Contributions Legal Scholars Can Make to Development Economics: Examples from China

Joyce Palomar

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CONTRIBUTIONS LEGAL SCHOLARS CAN MAKE TO DEVELOPMENT ECONOMICS: EXAMPLES FROM CHINA

JOYCE PALOMAR*

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Introduction

Significant economic research of recent years has posited, debated, and attempted to prove empirically the hypothesis that land tenure security can promote sustainable economic growth in emerging economies.\(^1\) For land tenure security to subsist, in turn, economists have theorized and empirically shown that emerging economies should maintain institutions that recognize and enforce property rights.

Development experts and legislators need more than broad economic theory, however, if they are to guide an emerging nation to land tenure security and the economic benefits that are believed to ensue. The next steps in this effort require legal analysts\(^2\) to advise regarding (a) where risks lie to land tenure security and (b) means by which an emerging nation may reduce those risks.

Developing a property rights institution—a set of laws or rules recognizing and defining private property rights along with

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2. See generally Frank B. Cross, Law and Economic Growth, 80 TEX. L. REV. 1737, 1739 (2002) (calling upon legal academics to assist economists in the field of development by pragmatically determining which legal institutions and laws facilitate the economic well-being of nations).
enforcement mechanisms and supporting organizations—does not alone ensure land tenure security. One reason is that risks to land tenure security exist when the goals of an emerging economy's property rights institution are thwarted by that new institution's own vagaries and failures of process, by the nation's other institutions, and by inconsistent local norms.

This Article identifies some of the unexpected sources of risk to owners' and investors' land tenure security. The Article also illustrates means of reducing risks to land tenure security in order to enhance availability of credit, stimulate foreign investment, and create a market for mortgage-backed debt. The goal of this Article is to give development specialists a beginning point for assessing, and then increasing, compatibility of an emerging country's institutions with its land tenure security and economic development goals.

Illustrations will be drawn from the People's Republic of China of types of unapparent risks that can result in loss of rights to land or frustrate investors' expectations. Illustrations also will be drawn from China's efforts to create new institutions and to strengthen existing legal institutions in order to enhance land tenure security and access to credit.

I. BENEFITS TO EMERGING ECONOMIES FROM LAND TENURE SECURITY

A. Contribution of Land Tenure Security to Credit Enhancement and a Sustainable Market Economy

Land tenure security is essential to stimulate the development of land. If land tenure is not secure, both local and foreign investors will be hesitant to invest in land development. Economists and international development specialists posit further that land tenure security not only stimulates a market for land and its development,

3. See id.
4. This part borrows substantially from Joyce Palomar, Land Tenure Security as a Market Stimulator in China, 12 DUKE J. COMP. & INT'L L. 7 (2002).
5. See JEFF GATES, THE OWNERSHIP SOLUTION xxvi (1998) (stating that "property's value derives largely from the confidence people place in its security").
but that this security is the very foundation of a market economy\(^7\) and sustainable economic growth.\(^8\) Economists and development

\(^7\) See id. at 6-7; see also GATES, supra note 5, at xxviii (stating that "free enterprise policymakers can no longer afford to be agnostic about ownership patterns"); GERHARD LARSSON, LAND REGISTRATION IN DEVELOPING COUNTRIES 20 (1991). Mancur Olson writes concerning the creation and sustenance of a market economy:

It is becoming clear that a country cannot obtain a competitive market economy simply by repealing communism and making sure that the government does not interfere with the economy. A thriving market economy does not emerge automatically. It requires institutions that most people in the economically developed democracies unthinkingly take for granted, but that the emerging democracies of Eastern Europe and the societies of Africa, Asia, and Latin America usually do not have.

A thriving market economy apparently requires, among other things, institutions that provide secure individual rights—that insure that individuals, and the firms that they create, can best advance their interests by being as productive as possible and engaging in mutually beneficial trade. The incentives to save and to invest depend upon individual rights to marketable assets—on property rights.

... Even in some of the countries where all the foregoing rights are available, they are not secure. Some dictatorships have, at times, provided individuals with the rights needed for competitive markets and thereby brought about periods of rapid economic growth. Yet the dictators' subjects have not only lacked political freedoms, but also any confidence that their property and contract rights will continue to be respected if the regime, or even the dictator's policy, changes. Thus the market rights do not elicit as much investment and economic advance as would have occurred if everyone were confident that they would last.


\(^8\) Ian Williamson writes:

The pivotal tension of sustainable development is between the environment and the pressures of human activity. It is the system of recognising, controlling and mediating rights, restrictions and responsibilities over land and resources that forms the fulcrum. Thus "land administration" can and should play an important role in the infrastructure for sustainable development.... In this context, "Sustainable development means development that effectively incorporates economic, social, political, conservation and resource management factors in decision-making for development. The challenge of balancing these competing tensions in sophisticated decision making requires access to accurate and relevant information in a readily interactive form."

... A common fault of some LAS (Land Administration System) projects around the world is that they focus on the technical aspects of the project, such as mapping, adjudication, surveying and preparation of titles, and sometimes forget the main objective for the project. Such projects are never about land titling \textit{per se}, nor should they be. They are about facilitating sustainable development, land markets, social justice, institutional reform, poverty eradication, environmental
experts agree that “[m]odern capital markets generate economic growth in part because formalized property rights remove uncertainty, which lowers transaction costs .... ‘Without formal property [relationships], ... a modern social market economy cannot exist.””

When property rights become secure, citizens can depend upon these rights in participating in private transactions. Economic historians cite the late eighteenth century experience in Western economies as an illustration of the relationship between property rights and the emergence of the modern market: “the boom in technological innovation in the West, and the massive investment that made it possible, began only at the end of the eighteenth century, when property rights were perfected and made independent of politics.”

When land titles and land tenure are secure, landholders may utilize their property rights as collateral for loans. When lenders are confident that their titles or liens against real property collateral will be enforceable, they will accept interests in land as security for loans in amounts up to the fair market value of the property interest. Thus, secure land titles and enforceable mortgage rights together create access to significant amounts of capital. In the management or addressing regional income disparities.

Ian P. Williamson, Best Practices for Land Administration Systems in Developing Countries, in INTERNATIONAL CONFERENCE ON LAND POLICY REFORM 6, 17 (2000) (citations omitted). Additionally, “land administration and cadastral systems ‘are not ends in themselves. They support effective land markets, increased agricultural productivity, sustainable economic development, environmental management, political stability and social justice.’” Id. at 26 (citation omitted).

9. GATES, supra note 5, at 224 (citation omitted); see also Pitman B. Potter, Globalisation and Local Legal Culture, Dilemmas of China’s Use of Liberal Ideals of Private Property Rights, 2 AUSTL. J. ASIAN L. 1, 7 (2000) (citing Richard A. Epstein, Property and Necessity, 13 HARP. J.L. & PUB. POLY 2 (1990)).

Among the organizations currently supporting research into practical applications of this theory for emerging economies are the following: World Bank’s Land Policy Network; United Nations Development Programme; United Nations Food & Agriculture Organization; Institute of Liberty and Democracy; World Business Council for Sustainable Development; Center for Institutional Reform and the Informal Sector (IRIS); The Adam Smith Institute (UK); Center for Ethics, Capital Markets, and Political Economy; Frontiers of Freedom Institute; AVINA Foundation; Foundation for Enterprise Development; and U.S. Agency for International Development.

10. DE SOTO, THE OTHER PATH, supra note 1, at 177.

11. Peruvian economist Hernando de Soto has published empirical evidence of how the lack of secure title to land in Peru inhibits economic development. See DE SOTO, THE OTHER PATH, supra note 1, at 13. Lack of legal title means lack of secure collateral, which means lack
United States, for example, seventy percent of the credit extended to new businesses stems from mortgaging real property titles as collateral for loans.\(^\text{12}\)

With access to credit, individuals may improve their land, grow crops, establish businesses, hire employees, pay wages, and generate profits.\(^\text{13}\) The standard of living of landowners, business owners, and their employees consequently will improve.\(^\text{14}\) From their increased profits and incomes, these individuals will have capital to buy services and products from vendors whose incomes and businesses also will improve. From all these increased incomes, profits, and property values, taxes will be paid, thereby increasing the nation’s income. Empirical studies in Thailand,\(^\text{15}\) Costa Rica,\(^\text{16}\) Peru,\(^\text{17}\) and other countries comparing the level of investment and productivity on titled and untitled farms support this hypothesis.\(^\text{18}\)

\(^{12}\) Of access to credit. De Soto found, conversely, that land development and investment in improvements and technology increased when occupants gained legal title to their land. See also Kerry A. Dolan, Waking Dead Capital, FORBES, May 15, 2000, at 99.


\(^{14}\) “Poverty is cured not with money but by gaining access to the productiveness—the skill and the tools—required to earn money.” GATES, supra note 5, at 33 (citing Robert Ashford, The Binary Economics of Louis Kelso: A Democratic Private Property System for Growth and Justice, in Curing World Poverty—The New Role of Property (John H. Miller ed., 1994)).


