures, *supra* note 96.

99. PRC Law on Grant and Transfer, *supra* note 28, art. 43.

100. *Id.* art. 44.

101. These conditions are as follows:

1. the leaseholder must be a company, enterprise, other economic organization or an individual;
2. the leaseholder must possess a state land use certificate;
3. the leaseholder must have proof of its lawful title to the structures or other attachments to the land; and,
4. a leasehold grant contract must be signed and either a leasehold grant fee or such portions of the earnings from the assignment, leasing out or mortgaging of the leasehold as correspond to the leasehold grant fee is paid to the local municipal or county People's Government.

Id. art. 45. For a more concise translation, see Allocated Leasehold Procedures, *supra* note 96.

assign, lease, or mortgage the allocated land use rights. These obligations basically consist of proving title and paying the state for the land use right originally received without compensation. The failure to adhere to these preconditions for conveying land use rights could subject the party who unlawfully seeks to convey these rights to confiscation of the illegal income and fines.¹⁰² Holders of allocated land use rights also should be aware that inactivity on the land brought about by moving away, dissolution, cancellation, bankruptcy, or any other occurrences may result in forfeiture of their land rights without compensation. In such situations, however, compensation may be available for structures on the surface of the land.¹⁰³

Procedures codified under the Administration of Allocated Leaseholds were enacted in March, 1992, which elaborate more extensively on the requirements pertaining to the assignment, lease, and mortgage of allocated land use rights.¹⁰⁴ Pursuant to these procedures, the land administration departments of the people's governments at and above the county level will administer, supervise, and examine the assignment, leasing, and mortgaging of leaseholds.¹⁰⁵ The preconditions for the assignment, lease, and mortgage of the allocated leasehold rights in Article 6 of the Allocated Leaseholds Procedures are identical to the preconditions specified in Article 45 of the PRC Law on Land Grant and Transfer.

A land user needing to assign, lease out, or mortgage a leasehold must submit a written application to the land administration department of the local municipal or county people's government on the strength of its legal proof of title.¹⁰⁶ Within fifteen days' receipt of the application, the appropriate department must issue a reply.¹⁰⁷ When it grants consent, the land administration department will sign leasehold grant contracts with applicants after "mutual consultation."¹⁰⁸ The term for the grant of the leasehold then is set forth in the leasehold grant contract following consultation and is subject to the PRC Law on Grant and Transfer regulations.¹⁰⁹ Additionally, the two parties to an assignment, lease, or

102. PRC Law on Grant and Transfer, *supra* note 28, art. 46.

103. *Id.* art. 47.

104. Allocated Leasehold Procedures, *supra* note 96, art. 3, provides that the assignment, leasing out and mortgaging of allocated leaseholds shall be governed by these procedures.

105. *Id.* art. 4.

106. *Id.* art. 12. Note that the statute uses the term "need." The land user hence may have to demonstrate a bona fide reliance on such a transfer of rights.

107. *Id.* art. 13.

108. *Id.* art. 14. It is unknown what "mutual consultation" entails.

109. *Id.* art. 25.

mortgage of the leasehold must sign a contract covering their transaction in accordance with the regulations and the leasehold grant contract.¹¹⁰

Within sixty days from the execution of the leasehold grant contract, the land user must pay the leasehold grant fee to the local municipal or county people's government and complete the procedures for registering the grant of the leasehold with the appropriate land administration department.¹¹¹ Failure by the land user to pay the grant fee in full within the term specified in the leasehold grant contract will give the grantor the right to terminate the contract and claim compensation for its breach.¹¹² The price of the leasehold grant fees will be proportionate to the indicated land price,¹¹³ provided that the fee not be lower than forty percent of the initial land price.¹¹⁴ Thereafter, within fifteen days after registering the grant of leasehold, both parties will register the assignment, lease, or mortgage with the land administration department of the local municipal or county people's government.¹¹⁵

The need to adhere strictly to the registration procedures cannot be overemphasized, and whenever possible, the actual regulations and procedures should be consulted. Failure to carry out the required land registration procedures shall render the assignment, lease, and mortgage void and thereby not protected by the law.¹¹⁶

110. *Id.* art. 15. "Regulations" refer to the PRC Law on Grant and Transfer, *supra* note 28.

111. Allocated Leasehold Procedures, *supra* note 96, art. 16. The state in such cases receives compensation for land rights which it previously had allocated for no value. By requiring the land user to pay for the land grant, the state is putting the land user in the similar situation of the holder of land use rights who also had to pay for those rights. In some instances the state can be seen to have been paid twice for the same land, for while the state allocated the land use rights for a state corporation participating in a foreign equity joint venture without being directly compensated, the state nevertheless was compensated indirectly for the land by receiving an allocation of capital on the balance sheet of the joint venture corporation.

112. *Id.* art. 31.

113. The land price will be established by the land administration departments of the relevant government on the basis of the standard land price, the term of the assignment, lease, or mortgage, and the physical condition of the lot.

114. Allocated Leasehold Procedures, *supra* note 96, art. 26.

115. *Id.* art. 17. At this point, the land user will be required to present the state land use certificate, the leasehold grant contract, the leasehold assignment/mortgage/lease contract, and other materials required by the people's government land administration departments.

116. *Id.* art. 32.

3. Transfer of Allocated Leasehold and Surface Structures

An assignment of the leasehold to another party can consist of only the leasehold or of the leasehold and the buildings found thereon.¹¹⁷ A leasehold may be assigned by sale, exchange, or by gift.¹¹⁸ As in the PRC Law on Grant and Transfer, under the Allocated Leasehold Procedures the land user may be faced with situations in which the surface structures on the land are assigned, leased, or mortgaged. If a party assigns or mortgages a leasehold, he must also assign a mortgage title to any buildings located on the land.¹¹⁹ If only the title to the building on the land is assigned or mortgaged, however, the leasehold of the land underlying that building is assigned along with it. Similarly, when a party leases a leasehold, he leases out buildings on the land along with the leaseholds. An assignee of a leasehold may change the provisions of the leasehold grant upon obtaining the consent of the people's government at the appropriate level and that of the urban planning department, but may be subject to a leasehold grant fee adjustment.¹²⁰

Article 9 provides that a holder of land use rights may lease out the leasehold rights along with the building rights or may lease out the building rights alone.¹²¹ This provision contradicts Article 11, which requires that the rights to the land and the structures must be leased together. The contradictory language of these two articles stands as a further example of the confusion surrounding the laws applicable to the transfer of rights of leaseholds and structures. As a safeguard measure for the lessor-landowner, a lessee may not erect new buildings without obtaining the consent of both the landowner and the relevant authorities.¹²² Within fifteen days from the date of termination of a lease contract, the lessor shall cancel the lease according to the registration

117. *Id.* art. 7.

118. *Id.* art. 8.

119. *Id.* art. 11.

120. *Id.* art. 20.

