



China's Land Law: An Overview

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Since all land in the People's Republic of China ("PRC") belongs to the state, corporate entities and individuals are not permitted to own land although they may own the property above the land. Given this division of ownership, the legal framework governing land in China includes legislation regulating land-use rights on the one hand and legislation regulating ownership of the buildings and structures on the other hand. Legislation is also in place concerning the requisition, development and protection of land in the PRC.

The Land Administration Law of the People's Republic of China (the "Land Law") is the fundamental law governing land matters in China. It came into effect on January 1, 1999, replacing the 1986 law.

In order to understand how the land administration system will affect their projects in the PRC, foreign investors must be aware of the nature of the land-use rights that they are dealing with. Among other things, they will need to know if their land-use rights will increase land-acquisition costs and land-related environmental obligations and liabilities.

Land-Title System

Although the Land Law introduced many changes, it has not altered the existing land-title system in China. Under this system, there are two types of land ownership: state ownership and collective ownership. There is no private land ownership under Chinese law. According to China's 1982 Constitution, all land in urban areas is owned by the state and is called state-owned land (*guoyou tudi*). All agricultural land and homesteads in the suburban and rural areas are owned by rural collectives and called collective land (*jiti tudi*). Uncultivated land in mountain and other remote areas is also state-owned.

Commercially, land-use rights (*tudi shiyongquan*) are of greater relevance than land ownership (*tudi suoyouquan*). Chinese law prohibits transferring ownership of state-owned land, but permits the Chinese government to grant, lease, or allocate the right to use state-owned land. For collective land, Chinese law has imposed so many restrictions that the transfer of ownership of collective land, while theoretically possible, is practically infeasible. But rural collectives may provide land-use rights and land contracting or the lease of collective land on a fixed term (*tudi chengbao jingyingquan*) to peasants and other land users, subject to stringent legal procedures.

The 1990 Urban Land Regulations and the 1994 Urban Real Estate Law authorize local land bureaus at county and municipal levels to grant long-term land-use rights (*churang tudi shiyongquan*) to local and foreign land users, but only over state-owned land, and not over collective land.

To obtain granted land-use rights, the land user must sign a land-grant contract with the local land bureau arrived at by means of a competitive mechanism (bidding, auction or a listing process) or negotiation and must pay a substantial land-grant fee up front. The grantee will enjoy a fixed land-grant term and must use the land for the purpose specified in the land-grant contract. Prior to the expiration of the term, the government may take back the land, but only for reasons of public interest, and in such a case the government must compensate the grantee for the value of the unexpired term and the costs of the superstructures. The maximum term of a land grant ranges from 40 years for commercial use to 70 years for residential use.

Apart from security of tenure, the other important legal feature of granted land-use rights is marketability; that is, granted land-use rights may be transferred, leased, or mortgaged in accordance with the law and the terms of the land-grant contract.

Other types of land-use rights include "allocated land-use rights" (*huabo tudi shiyongquan*), which are obtained through administrative approval by the government without the payment of a land-grant fee, and "collective land-use rights," which are obtained through contracts with rural collectives. In contrast, these non-granted types of land-use rights (*feichurang tudi shiyongquan*) lack either marketability or security of tenure. Hence foreign banks normally do not accept these non-granted types of land-use rights as security for lending,



particularly in limited-recourse project finance transactions. Generally speaking, the government may take back allocated land-use rights at any time without any compensation. Many Chinese joint-venture parties possess only non-granted types of land-use rights, because their rights were acquired long before the creation of the land-grant system in 1990.

One of the main problems that emerged with the system for granting land-use rights was that the vast majority of land grants were conducted by agreement rather than by auction or a tendering process. According to unofficial statistics, as of June 2002, approximately 95% of all land-use rights had been granted via private, bilateral agreements between local land bureaus and grantees. The problem is that when the agreement method is used, there is generally little or no competitive pricing or transparency. It is believed that the state has lost billions of dollars in state revenue through the granting of land-use rights at prices below market value.

On July 1, 2002, regulations came into effect that prohibit grants by agreement for land to be used for commercial purposes. The purpose of the regulations is to promote transparency and ensure that market prices are maintained. The land-use rights for commercial land must be granted by means of auction, a tendering process or a new kind of "listing" process. When land-use rights are granted by means of the "listing" process, the land is listed at a land exchange center and interested parties are given a certain period of time within which to submit bids.

Restricted Approval Procedure

The Land Law provides for the strengthening of the approval procedure for non-agricultural use of cultivated land. The New Land Law divides land into three types: "agricultural land" (nongyongdi), "construction land" (jianshe yongdi), and "unutilized land" (weiliyongdi). Agricultural land includes cultivated land, forested land, grassland, and other land used for agricultural production or irrigation. Construction land includes land for construction of buildings, mining, transportation facilities, water-conservancy projects, and military purposes. Unutilized land refers to all land that is neither agricultural nor construction land - usually state-owned land in uncultivated mountain areas.