\(^{17}\) DE SOTO, THE OTHER PATH, supra note 1, at 31–32.

\(^{18}\) Some related empirical studies reviewed by Feder and Nishio (1998) found that land registration led to: higher land values in Thailand, Philippines, Indonesia, Honduras, Brazil and Peru; higher investments in land in Costa Rica, Brazil, Honduras, Jamaica and Ghana; and higher output and income in Costa Rica, Brazil, Ecuador and Paraguay.... Empirical evidence in support of the positive impact of land registration on investment is available from studies conducted in Thailand, Costa Rica, Honduras, Jamaica and Ghana.... [A]n increase in investment demand and credit supply associated with land registration leads to more investment, greater use of variable inputs, higher output per unit of land, greater income and higher land values. This contention is supported by empirical evidence from Thailand, Honduras, Philippines, Brazil, Indonesia and
Conversely, when land titles are not secured by law, people cannot transfer their property easily.\textsuperscript{19} They cannot develop it for more valuable purposes or utilize it as collateral for credit.\textsuperscript{20} This

\textit{Zimbabwe...}


\textsuperscript{19.} The possession of a title can be an important determinant of the degree of tenure security. [A study of] the impact of land policies on farm productivity in Thailand, showed that the higher the degree of tenure security, the higher the demand for investment, especially for goods and services that become attached to land. Access to the formal credit system is easier for titled farmers because they represent a lower risk for the lending institutions. A larger supply of formal long-term credit (usually cheaper than credit obtained in informal markets) helps to further increase the rate of investment. Tenure security also increases access to short-term credit, which in turn leads to greater use of variable inputs. Consequently, output per hectare, the price of land, and income are higher for titled farmers.

An relevant consideration is often the probability of eviction. The lower this probability, the greater the incentive for farmers to invest in land-attached improvements and for the formal credit system to extend credit. In regions where tenure insecurity is pervasive, the price of land will not reflect the present value of the income stream associated with the exploitation of land for agricultural production because not all land rights are legitimate or enforceable under the law....

Tenure insecurity also precludes "landowners" in the urban sector from using this preferred form of collateral in the formal credit market. As in agriculture, it can be a binding constraint for potential borrowers, particularly for the more financially fragile. Similarly, tenure insecurity reduces the incentive to invest, especially in land-attached improvements. The capital-to-land ratio in the housing sector will accordingly be lower than otherwise. In peri-urban areas lack of tenure security is widespread, and so the incentive for investment will be reduced. In addition, ... tenure insecurity reduces the demand for house improvements and government services.


\textsuperscript{20.} See id.; see also Brian Schwarzwalder, \textit{Land Registration, in WORLD BANK, WORLD BANK TECHNICAL PAPER No. 436, LEGAL IMPEDIMENTS TO EFFECTIVE RURAL LAND RELATIONS IN EASTERN EUROPE AND CENTRAL ASIA, A COMPARATIVE PERSPECTIVE} 165 (Roy Prosterman & Tim Hanstad eds., 1999) (commenting that when land transfers are made before a legal framework has been created for ownership of interests in land, its transfer, and assurance of ownership rights, the legal results will be unclear). For example, without a federal law on registration of rights to land in the Kyrgyz Republic in Eastern Europe, registration of sales, bequests, gifts, mortgages, and other transactions between private parties did not occur in the countryside. \textit{Id.} at 166. The lack of a legally based, functioning system for recording or registering public land titles increased transactions costs. "[F]armers who mortgage their land
limits the productivity of the property and its value as a factor of production. Effects on the general economy may include the inability to increase productivity or investments, more expensive capital, an inefficient tax system, and perhaps other negative effects on a nation's development.

According to Hernando de Soto:

If [occupiers of land who do not have legal title] cannot enforce their rights to land, housing, and equipment, their incentives for investing in them are considerably reduced. People build less if they think there is a risk that the state or another person might take away or occupy what they have built. The effect of all this is to reduce aggregate investment.

Secure property rights, on the other hand, encourage holders to invest in their property because of their certainty that the property will not be usurped. From a strictly economic standpoint, therefore, the true purpose of property rights is not to benefit the individuals or entities holding those rights, but to give them the incentive to increase the value of their assets by investing, innovating, or combining them advantageously with other resources, something which would have beneficial results for society.

B. Necessity of Land Tenure Security to Stimulate Foreign Investment

As the previous section described, secure land titles may give landowners access to credit and capital. The land tenure security provided by a nation's public land title registration system may be sufficient to encourage mortgage loans from local banks and mortgage lenders. Emerging economies may benefit in additional

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21. DE SOTO, THE OTHER PATH, supra note 1, at 159.
22. Id. at 175–77 (suggesting that other possible effects include limited technological progress, increased utility rates, and difficulties in formulating macroeconomic policy).
23. Id. at 159–60.
ways, however, if land titles are sufficiently secure to attract foreign investors. Foreign investors willing to build factories and conduct business in developing countries bring new capital into the emerging economy and provide employment and tax revenue that will further economic growth. In order for investors to be willing either to invest money in land development in emerging economies or to accept borrowers' land as collateral for loans, investors must believe that their investments are secure. When investing in projects that involve land development or land use, foreign investors must be certain that the land can be developed and utilized according to their plans. Further, when accepting real property interests as collateral for loans, foreign investors must be confident that the right to the real property will be available to satisfy the debt.

C. Necessity of Land Tenure Security to Create a Market for a Nation's Mortgage-Backed Debt and New Capital for Mortgage Loans

An additional benefit when land titles are sufficiently secure to attract investors is that a secondary market for mortgage-backed debt may develop. Enabling local banks to sell their residential mortgage-backed debt can help to make capital available for middle-income housing. In the United States, debt backed by mortgages is "securitized," that is, interests in the repayment of large mortgage-backed loans or large pools of smaller mortgage-backed loans are sold as securities both directly to large institutional investors and indirectly to individuals who invest in mutual funds that hold shares in real estate investment trusts. This secondary market for


25. See generally JOYCE PALOMAR, TITLE INSURANCE LAW §§ 1:3, 19:1 (Supp. 2003); A PRIMER ON SECURITIZATION 1-2 (Michael J. Fishman & Leon T. Kendall eds., 1996) (defining securitization as "a process of packaging individual loans and other debt instruments, converting the package into a security or securities, and enhancing their credit status or rating to further their sale to third-party investors."). Another scholar has noted that

In the United States, as of December 31, 1996, more than $2.5 trillion securitization securities were outstanding; nearly $670 billion securitization
mortgage-backed loans is important because local development and housing construction need not depend solely on the availability of funds in that locality. Local lenders may trade their long-term mortgage loans in the securities market for new capital that then can be lent to new borrowers. The local lender, in turn, can sell those mortgage loans in the securities market for new capital that they subsequently can lend to new borrowers, yielding a steady source of funding for home purchases and property development. The trillions of dollars that investors have poured into the American secondary mortgage market has been credited with, first, creating a consistent flow of funds for home loans in the United States since the mid-1940s, and second, stimulating the boom in commercial real estate development in the 1990s. For rating agencies to rate mortgage-backed securities highly and for recognized investment banks to sponsor them, each mortgage lien must be valid and enforceable. An active secondary market for mortgage loans is

transactions were done in 1996 alone.

In a securitization transaction, a firm takes some of its rights to receive money (receivables) and conveys those rights to an entity (a "pool"). The pool issues securities representing rights to receive cash flows from the pool. The securities' terms are crafted to appeal to investors, and thus differ from the terms of the underlying receivables. The pool sells the securities to investors in private placements or public offerings, and pays the sales proceeds to the firm. The firm receives cash for its receivables.


27. Dwight Jaffee and Bertrand Renaud contend that a housing finance system and mortgage market are integral parts of the overall development of an emerging economy's financial sector. JAFFEE & RENAUD, supra note 26, at 4, 28.


29. See id. § 19. Claire Hill explains that

The rating agencies' role in these transactions is critical. Securitization seeks to attract investors who want securities of high, and readily ascertainable, quality. Rating agencies reduce the quality inquiry to a simple one, two or three letter code: AAA for the highest quality, AA for the next highest quality, A, for the next highest quality, BBB, for the next highest, etc., until D. Securities rated BBB or higher are investment grade; securities rated below BBB are speculative, or in some circles, "junk." A rating reflects the agency's assessment of the likelihood that the security will be paid in accordance with its terms.
created only if investors believe that mortgage-backed loans are relatively safe in comparison to their yield. In the United States, despite institutions of private property rights and the rule of law, the security necessary to stimulate a secondary mortgage market was accomplished only with the requirement of private mortgage insurance and title insurance on every mortgage lien intended for sale into the secondary mortgage market.

Referring to the example of China, since China amended its Constitution and Land Administration Law to permit the transfer of “land use rights” to private persons, the market for privately

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Hill, supra note 25, at 312.

30. The title insurance policy obtained by a mortgage lender continues to cover assignees or successors in ownership of the indebtedness. See PAlOMAR, supra note 25, § 4:8, App. E-6.