121. *Id.* art. 9. This Article provides that the land user may lease out the leasehold by itself or together with the buildings. Article 11, however, expressly requires that any leasing of the leasehold also include the leasing of the buildings on the land. *Id.* art. 11. Once again, the transfer of rights of the building structures to someone other than the leaseholder can create undesired problems and should be avoided. For example, if the holder of a leasehold leases the factories to one party, he may be precluded from leasing the leasehold to another party because Article 11 mandates that the leasehold rights of the land and the building must go together. *Id.*

122. *Id.* art. 21. Likewise, any change in the leasehold grant conditions require the consent of both the lessor and the appropriate urban planning and governing bodies.

procedures.¹²³

The procedures allow for the mortgagee to provide financing while obtaining a mortgage security on the leasehold interest.¹²⁴ A mortgagee shall have the right to dispose of the mortgaged property pursuant to state laws and regulations and the provisions of the mortgage contract if a mortgagor fails to perform her obligations when due, if a mortgagor is declared bankrupt, or if the mortgage is declared dissolved during the term of the mortgage.¹²⁵

The State may, when necessary for the public interest, re-enter a leasehold during the term of the grant and pay compensation commensurate with the number of years for which the land user has used the land and the level of actual land development.¹²⁶

III. REAL ESTATE LAW IN SHENZHEN

A. *Land Administration in Guangdong Province*

Shenzhen is a city bordering Hong Kong, situated in the Province of Guangdong. The Shenzhen Special Economic Zone (SEZ) is experiencing strong investment by foreigners interested in acquiring land rights. As a product of this investment interest, property prices naturally have risen. Indeed, during 1991 alone, scholars estimated that commercial and industrial property prices in Shenzhen increased nearly two hundred percent.¹²⁷ To streamline land management procedures in the SEZ, the province of Guangdong passed new legislation in 1991, the Land Management Regulations for Special Economic Zones in Guangdong Province (Guangdong Land Management Regulations), repealing the earlier Shenzhen laws on land administration passed in 1987.¹²⁸ These regulations are formulated in accordance with the Land Management Law of

123. *Id.* art. 22.

124. *Id.* art. 10.

125. *Id.* art. 24.

126. *Id.* art. 31.

127. Richard Brecher, *China Announces New Investment Policies*, CHINA BUS. REV. 4, 12 (1991).

128. Land Management Regulations for Special Economic Zones in Guangdong Province, Approved by the 20th Meeting of the Seventh Guangdong Provincial People's Congress standing committee on May 10, 1991, in 24 CHINA ECON. NEWS, July 1, 1991, at 5 [hereinafter Guangdong Land Management Regulations]. Article 58 stipulates that upon the coming into force of these regulations, the Regulations on Land Administration in The Shenzhen Special Economic Zone, as adopted at the 40th Session of the Standing Committee of the 6th Guangdong Provincial People's Congress on December 29, 1987, shall be simultaneously abolished. *Id.* art. 58.

the People's Republic of China to provide additional procedures for the administration of land management in the Guangdong province.¹²⁹ The administering bodies for these regulations are to be the Municipal People's Governments of Shenzhen's branch of the State Land Bureau and the Administrative Committee, which are the functioning organs for the administration of land in special economic zones.¹³⁰

The regulations provide that, unless otherwise specified by law, all corporations, enterprises, other organizations, and individuals inside and outside of the PRC may acquire land use rights to develop, utilize, and manage land in accordance with the law. The legitimate rights and interests of these land users are protected by law in the PRC.¹³¹ In Shenzhen, land use rights may be sold, transferred, leased, mortgaged, or used for other legal economic activities.¹³²

B. *Grant of Land Use Rights in Guangdong Province*

1. Acquisition of Land Use Rights Through Contract

Land use rights may be obtained in one of three ways in Shenzhen: by contractual agreement with the government; through public tender; or by public auction. Contractual agreement represents the most common means of acquisition.¹³³ A sale by agreement requires the purchaser to enter into a written contract with the State Land Bureau. The contract will set out the rights and obligations of both sides including the term period, the use of the land, the fees paid for the use of the land, the total investment for land development, and the deadline for investment payments.¹³⁴ If the purchaser fails to make full payment of the land use fee by the date specified in the contract, the State Land Bureau is entitled to terminate the sales contract and may seek damages for the breach. In the

129. *Id.* art. 1. Article 56 of the Land Management Laws, *supra* note 8, provides that the standing committee of respective provincial, autonomous regional, and municipal people's congress shall in accordance with this law formulate the methods of implementation.

130. Guangdong Land Management Regulations, *supra* note 128, arts. 2, 5.

131. *Id.* art. 3.

132. *Id.* art. 4. It is unspecified in the regulations just what uses constitute "other economic activities." One possible use may be the rollover of the land into a joint venture.

133. Detailed procedures and measures governing the sale of land use rights are codified in the Measures of Shenzhen SEZ on the Transfer of Land Use Rights, passed by the 28th Session of the Standing Committee of the Shenzhen Municipal People's Government. See *infra* part III.F.

134. Guangdong Land Management Regulations, *supra* note 128, art. 12.

event that the State Land Bureau fails to offer the land use right provided in the contract, the land user is entitled to terminate the contract and seek damages.¹³⁵ The provisions do not mention whether or not specific performance is available as a purchaser remedy, which could prove unfortunate for a purchaser embroiled in a dispute involving the transfer of a land use right. An investor of land must also face the time limit imposed by the contract for the development of the investment proposal itself. To this end, a land user who fails to invest and develop the land within the time limit prescribed by the sales contract may have the contract terminated by the State Land Bureau subject to approval of the Municipal Government or the Administrative Committee.¹³⁶ A land user desiring to change the contractual usage and investment conditions must apply to the State Land Bureau.¹³⁷

2. Term of Leasehold

Municipal Governments or the Administrative Committee determine the term of years for use of the land in accordance with relevant state provisions and in light of current circumstances.¹³⁸ Upon the expiration of the term of the land use right, the leasehold interest, as well as any structures on the property, are returned to the Municipal Government without any compensation to the leaseholder. Unlike the PRC Law on Grant and Transfer termination provision,¹³⁹ the Guangdong Land Management Regulations enable the land user to apply for an extension of the land use right six months before its expiration.¹⁴⁰ Allowing for extension prior to expiration represents a step in the right direction, albeit a small one. Investors in real estate for periods of forty or fifty years undoubtedly would prefer to know their land lease renewal options well in advance of six months of the expiration date. A time for renewing the leasehold set three, five, or more years in advance of the expiration date, or a suitable option to renew the lease in the granting contract, would be more favorable for purposes of resale and financing.

If land is sold by auction, the land user must make a deposit of ten percent of the full payment to the State Land Bureau on the date when the sales contract becomes effective and pay the remaining amount

135. *Id.* art. 13.

136. *Id.* art. 20.

137. *Id.* art. 17.

138. *Id.* art. 16.

139. PRC Law on Grant and Transfer, *supra* note 28. Article 41 provides that after expiration of the land use contract, the land user may negotiate a new term.

140. Guangdong Land Management Regulations, *supra* note 128, art. 19.

within sixty days. Failure to pay entitles the government to terminate the contract and results in forfeiture of the purchaser's deposit.¹⁴¹

C. *Transfer of Land Use Rights in Guangdong Province*

Land users can transfer their leasehold interests once they have paid their land use fees in full, obtained a duly issued real estate certificate, and invested in excess of twenty-five percent of the total investment amount set forth in the contract.¹⁴² An important new provision included in the land transfer law, and not evident in the above-mentioned real estate laws, is the ability of the land user, subject to approval by the State Land Bureau, to sell land use rights in advance, along with the structural premises thereon.¹⁴³ It thus appears that even before an investor has expended any of the required twenty-five percent minimum required investment, he theoretically will be able to transfer this leasehold. This provision could breathe life into the concept of quick resale of real estate for profit. Whenever a land user wishes to transfer a leasehold interest, he must transfer the building structures thereon with the leasehold.¹⁴⁴ An owner of surface structures is entitled to enjoy the use of the land within the usable area of the premises. A land user who transfers the ownership in the buildings must also transfer the usable premises area land use rights.¹⁴⁵

A land user must pay a fee associated with the transfer of land use rights. The municipal government or the administrative committee determine the amount of the fee, but impose only one when the land price has risen.¹⁴⁶ The land user may not transfer the land for any price he chooses, and if he irrationally raises the price, the municipal governments or the administrative committees may resort to "necessary measures."¹⁴⁷ Whenever the price of the land use right is significantly lower than market price, the State enjoys a right of first refusal.¹⁴⁸

141. *Id.* art. 14.