The Land Law brought about five major changes in the approval procedures for using cultivated land for non-agricultural purposes. First, the law significantly restricts the existing approval mechanism based on the size-limit. Provincial governments may only approve land requisitions of up to 35 hectares of cultivated land (previously 70 hectares), or 70 hectares of non-cultivated land (previously 140 hectares). Requisition of larger sites must be approved by the State Council.

Second, the Land Law placed further restrictions over basic cropland, used to produce staple and cash crops. The State Council must approve all requisitions of basic cropland for construction use, regardless of the land size.

Third, the Land Law introduced an agricultural land-usage conversion (nongyongdi zhuan yong) procedure for approval of new construction land. This is aimed at stopping local authorities from circumventing the law by sub-dividing large sites into smaller sites. It appears that virtually all new conversions of agricultural land into construction land must be either specifically approved by the State Council or the provincial governments, or receive prior general approval from these bodies.

Fourth, the Land Law specifically requires project owners to attach the local land bureau's preliminary examination report when they submit the feasibility study of their projects for approval.

Fifth, the legal effect of master land-use plans (tudi liyong zongti guihua) and annual land-use plans (tudi liyong niandu jihua), was enhanced significantly by the provisions of the Land Law.

All local land-use plans (and their subsequent amendments) require the approval of the State Council or the provincial governments. Land-use approvals given in violation of the relevant land-use plans will be legally void.

Financial Disincentives

The Land Law also introduced more financial disincentives to using cultivated land for construction purposes. It stipulates that 30 percent of the land revenues generated from all new conversions of cultivated land into construction land must be surrendered to the central government. (Previously, local governments kept land revenues from all types of land.) In contrast, local governments will be allowed to keep all land revenues generated from the use of existing construction land.



Moreover, the requirements of the Land Law have increased the costs of requisitioning cultivated land. It stipulates four statutory items of compensation in the requisition of cultivated land, namely, a land compensation fee (tudi buchangfei), resettlement allowance (anzhi buzhuifei), fixtures and young crops compensation fee (fuzhuowu he qingmiao de buchangfei), and vegetable land development fund payments (xincaidi kaifa jianshi jijin). As a further financial disincentive, the Land Law has reinforced the levy and collection of the new cultivation fee (kaikenfei). Any land user who obtains approval to convert a plot of cultivated land must cultivate a new plot of land of the same size and quality. Land users may undertake the cultivation themselves, but it is more common for users to pay a fee to local governments to do so.

As a result of the financial measures introduced by the Land Law, greenfield projects that need to use cultivated land, such as new infrastructure facilities, will incur significantly higher land costs. This has resulted in increased demand for existing construction land and, consequently, higher prices.

Tightening Up

In spite of the above measures, the problem of the encroachment of farmland has not gone away. China has recently introduced new restrictions in hopes of curbing the problem. In April 2004, China imposed a nationwide moratorium on the conversion of agricultural land into non-agricultural construction land for "a concentrated period of around half a year." The moratorium is to continue beyond that period in all areas that fail a land market assessment until specified land regulation and rectification requirements are met.

China has also been clamping down on the use of land in China's numerous "development zones." Pursuant to a December notice issued by the State Development and Reform Commission, the Ministry of Land and Resources, the Ministry of Construction and the Ministry of Commerce, unauthorized extensions of development zones were to be stopped and occupied land could be taken back depending on whether land regulations, land use plans and urban plans had been complied with. Unconfirmed press reports suggest that by April 2004, 3,763 development zones had been revoked and the total planning areas for development zones in China had been reduced from 35,400 square kilometers to 17,000 square kilometers.

It has also been reported that in March 2004 the Ministry of Land and Resources temporarily suspended approval of construction land in 26 cities, including Beijing, for failure to comply with construction land supply recordal requirements.

Legal and Practical Implications

Broadly speaking, the PRC Land Law has several major legal implications. First, land acquisition for investment projects in China has become more time consuming, and the risk of penalties and legal invalidity due to non-compliance is higher than under the earlier regime.

Further, the Implementing Regulations for the Land Law authorize the government to lease (rather than grant) land-use rights. A major difference between a land grant and a land lease is that a land grant would require a substantial downpayment and a "peppercorn" annual land-use fee, whereas a land lease instead calls for a higher annual rent but no huge downpayment. Foreign investors should consult their legal advisers to evaluate the alternative ways to acquire land.

Another subtle but important implication is that the Land Law has reaffirmed the legality of contribution of land-use rights as capital for granted or allocated land. It is still unclear as to what the legal procedures might be for collective land such as whether specific approval by the local land bureau would be required. Whether this mode of land acquisition would give joint ventures a security of land tenure is also unclear.

The PRC Land Law and subsequent restrictions on construction land may leave foreign investors with mixed feelings. But on the whole, the Law and its ancillary regulations represent a significant step forward in stopping the alarming loss of arable land and developing a more rational and transparent land system in China.