31. XIANFA [Constitution] art. 10, sec. 4 (amended 1988) (P.R.C.) (“Land use rights may be assigned in accordance with the laws and regulations.”), translated in ISABELLE I. H. WAN ET AL., A PROFESSIONAL’S GUIDE TO P.R.C. LAND LEGISLATION 103 (1999); Law of the People’s Republic of China on Land Administration, ch. 1, art. 2 (amended 1998) [hereinafter Land Law], translated in WAN ET AL., supra (“Land use rights may be assigned according to law.”).

In this Article, I have used the English translations of China’s Constitution (XIANFA), laws, and regulations found in WAN ET AL., supra. For further discussion of China’s land use laws, see PATRICK A. RANDOLPH, JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 125 (2000); Donald C. Clarke & Nicholas C. Howson, Developing P.R.C. Property and Real Estate Law: Revised Land Registration Rules, 18 E. ASIAN EXECUTIVE REP. 12 (1996). Pursuant to the Law of 1994, “land use right granted by the state can be transferred in the market as property .... [Land use rights] can also be leased and mortgaged.” CAO PEI, REAL ESTATE LAW IN CHINA 65 (1998). The Several Regulations on Definition of Land Ownership And Land Use Rights, National Land Administration Bureau (May 1, 1995) and the Regulations on the Implementation of the Land Administration Law of the People’s Republic of China, State Council (Jan. 4, 1991), define the aforementioned property rights over land in China.


To promote further the development of a market for real estate, the National People’s Congress promulgated additional laws for the administration of urban real estate in 1994. PEI, supra, at 32.

Though the State may transfer land use rights to private persons and entities, the right of ownership of the land remains vested in either the State or an agricultural collective. The land use rights transferred may be “granted land use rights” provided in exchange for value.
owned apartments has more than flourished. Individuals finance their purchases with twenty- or thirty-year home mortgage loans.32 At this time, the Bank of China finances all these residential mortgage loans with state money.33 If, instead of holding all this debt for twenty or thirty years, the Bank of China could sell packages of thousands of its residential mortgage loans into the world’s securities markets and, thus, make private capital available for residential mortgage lending, this process could generate trillions in state resources for the funding of other projects. This source of capital for residential mortgage loans, however, will not become available until China’s property rights institution and other institutions complement one another. Private mortgages must be proven enforceable34 over a long enough period of time to permit rating agencies and investment banks to rate China’s residential mortgage-backed securities highly, and the necessary financing techniques and legal structures must be made available for modern securitization of mortgage-backed debt.

for specific terms of years to domestic or foreign corporations, enterprises, other entities and individuals. See Law of the People’s Republic of China for the Administration of Urban Real Estate, ch. 2, § 1, art. 7 (adopted July 5, 1994, effective Jan. 1, 1995) [hereinafter Urban Real Estate Law], translated in WAN ET AL., supra, at 2060–61; Land Grant and Assignment Regulations, ch. II (1990), translated in WAN ET AL., supra, at 2109–10; RANDOLPH & LOU, supra, at 132; Clarke & Howson, supra, at 12.

Alternatively, the State may convey “allocated land use rights,” which are rights to use and occupy land for designated public purposes without payment of value, other than a small annual tax or “land use fee.” Urban Real Estate Law, ch. 2, § 2, art. 22, translated in WAN ET AL., supra, at 2064; Provisional Regulations Governing Allocated Land Use Rights, Decree No. 1, State Land Administration (1992) [hereinafter Allocated Land Use Rights Regulations], translated in WAN ET AL., supra, at 2141; Clarke & Howson, supra, at 12. In general, holders of granted land use rights may sell, lease, mortgage or otherwise transfer them. Urban Real Estate Law, ch. 4, translated in WAN ET AL., supra, at 2066–72. Conversely, holders of allocated land use rights may not transfer them, unless the holder first receives the State’s permission to convert the allocated land use right to a granted land use right. Id.; Allocated Land Use Rights Regulations, translated in WAN ET AL., supra, at 2141; see also Land Grant and Assignment Regulations, ch. VII, arts. 44–45, translated in WAN ET AL., supra, at 2105.

32. Comments by second- and third-year L.L.M. students in the author’s classes on “The Law of Real Estate” at East China University of Political Science and Law, Shanghai, China (Spring Semester 2002).
33. Id.
34. See RANDOLPH & LOU, supra note 31, at 99 (noting the uncertainty of whether mortgage lenders will really be permitted to foreclose on residential mortgages and evict defaulting residents).
While enhancing land tenure security\textsuperscript{35} may permit a market to develop for an emerging nation's mortgage-backed debt in the world's securities markets, unless the risks to an emerging nation's untested property rights can be identified and limited, the benefits of such a market, including credit enhancement, foreign commercial investment, and capital for mortgage loans, will be slowed. A necessary next course, therefore, is to expose the myriad sources of risk to land tenure security and then implement means by which they may be reduced.

\section*{II. Identifying Risks to Owners' Land Tenure Security and Investors' Security Interests in Land}

Economists who first concluded that land tenure security would stimulate economic growth equated the legal grant and public registration of private land titles with land tenure security. Subsequent studies have shown, however, that legalizing private occupants' title to land and establishing formal land title registration systems do not always provide access to capital or stimulate a market economy.\textsuperscript{36} These studies reveal that loans will not be available even to titled landowners if the location, size, and value of

\textsuperscript{35} Many nations, including China, will find it necessary to amend mortgage assignment and securities laws to permit securitization of pools of mortgage loans.

\textsuperscript{36} Empirical studies done in some rural areas of Kenya, Ghana, Rwanda and Somalia on the economic effects of land registration have found no statistically significant links between land registration on the one hand and investment and land productivity on the other. \textit{[T]he expected benefits of land registration did not materialize in the studies of Kenya, Ghana, Rwanda and Somalia.} Byamugisha, supra note 18, at 1, 6 (citations omitted).

Studies show that in Honduras, four years after registration, there was no difference in the rate of land transactions in one titled area compared to the rate of transactions in untitled areas. In fact, landowners transferred fewer parcels of land in one titled area during a four-year period than in the untitled area. The landowners themselves, however, perceived economic benefits from titling. Perhaps because having title enhanced the owners' interest in utilizing their land and developing it, they simply became less interested in transferring it for value. Hanstad, supra note 12, at 660, 661 n.47. For further evidence, see Building Institutions for Markets, supra note 1, at 7-9; Alan Gilbert, \textit{On the Mystery of Capital and the Myths of Hernando De Soto: What Difference Does Legal Title Make?}, 24 INT'L DEV. PLAN. REV. 11 (2002) (commenting on studies in Colombia, Turkey, Mexico, and South Africa); Baharoglu, supra note 1, at 18, 24-29.
the parcels involved are inadequate to interest lenders. ³⁷ Studies also show borrowers cannot obtain loans if they cannot promise that they will have regular income to repay loans. ³⁸

Additionally, formal land title registration systems cannot always reduce risks to private land titles sufficiently to motivate commercial lenders and foreign investors. Hidden risks to land tenure security need to be exposed. This Part will show how legal scholars can advise lawmakers to reduce (a) risks created by ambiguities, high transactions costs, and failures of process in the property rights institution itself, and (b) conflicts between the goals of a nation’s new property rights institution and goals of its other institutions and local norms. This Part will provide examples of legal scholars’ identification of such risks in China and lawmakers’ subsequent successes in reducing those impediments to economic growth.

A. Risks Within a Nation’s Property Rights Institution

It is not necessary that a nation grant private ownership rights equal to the common law fee simple absolute recognized in the United States to create land tenure security and economic growth. A private right for a definite term to possess, use, manage, receive income from, and transfer interests in a parcel of land has market value for purposes of credit, foreign commercial investment, and securitizing mortgage loans, so long as those rights are clear, enforceable, and indefeasible, even if the sovereign or the State retains the fee title. ³⁹ If rights are not clear, enforced by law, and indefeasible, however, investment in land will not be encouraged.