142. *Id.* art. 28.

143. *Id.* art. 31.

144. *Id.* art. 29.

145. *Id.* art. 30.

146. *Id.* art. 38.

147. *Id.* art. 35. Though the definition of "necessary measures" is not specified, the net effect is likely to have an impact on inflation and speculation. It is interesting to note that the Chinese have not been intolerant of profit. However, it is unknown what degree of profit the Chinese will tolerate. For instance, during the past recent years, real property prices in Shenzhen have been allowed to skyrocket. *See, e.g., supra* note 127.

148. Guangdong Land Management Regulations, *supra* note 128, art. 35.

D. *Leasing of Land Use Rights in Guangdong Province*

A holder of land use rights may enter into a written contract for the lease of those rights, but the lease must be registered within thirty days from the effective date of the contract.¹⁴⁹ The right to lease also shall be conditioned on the land user fulfilling the minimum investment and development requirements, as stipulated in the contract and discussed above.¹⁵⁰

1. Registration

The sale, transfer, leasing, mortgaging, inheritance, and termination of land use rights shall be registered at the land and house property registration offices designated by the Municipal governments or the administrative committee. These documents may be open for public reference.¹⁵¹ Regarding the initial sale of land use rights, the land user must register the sale within thirty days to receive a real estate certificate affirming the right to the use of the land.¹⁵² When transferring the land use right, the relevant contract must be registered within fifteen days of coming into force. The transfer, mortgage, or lease of land use rights shall not be legally effective if such occurrences are not registered according to the law.¹⁵³

2. Expropriation

The government has the power to requisition land use rights to meet the demands of public interest. Compensation, if any, is to be determined under the provisions of the Procedures and Measures For the Implementation Of Land Administration of Guangdong Province.¹⁵⁴ When the government requisitions land rights, a dissatisfied party may apply for reconsideration at the immediately higher government level or file suit in the People's Court.¹⁵⁵

149. *Id.* art. 36.

150. *Id.* art. 38.

151. *Id.* art. 9.

152. *Id.* art. 15.

153. *Id.* art. 47.

154. *Id.* art. 6.

155. *Id.* art. 44. Such a right to reconsideration concerns the requisition of Certificates of Land Use Rights itself, rather than the compensation. The government, upon the appeal, must render its decision within two months from the date of application. If the parties are still unsatisfied, they may bring action at the People's Court within fifteen days of the reconsideration.

3. Dispute

Under the Guangdong Land Management Regulations, when a dispute over land ownership or land use rights arises, it shall be settled through consultation between the parties concerned. If the parties cannot resolve their differences, the dispute, when deemed necessary, will be dealt with by the municipal governments, the administration committee, or the provincial government. The government's decision may be appealed to the People's Court within fifteen days of notification of the decision.¹⁵⁶

E. Grant of Land Use Rights in Shenzhen

In addition to the Land Management Regulations for Special Economic Zones in Guangdong Province, the Chinese have promulgated further provisions to apply to the transfer of land use rights in Shenzhen, specifically the Measures of the Shenzhen Special Economic Zone on the Transfer of Land Use Rights (Shenzhen Transfer Rights).¹⁵⁷ Those who may participate in the transfer of land use rights in Shenzhen are specifically noted in the legislation as domestic and foreign enterprises and other entities or individuals.¹⁵⁸ The Shenzhen Municipal State Land Planning Bureau (the Municipal Land Planning Bureau) presides over the transfer of land use rights in Shenzhen.¹⁵⁹ The Municipal Land Planning Bureau will determine matters pertaining to the zoning of land, the terms of duration, and other conditions associated with land use transfers.¹⁶⁰ In return for the land use rights, the land user must pay a land charge to the Municipal Land Planning Bureau.¹⁶¹ Foreign enterprises, other entities, or individuals shall pay land charges in foreign exchange.¹⁶² The Shenzhen Transfer Rights measures also set the dura-

156. *Id.* art. 45. It is uncertain what interplay, if any, this dispute mechanism has with respect to the appropriation of land rights provisions in Article 44.

157. Measures of the Shenzhen Special Economic Zone on the Transfer of Land Use Rights, adopted at the 28th Session of the Standing Committee of the Shenzhen Municipal People's Government [hereinafter Shenzhen Transfer Rights]. Article 1 of these measures expressly states that they are formulated in accordance with Article 11 of the Land Management Regulations for Special Economic Zones in Guangdong Province, *supra* note 128.

158. Shenzhen Transfer Rights, *supra* note 157, art. 5.

159. *Id.* art. 2.

160. *Id.*

161. *Id.* The land charge will consist of a land use rights transfer fee, a municipal works auxiliary infrastructure fee, and a land development fee. The precise definition of these three fees is unspecified in the legislation.

162. *Id.* art. 10. The laws do not specify which foreign exchange is acceptable.

tional lease term maximums.¹⁶³

F. *Initial Transfer of Land Use Rights in Shenzhen*

1. General Methods of Land Transfer

Three methods of obtaining initial grants of land from the State are available: by agreement; by tender; and by auction. Land use rights are not available for transfer unless the proposed use for the land falls within the scope of land use as outlined in the Shenzhen Transfer Rights measures.¹⁶⁴

2. Procedures for the Transfer of Leaseholds by Contract

To obtain the transfer of land use rights by agreement, a land user must follow a specified set of procedures, commencing with the filing of an application to the Municipal Land Planning Bureau.¹⁶⁵ Among the

163. The maximum terms are as follows:

- (1) land for industry: 30 years;
- (2) land for commerce and service industries: 30 years;
- (3) land for residential and office buildings: 50 years;
- (4) land for education, science and technology: 50 years;
- (5) land for tourist operations: 30 years;
- (6) land for horticultural, pastoral purposes: 20 years;

Id. art. 6.

164. These uses are:

- (1) land for high-tech industry projects;
- (2) land for industries unable to use standard factories;
- (3) land for welfare commodity housing;
- (4) low-profit commodity housing;
- (5) land for nonprofit purposes;
- (6) land for transforming old city and village areas.

Id. art. 11. Several restrictions applying to land for nonprofit purposes also warrant notice. According to Article 18 of these measures, land for nonprofit purposes may not be altered for use for profit-making purposes and may not be leased, assigned, or mortgaged. *Id.* art. 18. A land user must seek special approval from the Shenzhen Municipal Land Development Policy Committee for projects outside of this scope. It is unclear, for example, precisely in which category, if any, middle class condominiums, commercial office towers, or commercial shopping centers would fall.