Risks to land tenure security can exist within a nation’s property rights institution itself. Common sources of risks to owners’ land tenure and investors’ expectations that arise from the very rules,

³⁷. Baharoglu, supra note 1, at 18.
³⁸. Id.
³⁹. The market for land use rights in China illustrates the truth of this assertion. See also Klaus Deininger & Gershon Feder, Land Institutions and Land Markets 10 (World Bank Policy Research, Working Paper No. 2014, 1998), available at http://www-wds.worldbank.org (concluding that land tenure can be usufruct and does not have to be full ownership, if it is sufficiently secure).
enforcement mechanisms, and organizations intended to establish private property rights include:

- characteristics of a nation’s property rights institution that impose high transactions costs on the attaining of formal property rights;
- ambiguities in legal limitations on persons and entities authorized to acquire, hold, and transfer land rights, including, but not exclusive of, limitations on governmental subdivisions, women, minors, and mental incompetents;
- ambiguities in limits on the alienability of land and security interests in land;
- vague or inaccurate land description and boundary systems;
- lack of a legal right entitling owners to their land;
- rights of use and rights to restrict use accorded to occupants of adjacent land;
- land use regulations that are inaccessible or that fail to define means of compliance, including environmental, development, subdivision, zoning, and construction regulations;
- property tax laws, transfer taxes, assessments for public works, utilities’ liens, and lien foreclosure procedures;
- errors by not satisfying formalities required for transfers of land that permit a transfer to be challenged;
- failures of process in official, ministerial, or judicial transfers of private property—including in an owner’s death or divorce, a guardianship proceeding, or a foreclosure or judicial sale on execution of debt—that create a risk of avoidance of the transfer;
- a land registry that is inaccessible, incomplete, inconsistent and inaccurate due to
  - delays in registering titles by grantees or registry officials,
  - high fees that discourage use of the registry,
  - conflicting titles and interloping conveyances,
  - failure to give notice to interested parties when registering titles, or
  - recognition of unregistered conflicting interests by the judiciary;
legal interests created by operation of law that "override" the registry;
uncertainty as to the effect of failure to comply with laws and regulations of the property rights institution, for example, whether the consequence of failure to comply with formalities or restrictions will be a mere requirement to comply, a fine, or a forfeiture of the property interest; and
lack of an efficient process for resolving land title disputes.\(^4\)

When legal scholars help development specialists and legislators recognize risks within the property rights institution that may deter investment, action to reduce these risks can be implemented and land tenure security stabilized.\(^4\) For example, as part of the government's goal of establishing market transactions,\(^4\) China amended its Constitution and Land Administration Law in 1988 to permit the transfer of "land use rights" to private persons.\(^4\) In keeping with national philosophy, the right of full ownership of the land remains vested in either the State or an agricultural collective, but land use rights may be granted to private persons or entities for specific terms, typically between thirty and seventy years. In general, holders of granted land use rights may sell, lease, mortgage or otherwise transfer these rights.\(^4\) Legal scholars subsequently have identified ambiguities and uncertainties within the new laws, enforcement mechanisms, and organizations composing China's property rights institution. Legal scholars then worked with lawmakers to propose clarifications, primarily via a new "Property

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40. The examples listed are the sort of title risks that title examiners search for, attorneys write title opinions concerning, and title insurance policies are purchased to indemnify against in the United States. See generally the author's two leading treatises on land title issues, law, and insurance: JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES (3d ed. 2003); JOYCE PALOMAR, TITLE INSURANCE LAW (1994).

41. See infra Conclusion (regarding reducing risks to land tenure security).

42. "The state has put into practice a socialist market economy." XIANFA [Constitution] amend. II, \(\S\) 7 (1993), translated in WAN ET AL., supra note 31, at 103. "Individual, private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market economy." Id. amend. III.

43. See supra note 31.

Code" that will be added to the Civil Code of China. Some examples of their efforts follow.

Example 1: Land Use Renewal Rights. One uncertainty involves a land use rights holder's ability to renew at the end of the term. Holders of granted land use rights may apply for renewal at least one year prior to the expiration of the term. The current Real Estate Administration Law provides that the Chinese government will approve a renewal application unless the State needs to recover the land for the public interest. No one really knows how much protection this "renewal right" gives to holders of granted land use rights, because none of the land use rights granted after the 1988 Constitutional amendment have entered the renewal period.

Additionally, existing law does not state whether the land use rights holder must pay new consideration based on the value of the land at the time of renewal, or whether the renewed term will be at least as long as the original term. Legal scholars advised development specialists and lawmakers that long-term investment could be hindered and improvements permitted to deteriorate as the end of

45. Legislation affecting property rights in China to date has been addressed through the country's constitution, civil code, commercial code, and in land administration regulations and rules. In 1999, Chinese scholars began to draft a comprehensive property law code. The purposes were to enhance further property rights, land finance, environmental protection, and agricultural production institutions and to reduce risks to purchasers, lenders and investors in land that had been recognized. The draft of the new Property Code that scholars are expected to propose to the National People's Congress would both reinforce existing laws and add laws on land rights that have been absent until now. Some examples are laws governing communities structured similarly to condominiums in the United States, and laws governing leases and transfers of a family's tenure rights in land within an agricultural collective.

Chinese legal scholars have sought suggestions from other nations' real property law scholars regarding laws, regulations, and enforcement mechanisms that best sustain a market economy, particularly those pertaining to land use, possession, transfer, development, and financing that scholars believe stimulated and sustained economic growth in the West. The author was one of the scholars invited in 2000 to comment at a Peking University Law School Forum on property laws to stimulate a market economy. The author also was invited in 2001 to comment at a Tsinghua University Law School Forum led by Professor Jiang Ping on the draft of the Property Code that is to be submitted to the National People's Congress.

46. Urban Real Estate Law, ch. 2, art. 21, translated in WAN ET AL., supra note 31, at 2063. Local regulations are permitted to alter that requirement, however. See RANDOLPH & LOU, supra note 31, at 128.

47. Urban Real Estate Law, ch. 2, art. 21, translated in WAN ET AL., supra note 31, at 2063.

48. See RANDOLPH & LOU, supra note 31, at 128; Palomar, supra note 4, at 33; Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo for the Sino-American Forum on Chinese Property Law, Tsinghua Univ., Beijing, China, June 17-18, 2002 (article on file with author).
the term nears because of uncertainty about the holder's ability to renew. This would decrease both market value of the property and loan value of the land use right near the end of its term. To reduce the uncertainty and risk, Chinese scholars recommended an article in the proposed new Property Code to confirm expressly that the government shall renew a land use right, and that renewal is a "right" that the State will acknowledge, unless it is necessary to reclaim the land in the public interest. This amendment and its intent approaches the concept of eminent domain in the United States and Great Britain, where the state's reclamation of property is a sufficiently rare risk that does not impede credit for the development of land.

Example 2: Forfeiture of Land Use Rights if Purpose of Grant Is Not Commenced or Continued. A second example of a risk to land tenure security within China's property rights institution is existing law providing for forfeiture of a granted land use right if the use for which it was granted is not commenced or continued. The State grants land use rights for specified purposes. The purpose may be broad, such as residential use, or the purpose may be specific, such as building and operating a factory. If the purpose for which a land use right was granted is not properly commenced within two years, it is forfeitable to the state. No compensation is "payable either for

49. See Property Law of the People's Republic of China, ch. 14, art. 66 (June 2003) (draft for comments presented by Prof. Jiang Ping, translated by Tsinghua Univ. law students, and on file with author). In addition, this statute provides that

[i]f the holder of the land-use right for construction wants to use the land continuously after the term expires, he shall apply for prolongation of time in advance of one year. Transferor shall agree except it is necessary to reclaim the land for the sake of social public interest.

Id.

50. Legal scholars have recommended a further amendment to the proposed article to clarify what renewal term an owner can expect and the cost for renewal of the land use right. See Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo, supra note 48.

51. Although the State transfers granted land use rights for a fee to individuals and entities for residential or commercial use, the State can also give allocated land use rights without charge to educational institutions, cultural organizations, health institutions, scientific research institutes, and political subdivisions to use only for their particular purposes. See Palomar, supra note 4, at 43. "Recent amendments to the law have created uncertainty regarding whether an allocated land use right automatically terminates if the land use is discontinued." Id. Also, allocated land use rights are not transferable. Id. at 40.

52. See Urban Real Estate Law, ch. 2, § 1, art. 7, translated in WAN ET AL., supra note 31,
the loss of the land use right or the improvements. Conversely, so long as the granted land use right was properly commenced, it does not appear to be forfeitable if the use is not continued.

To satisfy the national objectives of development and economic growth that support granting private land use rights, commencement of land use usually requires substantial construction. Local governmental regulations may provide other definitions of what constitutes commencement. For example, local regulations in Shenzhen provide that "commencement' requires that all development and land use permits be obtained, and twenty-five percent of the planned investment be expended for the project." In the majority of locales where no specific definition of commencement exists, the government may disagree with investors' judgment that the use was properly commenced or continued, and then will reclaim the land, thereby chilling such investment for current and future projects. The law does permit certain excuses for failure to commence use within the two-year period, including force majeure, government interference with commencement, and other justifiable excuses. Again, however, investors and the government may reach different conclusions regarding the cause of a failure to commence the use.

In addition to permitting forfeiture, China's existing law invalidates any transfer of a granted land use right if the purpose for which the land use right was granted to the transferor is not substantially completed before the transfer. Several localities have adopted similar regulations to encourage land development and discourage acquisition of land use rights for purposes of speculation.

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53. RANDOLPH & LOU, supra note 31, at 130. Also, "[d]elay of commencement even for one year can result in a fine of up to 20% of the fee paid for the land use right," as well as other legal consequences. Id.
54. Id. In contrast, allocated land use rights may be forfeited if the use is not continued. Id. at 131.
55. Id. at 130.
56. Id.
57. Id.
58. See Urban Real Estate Law, ch. 2, § 1, art. 7, translated in WAN ET AL., supra note 31, at 2065.
59. RANDOLPH & LOU, supra note 31, at 131.
and personal profit making. Preconditions to the transfer of a granted land use right include:

1. The grantee must have paid the land use right fee and obtained the land use right certificate;
2. The grantee must have commenced the development of the land in accordance with the granting contract. In building projects, this means that the grantee must have invested at least twenty-five percent of the whole projected investment; and
3. If the building construction has finished, the grantee must have obtained the building ownership certificate. For the sale of housing to foreigners, a permit must have been obtained from the government.

A risk of invalidation occurs if the land use rights holder, a purchaser, and the purchaser's lender all deem the legal preconditions to have been substantially met, but, after the transfer, the State determines that the preconditions were not satisfied.

The Property Code that legal scholars are recommending to China's National People's Congress would eliminate these fearsome risks of forfeiture and invalid transfer. Article 32 of the proposed Property Code would change the current law so that a land use right is not actually granted until the State determines that the specified purpose has commenced sufficiently. Requiring this condition to be met before the land use right is acquired should also better motivate grantees to accomplish the purpose for the grant. In contrast, the existing Land Administration Bureau's (LAB) rules grant a land use right, but make it subject to subsequent forfeiture if the purpose for which the land was granted is not accomplished.

Example 3: Rights of Use and Rights to Restrict Use. Currently, Chinese law does not expressly recognize the concept of easements. In addition, China's land title registration law lacks provisions for

60. Id.
61. See Urban Real Estate Law, pt. III, translated in WAN ET AL., supra note 31, at 2068. For subdivisions, the developer must have installed the infrastructure. RANDOLPH & LOU, supra note 31, at 183.
62. RANDOLPH & LOU, supra note 31, at 130.
63. Id. at 322.
registering easements.\textsuperscript{64} If a contract for the transfer of a land use right contains promises in the nature of easements, this contract would become part of the registration file for the land use right.\textsuperscript{65} Significantly, such promises are not likely to appear on the official registration card.\textsuperscript{66} Legal scholars have advised that a risk for both investors in the burdened land and the benefitted land is uncertainty as to whether such a right would bind successive owners of the burdened land.\textsuperscript{67}

Chinese law also does not expressly recognize or permit registration of covenants that create a duty of use or a restriction on the use of a parcel of land.\textsuperscript{68} If such covenants in transfer documents are treated as mere contracts, they will not bind successors to the burdened land use right.\textsuperscript{69} Legal scholars warn that this creates a risk that transferees of housing or office units in condominium-style developments will not be bound by the initial transferee's covenants relating to use or maintenance fees.\textsuperscript{70} Even with no notice from their own purchase contracts or the land registry, purchasers, lessees, lenders, and investors risk government enforcement of restrictive covenants in documents that created the development if the restrictions are deemed necessary for the operation of the development.\textsuperscript{71}

To reduce these risks, Chinese legal scholars have proposed Chapter 16, Article 182 of the new Property Code expressly to authorize creation and registration of servitudes and to prevent enforcement of unregistered servitudes against third parties.\textsuperscript{72} In addition, Article 189 would clarify that a written and registered servitude will bind a transferee of the servient land use right.\textsuperscript{73}

\textsuperscript{64} Id. at 323.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} See id.; see also Palomar, supra note 4, at 36.
\textsuperscript{68} RANDOLPH & LOU, supra note 31, at 323–24.
\textsuperscript{69} Id. at 324.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Specifically, a "[s]ervitude is acquired when contract of servitude comes into force. Holder of servitude shall apply to registration authorities for registration if the parties so request. No servitude can act against a third party unless registered." Property Law of People's Republic of China, ch. 16, art. 182 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).
\textsuperscript{73} Id. at ch. 16, art. 189.
Chapter 16 of the proposed Property Code also would answer questions about a servitude’s effect on the servient tenement holder’s ability to vary the use of the land, and would designate acts that can terminate a servitude.\textsuperscript{74}

Currently, China does recognize unwritten and unregistered rights of use by adjacent landowners.\textsuperscript{75} When one party needs to cross over or through another’s property for water, drainage, ventilation, utility services, light, or access to the first party’s property, Chinese law recognizes and protects the right to use land in this manner as a “neighborhood right.”\textsuperscript{76} The policy of China’s property rights institution in enforcing such rights is to maintain: “proper neighborly relations in the spirit of helping production, making things convenient for people’s lives, enhancing unity and mutual assistance, and being fair and reasonable.”\textsuperscript{77} When neighborhood rights arise as a matter of law, rather than by contract or conveyance, there is nothing to register in the land registry. Legal scholars noted that such rights create risks that purchasers and lenders cannot know of, bargain about, or otherwise mitigate. To better inform investors, Chinese legal scholars have drafted a section of the proposed Property Code to clarify the law on neighborhood rights.\textsuperscript{78} The proposed code also would reduce purchasers’ and

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} RANDOLPH & LOU, supra note 31, at 316.
\item \textsuperscript{76} Id. The party benefitting from the neighborhood right may have a duty to compensate for injury or inconvenience. See id. at 318. Neighborhood rights are roughly equivalent to American common law easements by necessity. Id. at 47.
\item \textsuperscript{77} Property Law of People’s Republic of China, ch. 9, art. 77 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).
\item \textsuperscript{78} Chapter Nine takes several steps towards clarifying the law of neighborhood rights. Specifically, the “holder of immovables shall provide convenience for neighboring holders over use of water and drainage.” Id. at ch. 9, art. 78. In addition, the holder of immovables is entitled to prohibit others’ intrusion into his land, except under either of the following situations:
\begin{itemize}
\item (1) It is necessary for neighboring holder to use the land for passage;
\item (2) It is necessary for neighboring holder to use the land for construction, repairing building and its accessory facilities;
\item (3) It is necessary to use this land in accordance with local customs.
\end{itemize}
Id. at ch. 9, art. 81. Another section provides that “proper distance shall be kept between neighboring buildings and altitude of each building shall be limited. One building shall not hinder ventilation, lighting and sunshine of the other buildings.” Id. at ch. 9, art. 82. If “it is necessary for holder of immovables to use neighboring land to install wires, electric cables, water pipes, gas pipes and other pipes, the holder of neighboring land shall provide necessary
lenders' risk by giving a land use rights holder a right to compensation for any damage caused by persons exercising neighborhood rights for access, water use, drainage, or laying pipes and wires.79

Example 4: Rights of Unit Owners in Buildings. China's property rights institution recognizes co-ownership by shares.80 A concern identified by legal scholars, however, is the inability under that concept to determine the exact nature of the rights of persons who purchase land use rights in units of housing or office complexes that are developed similarly to American condominiums.81 Although it has been clear that occupants own the space within their own units and have neighborhood rights against the rest of the building, a number of questions remain open: Do owners of units hold fractional ownership interests in the common areas? Do owners of units have any rights or obligations regarding the building's appearance or maintenance? Does such co-ownership bring with it liability for injuries in common areas or for costs of maintaining common areas? When an owner sells a unit, does the owner's contractual agreement to pay maintenance fees run with the property to the purchaser of the unit? Do owners of units have the preemptive right that Chinese law generally gives to co-owners by shares to purchase the share of any co-owner who wishes to sell?82

As a result of these uncertainties, the Standing Committee of the National People's Congress has drafted completely new law on separate ownership in buildings in the proposed Property Code.83 These proposed statutes would specify that unit owners "enjoy joint ownership of corridors, elevators and other joint parts, and enjoy the convenience." Id. at ch. 9, art. 83. In addition, the "[h]older of immovables is entitled to prohibit neighboring holders from discharging and divulging atmospheric pollutants and giving out of noise shake, light, wireless radio and other virulent matters." Id. at ch. 9, art. 84. Further, "[d]isinterring of land, constructing building, installing pipes and wires and installment by the holder of immovables should not damage the ordinary use and safety of neighboring immovables." Id. at ch. 9, art. 85.

79. Id. at ch. 9, art. 86.
80. RANDOLPH & LOU, supra note 31, at 45.
81. Id. at 47.
82. Id.
83. Id.
84. Id. at 47–48.
85. Property Law of People's Republic of China, ch. 9, art. 86 (June 2003) (draft for comments presented by Professor Jiang Ping, translation by Tsinghua Univ. law students, and on file with author).
right of joint management of maintaining the buildings and accessory facilities." In addition, the statutes would clarify that the unit owners, as joint owners, must bear costs of maintenance and repairs both for their units and the common areas, and that if owners sell their units, their rights to common areas will be transferred as well. Finally, the proposed statutes specify that an association composed of all the separate owners will be the management organ of the buildings and accessory facilities, rather than the developer. Other proposed articles provide for unit owners to vote on decisions of the association and set the percentage vote required for actions that substantially impact individual unit owners' property rights. While legal scholars continue to recommend additional clarifications, the proposed property law goes a long way toward reducing the risk of loss of unit purchasers' expectations. As a result, it also reduces the risk of unit purchasers defaulting on their purchase money mortgage loans.