165. *Id.* art. 12. Specifically, the applicant is required to submit the following documents to the Municipal Land Planning Bureau:

- (1) a report on the land use application;
- (2) an application form to transfer land use rights through agreement (standard form supplied by Municipal Land Planning Bureau), with diagrams of the project's preliminary arrangements;
- (3) a document issued by the Municipal Government approving the establish-

documents to be submitted is the Article 12(3) document of establishment of an enterprise in the SEZ and a certificate of registration from the Authority for Industry and Commerce. This requirement clearly mandates that a foreign company establish a legal entity in China prior to even submitting an application, which seemingly conflicts slightly with Article 5's statement that the targets of the SEZ land use rights are to be domestic and foreign enterprises.¹⁶⁶ Within thirty days of receiving the application documents, the Municipal Land Planning Bureau must issue its response. When land is to be supplied to the applicant within a short time, a Notice Agreeing on Land Usage shall be issued to the applicant.¹⁶⁷ The successful applicant who receives the Notice Agreeing on Land Usage must present it to the Municipal Land Planning Bureau within fifteen days of receipt and negotiate land use matters. After the Municipal Land Planning Bureau has determined the land area, duration for the land use term, purpose of usage, and agreement-based land price standards, it shall report the details to the Shenzhen Municipal Land Development Policy Committee for approval and public announcement.¹⁶⁸ Within sixty days of gaining the approval of the Shenzhen Municipal Land Development Policy Committee, an applicant shall sign a land transfer contract with the Municipal Land Planning Bureau; the approval shall be deemed to have been rescinded if a contract is not signed within the stipulated period. The land user shall pay a land charge to the Municipal Land Planning Bureau pursuant to the amount stipulated in the transfer contract.¹⁶⁹ Upon presentation of a land charge payment receipt, verified and issued by the Municipal Land Planning Bureau, a land user shall register the land use rights pursuant to relevant provisions of the Shenzhen SEZ on real estate registration and shall obtain a Real Estate Certificate.

ment of an enterprise or institution in the SEZ and a certificate of registration from the Authority for Industry and Commerce;

(4) the Municipal Planning Bureau's annual preliminary project approval document; and

(5) documentary evidence of the applicant's ability to pay the land charge.

Id. Additionally, a project appraisal report issued by the Shenzhen Municipal Bureau of Science and Technology shall be submitted when a high technology project is envisaged. Any application for a reduction of or exemption from payment of a land use rights transfer fee (pursuant to Article 16 of these measures) shall also be submitted at this time. *Id.* arts. 12, 16.

166. *Id.* art. 5.

167. *Id.* art. 12.

168. *Id.*

169. *Id.*

On the day the land transfer contract takes effect, a land user shall pay a minimum of twenty percent of the land charge as a security deposit, with the balance due within sixty days thereafter. If the land user does not pay the balance within the stipulated time limit, the Municipal Land Planning Bureau shall have the right to cancel the contract, and the security deposit already collected shall be forfeited.¹⁷⁰ Land users seeking reductions or exemptions in land use fees must submit those requests with their initial application. Reductions in prices, if any, are to be determined in accordance with specific statutory provisions.¹⁷¹ In circumstances in which a land user gains reductions for land originally obtained through an administrative allocation, the land user and mortgagee (when there is a default and he proceeds to sell the land) must obtain approvals and remit the requisite payback to the Municipal Planning Bureau prior to proceeding with any leasing or transferring of the land use rights.¹⁷²

3. Transfer of Leaseholds by Tender¹⁷³

The transfer of land use rights by tender is administered by the Municipal Land Planning Bureau.¹⁷⁴ The Bureau employs both public and private tender processes to convey land use rights. The former method is open to the public at large, while the latter is restricted to those invited to tender. In either case, the Shenzhen authorities have adopted procedures that would be quite standard for a tendering process in the United States or Canada.¹⁷⁵ The successful tender candidate, upon notice, must

170. *Id.* art. 14.

171. *Id.* art. 16. The following applicable provisions for reduction in land prices are listed: (1) for high-tech projects, the amount of the land use rights transfer fee collected shall be reduced by 40%; (2) for welfare commodity housing projects, the land use rights transfer fee and municipal works auxiliary infrastructure fee shall be exempted; (3) for low profit commodity housing and nonprofit projects, the land use rights transfer fee shall be exempted; and (4) for land transformation of old city and village areas, the reduction will be determined according to the circumstances. *Id.*

172. *Id.* art. 14. The Articles specifically addressed to this matter should be scrutinized for further information. Articles 19 and 20 deal with reduction in prices and allocated land. *Id.* arts. 19-20.

173. This Article provides a brief summary of the transfer process. For further specific regulations on the tendering process, in addition to Articles 21 to 27, inclusive, of the Shenzhen Measures, see generally Provisional Measures on Invitation of Tenders and Submission of Tenders Concerning Land Sale in Shenzhen, CHINA ECON. NEWS (Dec. 28, 1987), at 8.

174. Shenzhen Transfer Rights, *supra* note 157, art. 21.

175. *Id.* art. 24. This Article outlines the procedures for transfer of land use rights by tender. These procedures are typical of any tendering process for land development in

sign a transfer contract with the Municipal Land Planning Bureau within a specified period and pay the land charge.¹⁷⁶ If the candidate does not pay the land charge in full within sixty days of the effective date of the contract, the Bureau may cancel the contract, and the candidate forfeits the security deposit.¹⁷⁷

4. Transfer of Leaseholds by Auction

Land use rights also may be transferred by means of public auction.¹⁷⁸ The government is entitled to submit a reserve bid, thereby permitting it to withdraw the land should the bids be too low.¹⁷⁹ Bidders are provided with a prospectus, and the successful bidder must promptly sign a transfer contract with the Municipal Land Planning Bureau and pay ten percent of the land charge as a security deposit, with the balance to be paid in full within sixty days of the contract taking effect.¹⁸⁰ Payment for the deposit from a domestic legal person may be in the form of a check. A foreign enterprise, other entity, or individual may use cash or a bank check issued by a Shenzhen-registered bank, or a Chinese banking group established overseas, to pay the deposit.¹⁸¹ Failure to promptly pay the security deposit will be deemed a breach of contract and may subject the bidder to payment for the auction expenses, as well as any price differential, if the government is unable to transfer the land at the same or a higher price.¹⁸² In the context of both tender and auction land use rights purchases, the land user must establish that he has the right to deal in real estate. Accordingly, the provisions enable a land user in these circumstances to apply to the municipal government for the right to operate a specific real estate project within thirty days of the transfer contract taking effect.¹⁸³

the United States or Canada. As is usual, unless otherwise provided, neither the lowest bidder, nor any bidder, is entitled to the contract.

176. *Id.* art. 24.

177. *Id.* art. 27.

178. *Id.* art. 28.

179. *Id.* art. 32.

180. *Id.* art. 31.

181. *Id.* art. 33.

182. *Id.* art. 34.

183. *Id.* art. 37. It may be recalled that under the transfer of land use rights through agreement, Article 12(3) also required the land user to obtain from the municipal government permission for the establishment of an enterprise dealing with the land. *Id.* art. 12.

G. Land Use Fees in Shenzhen

The Chinese have enacted the Provisions of Shenzhen SEZ on Land Use Fees and Reduction or Exemption of Such Fees to deal with the price of land use fees in Shenzhen and their reduction.¹⁸⁴ Under the Shenzhen Transfer Rights measures, Article 9 requires the land user to pay a land use rights transfer fee and, at the same time, a land development fee and a municipal works auxiliary infrastructure fee.¹⁸⁵ By contrast, the Shenzhen Land Use Fees under Article 2 require that Shenzhen SEZ collect a land use fee and a land development fee, without mentioning the municipal works fee. It is possible that the municipal works fee refers to the costs involved in making the necessary sanitary and utility connections to the property, which the land user will have to pay. In any event, the land use fees are to be determined by considering the type of business, the location of the land, the floor space of the building, the environmental circumstances, and the term of the project. Fees with respect to land development include compensation for land requisition and charges for leveling and making predevelopment preparations.¹⁸⁶ Although a land user may obtain a reduction in the land use fee, he will still be obligated to pay for the land development fee.¹⁸⁷ Reductions in land use fees are basically the same under these provisions as in Article 16 of the Shenzhen Transfer Rights, with one exception. Article 16 provides that land use fees for high technology purposes are to be reduced by forty percent, whereas Article 7 of the Shenzhen Land Use Fees sets the land use fee reduction levels for high technology projects at ten percent to fifty percent. It is uncertain which of these two articles governs.