Example 5: Land Title Registration Risks. Risks to owners' property rights and lenders' security interests can exist within the processes for registering and transferring private rights in land. Risks can be a consequence of incomplete, inaccurate, inefficient, and uneconomical land title registration procedures; vague land description and boundary systems; conflicting titles and interloping conveyances; lack of an efficient process for resolving land boundary disputes; and interests created by operation of law that override the registry. Risks also exist when applicable land administration regulations, including development, subdivision, building and construction, land use, zoning, and environmental regulations, are not apparent from the registry. Additional risks arise from ambiguous or unevenly applied property tax laws,

86. Id. at ch. 9, art. 66.
87. Id. at ch. 9, art. 69.
88. Id. at ch. 9, art. 68.
89. Id. at ch. 9, art. 70.
90. See generally id. at ch. 9.
91. See Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo, supra note 48.
92. RANDOLPH & LOU, supra note 31, at 166.
93. Id. at 173.
94. Palomar, supra note 4, at 20-21.
95. Id. at 24.
96. Id. at 25.
97. Id.
assessments for public works, utility liens, and lien foreclosure procedures. Furthermore, lack of a fixed process or rules for disputing land administration decisions increases transactions costs and discourages investment.

Most developed countries utilize registries of rights. In contrast to America's system of merely recording title evidence, a registry of rights is intended to do more than give notice. A registry of rights intends to establish conclusively the rights to each parcel of land. A right in rem is not created until the registrar determines the status of title and enters it in the land registry. With a few exceptions, rights not reflected in the register are not recognized, even if legitimate. Properly functioning registries of rights reduce risks to purchasers, lenders and other investors significantly more than the system of public title evidence recording provided by local governments in the United States. To this end, most developed countries have invested significant government dollars to train registry officials, survey parcels, and provide judicial or administrative proceedings for the conclusive determination and registration of title to each parcel of land. At the recommendation of economists and land administration experts, in recent decades, emerging economies have attempted to adopt such registries of rights. Their successes have varied, however, and often in different localities within the same nation. The problem often is the cost of maintaining such a system. When the cost of a formal registry of rights is higher than a locality can sustain, or when other factors prevent a

98. Id. at 37-38.
99. See also Palomar, Patton and Palomar on Land Titles, supra note 40, § 691; Palomar, Title Insurance Law, supra note 40, § 22:2.
100. Palomar, Patton and Palomar on Land Titles, supra note 40, § 691.
101. The land registry both states the identity of the legal titleholder and lists all easements, liens, mortgages, leases, covenants, and other encumbrances against the title. Schwarzwalder, supra note 20, at 167. An owner who transfers land brings the contract or deed to the registry and the registrar makes a new entry on the register in the name of the new owner. Id. at 168. In systems that use certificates, the registrar issues a new certificate. Id. The registrar maintains files or books containing the originals or copies of all documents referred to on the land register so an examiner can review them. Id. The files or books are usually indexed by tract of land, permitting easy location of all instruments affecting title to that tract. Id. Nevertheless, a prospective purchaser or lender wanting to learn the status of rights to a tract of land only needs to inspect the current land register itself. Id. at 167.
102. Canadian and English attorneys have told the author that this is truer in theory than in fact, and that their courts recognize many exceptions in the interest of fairness and equity.
103. See citations throughout supra Part I.
formal land title registry from functioning properly, risks are created, rather than reduced.

Like many emerging nations, China has adopted a registry of rights system. Because the institution of private property rights in land is still relatively new in China, Chinese legal scholars are still debating its foundational principles. A recent debate centers on when a right in rem is created legally. At least one Chinese legal scholar argued that the right in rem should be deemed created in a transferee through the contract of sale, and that registering should only perfect the transferee's interest and give notice to third parties. This is essentially the theory of the private property

104. The registration process includes: (1) a land registration application form; (2) registry officials obtaining a survey of the land; (3) registry officials examining the title to the land and adjudicating or mediating competing claims; (4) completion of a land registration card for each legal person with an interest in the land and placement of it in the land registration book; and (5) issuance of a land title certificate to the applicant. See Rules on Land Registration, ch. II, arts. 10-19 (1995), translated in WAN ET AL., supra note 31, at 2124-26; RANDOLPH & LOU, supra note 31, at 164. Subsequently, a new registration is made when a registered land use right is transferred, when any changes are made to the name of the land user, or when a previous land registration is cancelled. Rules on Land Registration, chs. IV-V, translated in WAN ET AL., supra note 31, at 2129-33. If an applicant claims to have lost a land use rights certificate, then public notice and a comment period will be given before issuance of a new certificate. RANDOLPH & LOU, supra note 31, at 165. The LAB is responsible for settling disputes over land use rights by mediating disputes and registering the results. See Land Law Implementing Rules, ch. 2, art. 16 (1998), translated in WAN ET AL., supra note 31, at 2145-46; Rules on Land Registration, ch. II, art. 18, translated in WAN ET AL., supra note 31, at 2126. Further, China is among those countries in which the registry office is financially responsible for the direct economic consequences caused by its negligent registration of an interest. RANDOLPH & LOU, supra note 31, at 171. These do not include the owner's "expectation damages," even those regarded as "reasonably foreseeable." Id.

At least theoretically, the local LAB's book of land registration cards should be indexed by tract of land. Rules on Land Registration, ch. VII, art. 60, translated in WAN ET AL., supra note 31, at 2135. Each LAB office should file: the land registration application forms received; the documents submitted as evidence of legal rights in the land with each registration application; the land registration approval form; the land registration book composed of all the land registration cards; receipts for land use rights certificates; and any other agreements or documents made for deciding titles to land. Rules on Land Registration, ch. VII, art. 59, translated in WAN ET AL., supra note 31, at 2135. Chinese law also provides for a national cadaster for purposes of taxation and land use planning.


106. The author heard this argument by one Chinese scholar at the Sino-American Forum on Chinese Property Law, Tsinghua Univ., Beijing, China, June 17-18, 2002 (conference
rights institution and title evidence recording system in America; in contrast, other scholars point out that the quintessential characteristic of a registry of rights is that rights in rem cannot be created other than through registration. Under this latter theory, a party with an unregistered claim to land may have a right in contract for money damages, but no right in rem to be awarded the land over the titleholder listed in the registry of rights. It is this theory that allows a registry of rights to be conclusive and provide greater land tenure security than the American system of recording title evidence.

The proposed Property Code would end the uncertainty regarding the legal effect of registration and clarify that China's property rights institution honors registration as the act that creates a transferee's land use right.\(^{107}\) The proposed code clarifies further that certificates of title given by registrars to transferees are merely evidence of their title and that, if the contents of a certificate of title are inconsistent with the registry, the transferee's legal rights shall be based on the registry.\(^{108}\)

China's land registries in business centers such as Beijing and Shanghai reportedly are operating efficiently and accurately. Current LAB rules and procedures reflect the components that experts have recommended. China's urban business centers also are reported to be doing well with the timeliness of registration. Users of the Beijing and Shanghai registries have told the author that the time between filing an application to register a transfer of a land use right and its actual registration is six to eight months.\(^{109}\) Legal
scholars have found, however, that in some less urban locations in China, the organization of the land registry records renders them inaccessible in fact.\textsuperscript{110} Reportedly, public inspection has not been permitted in some locations, despite the recent legal mandate.\textsuperscript{111}

The charging of high fees for access to registry records also has inhibited use of the land registry in some locations.\textsuperscript{112} The risk of proceeding with planning, financing, and purchase is great if a transferee cannot know that the title is as the transferor represents it until after closing the transaction and having the transferee’s own application for land use rights registration accepted or declined.\textsuperscript{113} To reduce that risk, China’s Ministry of Land and Resources adopted a new law, effective March 2003, declaring that

\begin{quote}
In Mozambique there is a backlog of about 10,000 applications for land rights, which means long delays between receipt of an investment plan and eventual granting of the land right. In Cameroon, the minimum amount of time it takes to register a plot is 15 months, and registration commonly takes between 2 and 7 years. In Peru the official adjudication process takes 43 months and 207 steps in 48 offices, although an expedited process has been implemented in selected areas.
\end{quote}

\textbf{Building Institutions for Markets, supra} note 1, at 35.

\textsuperscript{110} \textsc{Randolph} \& \textsc{Lou, supra} note 31, at 166.

\textsuperscript{111} In 1996, the Rules on Land Registration changed the preexisting policy of open public inspection. \textit{See id.} These Rules required parties wishing to inspect the registration records, including potential transferees and mortgagees, to apply for permission in writing. \textit{See id.} at 165–66; \textit{see also} Clarke \& Howson, \textit{supra} note 31, at 15. The 1998 Land Law Implementing Rules restated the previously existing policy that records should be available for public inspection. \textit{See Land Law Implementing Rules (1998), translated in Wan ET AL., supra} note 31, at 2084. Yet, it was not clear whether permission will always be granted, particularly to foreigners, or whether the times permitted for inspection will be reasonable. “\textquote{Regular and effective access to the registration records may not be a practical reality in some areas unless the party seeking such access has [a connection].}” \textsc{Randolph} \& \textsc{Lou, supra} note 31, at 166; \textit{see also} Andrew John Godwin, The Theory Underpinning the Development of Mortgage Law in China 121–22 (2000) (unpublished Master of Laws thesis, University of Melbourne) (on file with the University of Melbourne Library) (arguing that Article 45 of the Peoples’ Republic of China Security Law providing for inspections of the registration department is more theory than practice and that it is often difficult even for lawyers to inspect the registry).