The Shenzhen Land Use Fees provide for installment payments for those who have difficulty paying the entire land use fee at once. These parties may apply to the Municipal Land Bureau to obtain such privileges. The time limit on the installment payments is generally one year, with three years being the limit. Installment payments are subject to a monthly interest payment to be fixed in the land use contract.¹⁸⁸ As of May 1, 1991, a specific table of fees governs both land use fees and land

184. See Provisions of Shenzhen SEZ on Land Use Fees and Reduction or Exemption of Such Fees, published by the Shenzhen Municipal People's Government on April 16, 1991, in CHINA ECON. NEWS, No. 33, Sept. 2, 1991, at 9 [hereinafter Shenzhen Land Use Fees]. These provisions became effective on May 1, 1991.

185. Shenzhen Transfer Rights, *supra* note 157, art. 9.

186. Shenzhen Land Use Fees, *supra* note 184, art. 3.

187. *Id.* art. 6.

188. *Id.* art. 9.

development fees in Shenzhen.¹⁸⁹

H. *Mortgage Law in the PRC and Shenzhen*

A land user who obtains his land rights in accordance with the law as discussed above may obtain a leasehold mortgage and a chattel mortgage. The state by law protects this right.¹⁹⁰ A holder of a leasehold estate containing surface structures or attachments thereon is subject to additional requirements. Whenever land use rights are mortgaged, the holder of the leasehold estate also must mortgage the surface structures and other attached objects. Likewise, whenever the mortgage of the surface structures is sought, the right to the use of the land within the scope of the structures' use must also be pledged.¹⁹¹

The mortgage of land use rights requires that the mortgagor and mortgagee enter a signed, written contract. The parties then must duly register the mortgage.¹⁹²

State laws define default of the mortgage as occurring when the mortgagor fails to perform his debt obligations or declares dissolution or bankruptcy during the term of the mortgage contract. Upon default, the mortgagee has the right to dispose of the mortgaged properties in accordance with state laws and the terms of the mortgage.¹⁹³ The mortgagee receives a preferential right to receive the compensation from income generated from the disposition of pledged properties.¹⁹⁴ Upon a valid discharge, as a result of repayment in full or for other reasons, the mortgage is to be canceled and appropriate registration measures are to be

189. *Id.* art. 12. See List of Shenzhen Land Use Fees, *infra* table 1.

190. PRC Law on Grant and Transfer, *supra* note 28, arts. 4, 32.

191. *Id.* art. 33. The problems involved with the conveyance of leaseholds and structures, as discussed in the context of the national laws, are also evident under the Shenzhen laws. As discussed *supra* in part III.D.2, numerous difficulties may arise in the pledging of property where the owner of the leasehold rights and the structure thereon are two different parties.

192. *Id.* arts. 34-35.

193. *Id.* art. 36.

194. *Id.* art. 37. This legislation may be interpreted to hold that the only remedy available to the mortgagee is one analogous to the power of sale, as it is known in the United States context. The mortgagee does not seem to have any rights other than selling the property. Specifically, there is no mention in the statute of the right to foreclose and occupy the leasehold rights of the mortgagor. *Id.* There is also no mention of the right to recourse against the mortgagee for any deficiency in the funds raised by the sale of the property. *Id.* The topics of priority of mortgages, sale of properties subject to mortgages, and notification by mortgagee holding a mortgage in default to subsequent mortgagees are not addressed by this legislation.

followed.¹⁹⁵

I. *Regulations on Mortgages for the Guangdong Special Economic Zones*

1. Application of Guangdong Regulations

The Regulations on Mortgage Loan Administration in the Special Economic Zone of the Guangdong Province (Guangdong Mortgage Regulations) have defined a mortgage as a loan relationship in which a mortgagor provides a mortgagee with property as security on the repayment of a loan within a prescribed time limit.¹⁹⁶ The statute further provides that, in the event the mortgagor is unable to repay the amount on schedule, the mortgagee may dispose of the mortgaged property and require the priority right of repayment of the loan amount.¹⁹⁷ The Guangdong Mortgage Regulations apply to mortgage loans between Special Zone Enterprises and individuals and state-approved financial institutions established inside and outside of the PRC.¹⁹⁸ A mortgagor must use a loan for the purpose specified in the mortgage contract. Failure to do so entitles the mortgagee to order the premature repayment of the loan and the payment of penalty interest in accordance with state loan regulations or contract provisions.¹⁹⁹

Under the regulations, certain types of property may be mortgaged: buildings and other fixed assets; machinery, equipment, products and

195. *Id.* art. 38. More detailed provisions regarding mortgage law are to be found in the mortgage law regulations of Guangdong Province.

196. Regulations on Mortgage Loan Administration in the Special Economic Zones of Guangdong Province, adopted February 28, 1990 at the 12th Session of the Standing Committee of the 7th Guangdong Provincial People's Congress and promulgated March 19, 1990 by the Standing Committee of the Guangdong Provincial People's Congress, *in* CHINA LAWS FOR FOREIGN BUS. (CCH Austrl. Ltd.) 70-889, art. 2 [hereinafter Guangdong Mortgage Regulations]. These regulations stipulate under Article 4 that mortgage loan activities undertaken in accordance with the law shall receive the protection of the law. *Id.* art. 4.

197. *Id.*

198. *Id.* art. 3. The necessity to establish a Chinese corporate entity for the purpose of owning real estate in China and in Shenzhen appears again for those land holders seeking to obtain mortgage financing. The regulations do not provide a list of the state-approved domestic or international financial institutions which would be acceptable, nor the criterion for obtaining state approval. It is questionable under this Article whether or not land users may obtain mortgage financing from private investors. *Id.* If there is indeed a prohibition against such private financing, this would be truly unfortunate as regards investors who would typically rely on this type of funding.

199. *Id.* art. 31.

other non-fixed assets; marketable securities and other transferable rights; and other transferable property.²⁰⁰ The following property is expressly forbidden from being mortgaged: natural resources property or rights prohibited by law from being traded; property the ownership of which is disputed; schools, hospitals, and other public welfare facilities; property which has been sealed off, confiscated, or is subject to other custody measures pursuant to the law; and property the rights to which are unable to be enforced.²⁰¹ Any property over which land rights are disputed cannot be mortgaged. Developers seeking to build in the public welfare sector are cautioned that such projects are forbidden from obtaining mortgage financing.²⁰² In the case of land use rights jointly held by two or more persons, a mortgagor may not use the property as mortgage security without obtaining the written approval of all other joint owners. However, the article addressing the rights of joint owners of a leasehold provides only that a mortgagor, intending to use his own share of an item of property with joint title as mortgage security, give prior written notice to the other joint owners.²⁰³

2. Formalities of the Mortgage

The regulations require parties to a mortgage to sign a written contract that must contain certain specified terms.²⁰⁴ The mortgage contract

200. *Id.* art. 5.

201. *Id.*

202. *Id.* art. 7.

203. *Id.* art. 9. This Article is very unclear regarding the rights of a joint owner to mortgage his share. On the one hand it forbids the mortgaging of jointly held property without the written consent of all the owners of the leasehold; on the other hand it seems to empower a holder of land use rights to mortgage its own share of property so long as the holder provides written notice. *Id.* The Article conceivably might be interpreted as forbidding the joint holder from mortgaging more than its share of the leasehold, without obtaining approval of the other leaseholds.

204. These terms are as follows:

1. the full names and addresses of the mortgagor, mortgagee, and the bank and account number of the mortgagor;
2. loan usage;
3. type of currency and amount;
4. duration of loan, interest rate, method of payment, and loan principal and interest repayment times and methods;
5. description of the mortgaged property, amount, circumstances, location, and title to property rights or usage rights;
6. valuation price and mortgage ratio;
7. custodian of the mortgaged property, custody method, and liability and risk of liability for accidental damage, destruction or loss;

must be registered with the appropriate government authority within fifteen days of the signing of a mortgage loan contract.²⁰⁵ Fees for registering the mortgage property shall be paid by the mortgagor.²⁰⁶ When the mortgaged property requires insurance, the mortgagor must obtain insurance protection from a company in the Special Economic Zone. Additionally, the law requires the mortgagor to name the mortgagee as the first beneficiary of the insurance policy for the period of mortgage; the beneficiary is entitled to receive compensation in the amount of the principal and interest owed by the mortgagor.²⁰⁷ The mortgagor must notify all mortgagees on a property before obtaining additional mortgages on the property.²⁰⁸ The parties to a mortgage must obtain a valuation of the property in connection with any mortgage.²⁰⁹

3. Alienation

Once a property is mortgaged, statutory restrictions are imposed upon its alienation. Before a mortgaged property may be subsequently leased,

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8. type and category of insurance coverage taken out on the mortgaged property and the compensation payment method;
 9. method of return of the mortgaged property;
 10. liability for breach of contract;
 11. dispute resolution measures;
 12. provisions governing contract validity and other agreed items; and
 13. date and place of signing and the signatures or seals of the parties to the contract.

Id. art. 16. It is unclear to what custody method or custodian of the mortgaged property the Article refers. The legislation does not specifically require the mortgagor to transfer the land use title rights to a custodian or to the mortgagee. On the issue of whether China is a lien theory or a title theory mortgage jurisdiction, there is no express explanation in the legislation. The legislation definitely provides for a security lien for the loan by way of a mortgage with a priority to the proceeds; however, there does not appear to be express support for the notion of a title theory mortgage jurisdiction.

205. *Id.* art. 17. The appropriate authorities are as follows: State Land Bureau—mortgage on land use rights; Real Estate Administration Bureau—mortgage on building; Administration for Industry and Commerce—other forms of mortgages. The date of registration of mortgaged property shall be the date on which the property is deemed to become mortgage security, and the date on which the deal becomes legally valid. The statute leaves unanswered questions such as: when the property becomes a mortgage security; and when the deal becomes legally valid. In any question concerning priority of encumbrances on the property, it is also unknown whether the PRC looks to the time the mortgage was formed, registered, or some other point.

206. *Id.* art. 18.

207. *Id.* art. 19.

208. *Id.* art. 14.

209. *Id.* art. 15.

sold, remortgaged, or transferred, all parties to the mortgage loan must give their written approval, and the revised rights and obligations of the parties to the mortgage must be placed in writing.²¹⁰ When property subject to a mortgage is subsequently inherited or bequeathed, the inheritor or beneficiary is obligated to fulfill the requirements of the mortgage loan contract signed by the mortgagor, in addition to registering the change in title within thirty days.²¹¹

4. Rights of the Mortgagee

A mortgagee has the right to dispose of the property upon the occurrence of one of the following events: failure of a mortgagor to repay the loan principal and interest in accordance with contract provisions upon expiration of the loan contract term; lack of an inheritor or beneficiary upon the death of the mortgagor; refusal of the inheritor or beneficiary to fulfill the mortgagor's obligation to repay the loan principal and interest; and declaration of dissolution or bankruptcy or rescission of the rights of the mortgagor in accordance with the law.²¹²

A mortgagee may dispose of mortgaged property by cash sale, auction, or assignment.²¹³ The auctioning of mortgaged property is governed by special proceedings, as administered by an authority established with the approval of the local Special Zone Municipal People's Government or Special Zone Administrative Commission.²¹⁴ The mortgagor has the

210. *Id.* art. 22. The legislation does not define the content of these revised rights. *Id.* It is unclear, for example, whether an original mortgagor may obtain a novation and release from his debt or will still be liable on his note.

211. *Id.* art. 21.

212. *Id.* art. 23. These default events, upon the occurrence of which the mortgagee may take evasive action to safeguard its interests, present cause for concern. The first default event entitles the mortgagee to dispose of the property when the mortgagor fails to repay the loan principal and interest upon expiration of the loan contract term. Taken literally, the mortgagee would have to wait until the end of the expiration term, before exercising its disposal rights, giving the mortgagor the chance to pay back the loan and principal. A more suitable law would expressly permit the mortgagee to dispose of the property when any payment of interest or principal was in arrears and would provide an appropriate cure period.

Additionally, a mortgagee has the right to order the premature repayment of the loan principal and interest and to require the mortgagor to pay a default fine when the mortgagor disposes of mortgaged property without authorization. Such a disposition through a lease, sale, or gift will be deemed invalid. *Id.* art. 33.

213. *Id.* art. 24. There is no mention in the regulations of a right of the mortgagee to transfer its mortgage before any event of default.

214. *Id.* art. 25. The special procedures include the following measures:

1. the mortgage shall submit an auction application and the relevant certificates to

right to halt the auction upon obtaining the necessary funds to repay the amount of the loan principal and interest outstanding. The auction may also be halted by the People's Court if the court agrees to hear a third party complaint concerning title to the mortgaged property. Finally, the mortgagee may stop the auction.²¹⁵

The statute governs payout of the funds garnered through the sale of the mortgaged property. The costs incurred in disposing of the mortgaged property are to be paid out first, followed by the taxes payable on the mortgaged property. Next, the mortgagee is to be paid the principal and interest funds owed to it. The remaining balance, if any, goes to the mortgagor. When more than one mortgagee appears on the title, priority of disbursement is set by the chronological order in which the item was registered as a mortgage security.²¹⁶

5. Burden of Risk

The mortgage regulations also address the subject of risk of loss. The regulations require the parties to the mortgage to safeguard the mortgaged property in their custody pursuant to terms in the mortgage contract.²¹⁷ Whichever party has custody of the property bears the full weight of responsibility for any damages, whether caused deliberately or by error. While in the custody of the mortgagor, damaged property must be restored to its original state or a substitute property of equal value must be provided. The mortgagor must be compensated for any resulting actual loss from property damaged while in the custody of the mortga-

the auctioneer;

2. the auctioneer shall check and verify the mortgaged property and determine a base price for the auction;

3. the auctioneer shall place a public announcement regarding the auction in the SEZ newspapers for a period of 15 days;

4. if no dispute has been lodged over title to the mortgage property on the expiration of the 15 days, the auctioneer shall hold a public auction;

5. following the auction, procedures for tax payments and transfer of ownership of the auctioned property shall be undertaken.

Id.

215. *Id.* art. 27.

216. *Id.* art. 28. The problem with the priority being based on registration is that, while Article 17 specifies that the date of registration of mortgaged property shall be the date on which the property is deemed to become mortgage security and the date on which the deal becomes legally valid, "mortgage security" and the date on which the deal becomes valid are not defined in the statute. *Id.* art. 17.

217. *Id.* art. 20. Parties must also accept the right of the other party to inspection of the property.

gee.²¹⁸ Finally, any disputes arising with respect to the mortgage loan should be settled through consultation. Should consultation not prove effective, either party may apply to an arbitral body for arbitration or file suit with the People's Court.²¹⁹

IV. FOREIGN INVESTMENT IN REAL ESTATE

A. *State Involvement In Foreign Investment*

1. Generally

As demonstrated by the preceding analysis of Chinese commercial real estate law, the State plays a large and pervasive role in the granting and transferring of real property rights in the PRC. Direct and completely private purchases of leasehold property simply do not occur in the PRC. Governing authorities expend considerable effort in determining when, how, and the extent land use rights may be available at any given time. Similarly, a prospective purchaser of these rights must go through a rigorous process of applications and approvals prior to being able to obtain land use rights. For foreign investors, the acquisition of property rights is further complicated by the limitations imposed at law on the method by which land use rights may be acquired.²²⁰ As the scope of this Article primarily focuses on commercial real estate law, the subject of foreign investment will be dealt with only as it pertains to the corporate vehicles through which land use rights may be obtained.