\textsuperscript{112} \textsc{Randolph} \& \textsc{Lou, supra} note 31, at 166.

\textsuperscript{113} “If access is limited, the long-term integrity of the land registry system may be threatened. Moreover, the registry’s usefulness as a source of land market information remains unmet if public access is limited.” Schwarzwalder, \textit{supra} note 20, at 175 (discussing public access to land registration records in Eastern European countries).

If both the registry book and copies of right-establishing documents are open to public inspection, purchasers, lenders and other investors also can be more confident in the accuracy of the registry’s conclusions as to the proper holder of title and less worried about corruption or political favoritism.
registries must be open for public inquiry. Chapter Two of the new Property Code proposed by Chinese legal scholars would mandate further that registries must be open for inspection, registration fees must be "moderate," and all matters must be registered in a timely manner.

Additionally, legal scholars identified conflicts within the property rights institution itself involving China's dual land registry system—one system and location for land use rights registration and a separate system and location for building ownership and lease registration. A title risk exists if an owner registers ownership of a building, but fails to register simultaneously an ownership interest in the land use right to the land under and around the building. Legal scholars recommended that for efficiency, consistency, and accuracy in both registration of transfers and examination of title, these systems should be consolidated. The 1994 Law on Urban Real Estate Administration authorized provincial governments to consolidate the registration systems
within their own jurisdictions.\textsuperscript{120} As a result, regulations were passed in Shanghai and Shenzhen to provide for one government agency, the Municipal Building and Land Bureau, to issue a uniform certificate for both interests.\textsuperscript{121} In 2003, Chinese legal scholars began drafting a set of registration regulations for Beijing that would accomplish the same.\textsuperscript{122} Legal scholars have recommended that further consolidation of the two registry systems throughout the country can reduce inconsistencies, confusion, time and expense in both registration and examination of rights to land and buildings.\textsuperscript{123}

One more illustration of risk to land tenure rights within China's property rights identified by legal scholars is that land descriptions often utilize impermanent monuments such as local roads, buildings, or other features as beginning points for descriptions of the land.\textsuperscript{124} When land descriptions are inadequate, interests in the same land could be registered under different land descriptions and, consequently, purchasers and other investors may not be able to rely on the land registry. If a transfer or mortgage was registered under one land description, it is unclear whether it would defeat a subsequent registration of a transfer or mortgage filed under another, more accurate description of the same land. Some legal experts recommended recognizing a concept like adverse possession to make the boundaries of parcels of land as occupied their actual, legal boundaries.\textsuperscript{125} Though Chinese law does not generally recognize the concept of adverse possession,\textsuperscript{126} a few recent statutes

\textsuperscript{120.} \textit{Id., translated in} WAN ET AL., \textit{supra} note 31, at 2074. 
\textsuperscript{121.} RANDOLPH & LOU, \textit{supra} note 31, at 163. 
\textsuperscript{122.} Verbal report to the author from Li Hao, Tsinghua University Law School Ph.D. student and research assistant to Professor Cui Jianyuan. Both Professor Cui Jianyuan and Li Hao are working on a draft of Beijing Land Registration Rules which they anticipate to be similar to the Shanghai Land Registration Rules that were adopted in December 2002. 
\textsuperscript{123.} Palomar, \textit{supra} note 4, at 60; \textit{see also} RANDOLPH & LOU, \textit{supra} note 31, at 166. 
\textsuperscript{124.} RANDOLPH & LOU, \textit{supra} note 31, at 173. 
\textsuperscript{125.} \textit{See generally} \textit{id.} at 174 (noting that “Chinese law does not have the concept of adverse possession in a form as developed as the common law”); Williamson, \textit{supra} note 8, at 12. The different practices of describing land parcels for registration purposes in different countries are discussed in Hanstad, \textit{supra} note 13, at 677. \textit{See also} Schwarzwalder, \textit{supra} note 20, at 177 (describing the “Draft Registration Law” of the Kyrgyz Republic as having a low initial standard for land descriptions, but containing procedures for adding more detailed descriptions where necessary). Either the registry office or the holder of rights can ask for a topographic survey of boundaries if they deem it necessary. \textit{Id.} 
\textsuperscript{126.} RANDOLPH & LOU, \textit{supra} note 31, at 174.
have begun to permit possession to be used to resolve boundary disputes and clarify registration records.\textsuperscript{127}

Finally, legal scholars have identified the absence of clear methods to decide boundary and title disputes as a risk to land tenure rights within China's property rights institution.\textsuperscript{128} Chinese legal scholars advocate resolving this risk in the proposed new Property Code for China by implicitly empowering registration authorities to hear boundary disputes and make corrections.\textsuperscript{129} This resolution is economical, efficient and reasonable, because registration authorities generally will have greater experience in land rights, administration, and surveys than courts.

B. Conflicts Between Goals of the Property Rights Institution and Other Institutions and Norms

Myriad institutions affect the security of land tenure and investments in land besides a nation's property rights institution. Claims and forfeiture of rights to land can arise from operation of the laws, rules, enforcement mechanisms, and supporting organizations of constitutional law; administrative law; local government law; commercial law; secured finance, mortgage and foreclosure law; debtor, creditor, and bankruptcy law; civil procedure; contract law; business associations, corporate, agency, and partnership law; environmental, natural resources, and water law; tax law; family law; inheritance and succession law; and criminal law. This Section will illustrate the ways that legal scholars have assisted an emerging economy's economic development goals by identifying conflicts between the goals of its property rights institution and certain laws, rules, and enforcement mechanisms of the nation's other institutions.

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} Palomar, supra note 4, at 24-25; Joyce Palomar, Comments on the Draft Property Law of People's Republic of China at the Sino-American Forum on Chinese Property Law, Tsinghua Univ., Beijing, China, June 17-18, 2002 (commenting on Article 18); Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo, supra note 48 (commenting on Article 18).
\item \textsuperscript{129} Property Law of People's Republic of China, ch. 2, arts. 11 & 18 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).
\end{itemize}
1. Risks Within a Nation's Financing and Credit Institutions

Within a nation's financing and credit institutions, risks to owners' and lenders' rights and investors' expectations may arise as a consequence of debtors' or creditors' rights in bankruptcy; invalidity of conveyances by an insolvent debtor; vacated sales in execution of debt; and rights of mechanics or material suppliers. Further risks to a lender's lien against land may exist due to invalidity of an assignment of the lien; invalidity of a release or subordination of a mortgage or other lien; a prior equitable lien in favor of the property vendor or another; inability to foreclose liens against occupants; unenforceability of mortgage liens due to limitations on alienability of the mortgaged property right; and securities laws that bar securitization of mortgages. Another set of risks to a lender's lien is a bar to its enforceability because of future advances, interest rate changes, violations of usury or consumer protection laws, or violations of "doing business" regulations.

Example 1: Uncertain Ability to Foreclose Mortgages on Allocated Land Use Rights. One illustration from China's financing and credit institutions involves legal scholars' concern regarding whether, under China's existing "Security Law," a mortgagee would be permitted to foreclose a mortgage on "allocated land use rights" on unimproved land. While the granted land use rights discussed so far in this Article are transferred by the State to individuals and entities who pay market value, the State also gives allocated land use rights without payment of value to educational institutions, cultural organizations, health institutions, scientific research institutes, and political subdivisions to use for their own purposes. In contrast to granted land use rights which can be sold, leased, mortgaged or otherwise transferred, allocated land use rights may

130. While the grantee does not pay fair market value in consideration for the transfer, a small annual tax or "land use fee" is assessed. Urban Real Estate Law, ch. 2, § 2, art. 22 (adopted July 5, 1994, effective Jan. 1, 1995), translated in WAN ET AL., supra note 31, at 2064; Allocated Land Use Rights Regulations (1992), translated in WAN ET AL., supra note 31, at 2141; Clarke & Howson, supra note 31, at 16.


not be transferred unless the holder first receives the State's permission to convert the allocated land use right to a granted land use and pays value for that right.\textsuperscript{133} Legal scholars noted that, because allocated land use rights are nontransferable, in order to foreclose a mortgage on an allocated land use right, the mortgagee would be required first to pay the consideration necessary to convert the allocated land use right to a granted land use right.\textsuperscript{134}

Additionally, legal scholars counseled that mortgagees face a risk because conversion of an allocated land use right to a granted land use right is at the discretion of the State, and a mortgagee has no guarantee that the State will approve conversion for the purpose of permitting the mortgagee to foreclose.\textsuperscript{135} Chinese legal scholars now propose to clarify this issue in the proposed Property Code for China. Article 273 would affirm that the mortgagee must pay the "granting fees for the land use right"\textsuperscript{136} to foreclose, but also would remove the State's discretion by declaring that the "mortgagee shall be entitled" to have its claim satisfied with proceeds from an auction of the allocated land use right.\textsuperscript{137}