As far as the law is concerned, in order for a foreign corporation to obtain land use rights in the PRC from the government, it must first establish a Chinese corporate entity for the purposes of effecting the transfer of land and for the subsequent development of that land.²²¹ The Shenzhen Transfer Rights measures state that domestic and foreign en-

218. *Id.* arts. 34-35. These Articles do not mention what, if any, the responsibilities are of a party in custody when the damage results from an act of a third party or from an act of God.

219. *Id.* art. 36.

220. Foreign investment in the PRC has been the subject of numerous books and articles in recent years. For an excellent review of foreign investment law in the PRC, consult M. PEARSON, *JOINT VENTURES IN THE PRC* (1991); Henry Zheng, *Foreign Investment Law In the PRC*, 19 N.Y.U. J. INT'L. L. & POL. 269 (Winter, 1987).

221. Interview with Xiao Yong, Attorney at Law, Department of Treaty and Law, Ministry of Foreign Economic Relations and Trade, PRC, in New York, N.Y. (Oct., 1992); Interview with Chen Tung-Pi, Professor of Law, Queen's University, Ontario, Canada (Dec., 1992).

terprises and other entities or individuals may participate in the transfer of land use rights in Shenzhen.²²² This statement implies that a foreign corporation would be able to negotiate and receive a land use rights transfer deed. A further provision in the same statute, however, requires that the foreign investor must first submit, among other materials, proof of the establishment of an enterprise in the SEZ, as well as a certificate of registration from the Authority of Industry and Commerce, before the government will even consider an application for land use rights.²²³ Therefore, as far as Shenzhen is concerned, a foreign investor actually must establish a PRC entity to obtain land use rights from the government. It is unclear whether this same requirement of establishing a Chinese corporate entity would apply if a foreign party were acquiring the land use rights from a holder of the land use rights other than the government (*i.e.*, from a private entity seeking to assign its leasehold rights). A brief review of the corporate mechanisms that may be available for the acquisition of land use rights is therefore necessary.

2. Approved Vehicles for Foreign Investment

Three major corporate vehicles are employed for the purpose of effecting foreign investment in China:²²⁴ the Chinese Foreign Equity Joint Venture; the Chinese Foreign Cooperative Joint Ventures; and the Wholly Foreign-Owned Enterprises.

3. Foreign Equity Joint Venture

Chinese Foreign Equity Joint Venture laws constituted the first major laws on foreign investment in China. Formally known as the Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures (and subsequently amended as the Equity Joint Venture Laws), this statute was the first to permit direct foreign investment in the PRC through the use of the equity joint venture.²²⁵ An equity joint venture is

222. Shenzhen Transfer Rights, *supra* note 157, art. 5.

223. *Id.* Art. 12. This Article stipulates the documents an applicant must submit to the Municipal Land Planning Bureau to receive a grant of land use rights from the government.

224. *Preface to Foreign Investment Laws*, The Department of Treaties and Law of the Ministry of Foreign Economic Relations and Trade, Feb. 1992.

225. The Law of the People's Republic of China on Chinese Foreign Equity Joint Ventures, adopted on July 1, 1979 at the Second Session of the Fifth National People's Congress, and amended pursuant to the "Decision on Amendment of The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures," passed on April 4, 1990 at the Third Session of the Seventh National People's Congress [hereinafter

a Chinese corporation with limited liability that may exist in perpetuity.²²⁶ Rather than having actual shares indicating fixed interests, the corporation has a registered capital account to which the equity parties can make contributions. The parties to the venture share their profits and bear the risks of loss in proportion to their respective contributions to the registered capital.²²⁷ A board of directors presides over the joint venture, and the board governs itself in accordance with the articles of association of the equity joint venture.²²⁸

Generally, the foreign investor must contribute not less than twenty-five percent of the registered capital of the corporation.²²⁹ Under the law, the investment of the Chinese party may include providing the right to use a site during the term of operation of the equity joint venture.²³⁰ In such a scenario, the Chinese party would pay the annual land use fee charged by the government, which is only logical as the Chinese party would be receiving profits from the value given to the land contribution.²³¹ Another scenario would be for the equity joint venture to acquire the land use rights for itself. In this situation, the venture would be obligated to pay the annual land use fees.²³² The law is silent on the status of the leasehold when the Chinese party contributes it to the joint venture, and there is no express indication that the leasehold deed is in any way transferred from the Chinese party to the equity joint venture corporation. This lack of explanation may not be a cause for concern when dealing with a nonreal estate investment, in which the land used is not the primary focus of the investment. In the case of a commercial development, however, in which a key consideration, if not the most important consideration, concerns the resale of the leasehold, it is paramount that

Equity Joint Venture Laws]. This subject is dealt with by Lie Chu & Clark T. Randt, *Foreign Investment Vehicles*, DOING BUSINESS IN CHINA (Streng ed., 1992), at 6-2.

226. Equity Joint Venture Laws, *supra* note 225, art. 4.

227. *Id.* art. 5.

228. *Id.* art. 6.

229. *Id.* art. 4. It should be noted that the Chinese have imposed certain restrictions governing the allowable leveraging of the Chinese foreign equity joint venture. These rules are set out in the Provisional Regulations of the State Administration for Industry and Commerce Concerning the Proportion of Registered Capital to Total Investment of Sino-Foreign Joint Ventures, Mar. 1, 1987. Under these rules, in an investment totalling \$3 million or less, the ratio of registered capital to total investment is 70%. *Id.* Between totals of \$3-10 million, the ratio is 50%, between \$10 and 30 million, the ratio is 40%, and for totals of \$30 million or more, the ratio is 33 1/3 %. See, Streng, *supra* note 225, at 6-20.

230. Equity Joint Venture Laws, *supra* note 225, art. 5.

231. *Id.*

232. *Id.*

the land use rights be registered, at the very minimum, in the name of the equity joint venture corporation. The foreign corporation will want to have at least the same rights as the Chinese corporation with respect to the leasehold interests, and one way to achieve such a result is to have the Chinese party transfer the leasehold interest to the equity joint venture. Alternatively, the equity joint venture can acquire a leasehold directly from the government. The parties may assign their interest in the equity joint venture with the consent of the other party.²³³

Under the Regulations for the Implementation of the Law of the PRC on Chinese Foreign Joint Ventures (Equity Joint Venture Regulations), the foreign investor may transfer its profits from the joint venture abroad, but may not withdraw contributions made to registered capital during the life of the equity joint venture.²³⁴ Given that the purpose for a real estate development joint venture logically would end upon the sale of the leasehold rights, it would be reasonable to expect that such a transaction also would bring about the end of the joint venture, thereby enabling the foreign party to both remit its profits and withdraw its registered capital. The regulations governing equity joint ventures appear to limit the use of this type of corporate vehicle to businesses in specific fields, including tourism and service industries.²³⁵ It is uncertain whether, in order to qualify for this type of corporate vehicle, it is enough that the equity joint venture be developing land which eventually will be used by some other entity for an approved purpose, or whether the approved scope must be the goal of the equity joint venture itself.

4. Chinese-Foreign Cooperative Joint Venture

The second possible corporate vehicle for the acquisition of land use rights is the Chinese-Foreign Cooperative Joint Venture,²³⁶ of which there are two types. The first type takes the form of a limited liability company, while the second type of vehicle operates as a nonlegal entity, such as a partnership.²³⁷ Three noticeable differences exist between the

233. *Id.* art. 4.

234. *Id.* art. 10. This portion of the regulation deals with profits. Regulations for the implementation of the law of the PRC On Chinese Foreign Joint Ventures Issued by the State Council on September 20, 1983 [hereinafter Equity Joint Venture Regulations], Article 22 specifies that during the term of its operations, a joint venture may not reduce its registered capital. *Id.* art. 22.

235. Equity Joint Venture Regulations, *supra* note 234, art. 3.

236. The Law of the PRC on Chinese-Foreign Cooperative Joint Ventures, Promulgated on April 13, 1988 by Order No. 4 of the President of the PRC and effective from April 13, 1988 [hereinafter Cooperative Joint Venture Laws].

237. Jerome A. Cohen, *The Long-Awaited Cooperative Venture Law*, CHINA BUS.

Equity Joint Venture and the Cooperative Venture approaches. First, the Cooperative Venture does not impose upon the foreign investor a minimum capital contribution.²³⁸ Second, the Cooperative Venture enables the parties to determine freely the profit split, notwithstanding their respective capital contributions.²³⁹ Third, the Cooperative Venture parties are entitled to withdraw their capital contribution prior to the termination of the project.²⁴⁰ If the parties agree to an early withdrawal of the registered capital, the Chinese party keeps the fixed assets.²⁴¹ In the majority of situations, instead of the venture being taxed on its income, the parties to the Cooperative Venture are taxed individually on their respective incomes.²⁴² Generally, the Cooperative Venture confers more discretion on the foreign investor with respect to the management of the project.²⁴³

One concern about Cooperative Ventures is to what extent, if any, these entities enjoy the benefit of limited liability. In the PRC a legal person may enjoy limited liability if it publishes its registered capital and declares itself to be a limited liability company. On the other hand, a Cooperative Venture is liable for a minimum of the contributed capital, unless the agreement or the law provides otherwise.²⁴⁴

5. Wholly Foreign-Owned Enterprise

The third possible method of acquiring leasehold rights in the PRC is through the use of the Wholly Foreign-Owned Enterprises.²⁴⁵ The concept of the wholly foreign-owned corporation is the most appealing to the foreign investor. Typically, the foreign investor establishes a wholly owned subsidiary in the country in which the land is to be used and enjoys free and total control over project decisions, subject, of course, to the very large role that the Chinese government plays in its own market. Under the statute, a wholly foreign-owned enterprise may obtain the le-

REV. 14 (July-Aug. 1988).

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 15-16.

243. *Id.* at 15. While both the Equity Joint Venture Law and the Cooperative Joint Venture Law enable the foreign party to select the Chairman, the Cooperative Venture Law enables the parties to select a management scheme to their liking.

244. *Id.* at 15-16.

245. The Law of the PRC on Wholly Foreign-Owned Enterprises, adopted on April 12, 1986 at the Fourth Session of the Sixth National People's Congress.

gal status of a Chinese legal person, according to the law.²⁴⁶ Nevertheless, during the term of its operation, a Wholly Owned Enterprise may not reduce its registered capital.²⁴⁷ One problem with Wholly Foreign-Owned Enterprises is that the scope of allowable usage of this type of corporate vehicle is somewhat limited.²⁴⁸ Indeed, Article 5 of the Wholly Foreign-Owned Enterprise Rules specifically delineates the businesses for which this type of vehicle is actually forbidden and those for which this vehicle is restricted. Real estate development falls within the restricted group, and it is uncertain under what conditions the restriction for using a Wholly Foreign-Owned Enterprise for a land acquisition project would be lifted.

V. CONCLUSION

The PRC's establishment of a comprehensive set of commercial real property laws is taking place at an historical moment. China's need for foreign assistance in aid and technology to accomplish the long-term goals of modernization remains unquestioned. The Chinese therefore have taken a logical and meaningful approach to enhance the real property rights of individuals and make foreign investment more attractive. As the Chinese clearly recognize, the development and use of land is a fundamental and inseparable part of any state's economic growth. The role of the State in the PRC's real property markets is a dual one of urban planner and economic protector. However impractical the approval process and litany of restrictions and regulations imposed on the transferability of the mere leasehold rights, these measures no doubt afford the Chinese a feeling of control and power that is imperative to the present regime. While national economies that are run entirely by the state are traditionally the hope of the hopeless, the PRC's case may well be different. The PRC's cautious but steady transition away from communism, first to socialism with Chinese characteristics, and then to perhaps a market economy, may prove a wise course. In the most important areas of leasehold rights and mortgages, the PRC has created an impressive primary legal infrastructure. Of course, two things still are lacking

246. *Id.* art. 8.

247. Rules for the Implementation of the Law of the PRC on Wholly Foreign-Owned Enterprises, approved by the State Council on October 28, 1990 and issued by the Ministry of Foreign Economic Relations and Trade on December 12, 1990 [hereinafter Wholly Foreign-Owned Enterprise Rules].

248. *Id.* Article 3 lists requirements which must be met in order to establish a wholly foreign-owned enterprise. *Id.* art. 3. The requirements, while including areas like improving technology and increasing exports, do not list land development per se. *Id.*

in the PRC: first, the totality of experience with the new real property system by domestic and foreign entities represented either in the form of case law or in the gloss provided by historical application of the legislation; and second, predictability. Nevertheless, the continued proliferation and adjustment of primary legislation and regulations of real property law will enhance the understanding of and fill the many gaps in the existing legal framework. In the first nine months of 1992, the PRC attracted a record total of some \$31 billion in foreign investment. It is estimated that some 27,000 new foreign-funded ventures (almost two-thirds of the previous thirteen years' total) will be added this year, to bring the total to more than 70,000 joint ventures in the PRC.²⁴⁹ As Beijing moves towards implementing its programs of modernization of more than \$105 billion over the 1991-1995 period, the importance of land use rights undoubtedly will continue to grow.²⁵⁰

Table 1: Shenzhen Special Economic Zone
Land Use Fee Rates for 1991

Land use category	Land use fee	(yuan/sq mtr)				
		A	B	C	D	E
Grade of land						
	1	1,200	300	180	130	50
	2	700	280	160	110	40
	3	400	220	140	90	30
	4	250	180	120	70	20
	5	190	160	100	60	10

Notes:

1. Table 1 fees consist of two parts: (1) land use right transfer fees; (2) land development fees (RMB 100 yuan/sq metre for developed land).
2. Land use fees for projects in Category A involving the same grade of land may fluctuate within a range of 20%.
3. Land use fees for projects in Category B involving the same grade of land may fluctuate within a range of 10%.
4. Fees for urban land used for areas of greenery within the city are RMB100 yuan/sq metre. Land user units shall only have management rights, with property rights remaining with the government.

249. WALL ST. J., Nov. 24, 1992, at A9.

250. *Europeans, Japanese Get Head Start in China*, XIV ASIAN WALL ST. J. WKLY., No. 20, May 18, 1992, at 1.

Category	Usage
A	land for commerce, offices, trade, services, finance, insurance, petrol stations, villas, catering and other commercial purposes
B	land for all types of residential housing other than villas
C	land for industry, warehouses, transport (including ports), telecommunications, water and power supply facilities
D	land for all types of open-air sites and building and installation production sites
E	land for crop cultivation, aquaculture and pastoral industries and tourism facilities

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