\textbf{Example 2: Inability to Register Presale Contracts as Rights In Rem.} A second illustration of a risk to purchasers' and lenders' property rights created by conflicting goals of China's financing and credit institutions involves preselling or preleasing the property, a common method developers employ to obtain funds for construction. A developer of a housing project is permitted to presell housing before completion of construction if the developer has (1) paid the land use right fee and obtained the land use right certificate, (2) invested at least twenty-five percent of the entire projected invest-

\begin{footnotes}
\textsuperscript{133} \textit{Id.}; \textit{Allocated Land Use Rights Regulations, translated in WAN ET AL., supra note 31}; \textit{Urban Land Grant and Assignment Regulations, ch. VII, arts. 44 & 45 (1990), translated in WAN ET AL., supra note 31, at 2105.}
\textsuperscript{134} \textit{RANDOLPH & LOU, supra note 31, at 99, 241.}
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Property Law of People's Republic of China, ch. 23, art. 273 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).}
\textsuperscript{137} \textit{Property Law of People's Republic of China, ch. 23, art. 273 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).}
\end{footnotes}
ment in the building, and (3) obtained both a zoning license for the project and a presale permit from the Building Administration at or above the county level. Legal scholars argued, however, that a risk to both buyers and their lenders exists because the buyer's right under a presale contract is only a "credit right," not a land use right that could be registered to create a right in rem in the property. To reduce the risk of a developer reselling a parcel of property after receiving payment from a prior unregistered buyer, the new Property Code proposes to permit buyers to register their presale contracts. Registration of a presale contract would not give the purchaser a right in rem, but, under the proposed Code, it would defeat any subsequent conflicting conveyance of the property by the developer. Registration of a presale contract also should cause the registrar to decline to register a conflicting transfer of the property, and would give notice of the prior claim to subsequent purchasers and lenders. Even if a subsequent purchaser were the first to register a land use right in the property, the proposed Property Code would leave that registry entry subject to "correction" due to the subsequent purchaser's notice.

Example 3: Uncertainty as to Mortgage and Foreclosure Rights on Land in Agricultural Collectives. Recently, legal scholars found

138. Urban Real Estate Law, ch. 4, art. 38, translated in WAN ET AL., supra note 31, at 2068. For subdivisions, the developer must have installed the infrastructure. RANDOLPH & LOU, supra note 31, at 183.

139. The holder of a credit right is entitled to apply to registration authorities for advanced registration in order to restrain obligor's disposal of immovables and ensure that the holder of the credit right acquires right in rem in the future. After the advanced registration, Debtors' disposal of immovables in violation of the advanced registration shall take no effect. Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo, supra note 48.

140. See id. Reportedly this practice is proceeding at this time.

141. See Property Law of People's Republic of China, ch. 2, art. 22 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author). "A right in rem enjoyed on the basis of the registration book of immovables is protected by law, unless the holder recorded in the registration book of immovables is aware of the flaws in the right in rem." Id.

Nevertheless, purchasers and their lenders still risk that the developer will not complete the development, receive the land use right to the property, and be able to transfer a land use right to the unit purchaser. Reducing the risk that the developer will not acquire title and the purchaser of the presale certificate will be unable to get a final land use right is considered in a forthcoming article by the author titled Broadening Perspectives on Land Title Assurance Systems for Credit Enhancement in Emerging Economies.
uncertainty as to whether land within China’s agricultural collectives could be mortgaged and foreclosed. That uncertainty stifled use of agricultural land as collateral for loans for seed, fertilizer, production costs, and improvements. While the 1988 amendments to China’s 1982 Constitution recognized a right to transfer granted land use rights, it did not expressly address transferability of land use rights on agricultural collective land. Therefore, many believed it was not possible to lease, mortgage, or transfer ownership of land in agricultural collectives. Amendments to the Land Administration Law in 1988 provided that land use rights on agricultural collective land are transferable, but then the 1998 Land Administration Law appeared to prohibit such a practice. Transactions of agricultural land occurred in some areas regardless of the laws. To enhance the availability of credit for production and for improvements on land in agricultural collectives, the Standing Committee of the National People’s Congress adopted the Rural Land Contracting Law, effective in March 2003, expressly permitting farmers to transfer, lease, or mortgage their land use right for all or any portion of its thirty-year term. These principles

142. RANDOLPH & LOU, supra note 31, at 82.
143. Id.
144. Id.
145. Id.
146. Rural Land Contracting Law, art. 16 (Aug. 29, 2002), translated by Rural Development Institute, Seattle, Wash.: The contracting party shall enjoy the following rights:
1. the rights to use, profit from, and transfer land contracting and operation rights, and the right of autonomy over production operations and disposition of products;
2. when land is expropriated in accordance with law, to receive the corresponding compensation as provided by law;
3. other rights that are set forth in laws and administrative regulations.
Id.; see also id. at art. 49:
Upon registration in accordance with law and issuance of written Land Contracting and Operation Certificate, or Forest Right Certificate for rural land that has been contracted through competitive bidding, auction, or public negotiation or other forms of contracting, the contracting and operation rights to such land may be assigned, leased, contributed as stock, mortgaged, or transacted by other means.
Id.; accord Property Law of People’s Republic of China, art. 132 (June 2003) (draft for
also appear as a chapter in the proposed Property Code;\textsuperscript{147} but as the entire Code was not deemed ready, adoption of the Rural Land Contracting Law has prevented delay of this badly needed stimulus for economic development in China's poverty-stricken rural areas.

The Rural Land Contracting Law is discussed further in the next Section of this Article in relation to its resolution of risks to land tenure security resulting from conflicting goals of China's political institution.

2. Risks Within the Political Institution

Laws adopted to enforce political policy also may inadvertently conflict with the property rights institution's policy of land tenure security. Because rights recognized by the political institution often are created by statute or operation of law, rather than by contract or instrument of conveyance, they do not appear in the land registry. Thus, they pose a risk to investors that is not discernible from the nation's land registry system, regardless of how accessible, efficient or economical the system is.

Example 1: Readjustments of Land Use Rights in Agricultural Collectives. Legal scholars recently exposed a conflict between goals of China's political institution and its property rights institution comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author) ("Holder of contracted management rights of rural land enjoys the right of transfer, subcontracting, exchanging, investing, gifting or mortgaging his contracted management rights of rural land."").

Loan value will be limited, of course, by laws supporting the policy of China's public welfare institution to guard strictly conversion of agricultural land from food production to other purposes. A mortgagee, thus, may only acquire or sell to another in foreclosure subject to the rights of the agricultural collective and for agricultural operations. Rural Land Contracting Law, art. 33, ¶¶ 4 & 5; Contracted Management Rights of Rural Land, Property Law of People's Republic of China, ch. 13, art. 128 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author) ("It is prohibited to alter the nature and the use of the land."); see also Right of Mortgage, Property Law of People's Republic of China, ch. 23, art. 272 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author):

Where the land-use right to contracted barren hills is mortgaged or the land-use right to the land occupied by the factories and other buildings of a township (town) or village enterprise is mortgaged in accordance with the provisions of this Law, the collective ownership and the uses of the land may not be altered without following the legal procedure after enforcement of the right of mortgage.

\textsuperscript{147} Property Law of People's Republic of China, art. 132 (quoted supra note 146).
which has prevented agricultural collectives\textsuperscript{148} from achieving their economic development goals. In an effort to increase agricultural productivity, between 1978 and 1984, China moved from a purely communal agricultural system to a "household responsibility system.\textsuperscript{149}" Giving each household rights to farm and to profit from the production of a specific parcel of land initially raised agricultural production significantly.\textsuperscript{150} Yet, productivity began to decrease as time elapsed.\textsuperscript{151} Legal scholars with the Rural Development Institute in Washington posited that this decrease in productivity occurred because farmers' land tenure rights still were insecure as a result of village leaders periodically readjusting families' assignments of land.\textsuperscript{152} If a member of a family died or a daughter married and moved to another village, the household lost that member's land share.\textsuperscript{153} Conversely, a household into which a child was born or a new spouse moved gained an additional land share.\textsuperscript{154} Furthermore, as the village's overall population grew, village leaders would re-subdivide and redistribute its land, with a consequent reduction in the size of every individual's land share.\textsuperscript{155}

This policy of readjustment likely was intended to achieve a goal within the local political institution, such as that of treating each person equally by making each person's landholding equal. Because farmers risked losing the land they were farming, however, they were discouraged from making long-term investments that might otherwise have improved the land's productivity.\textsuperscript{156} Also, even after China's property rights institution assured the alienability of

\textsuperscript{148} All land in China is owned either by the State or by agricultural collectives. The State owns land in the cities, while agricultural collectives own land in rural and suburban areas—including house sites, privately farmed plots of cropland, and "hilly land"—except for portions that belong to the State under other provisions of the law. XIANFA [Constitution] art. 10 (amended 1988), translated in \textit{WAN ET AL., supra} note 31, at 102-03; RANDOLPH & LOU, \textit{supra} note 31, at 59.


\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.}
farmers' land use rights, they in fact had no transferable or mortgageable value for more than one season, because the transferee risked losing the parcel in the next readjustment. After learning of the contradictory effect of this political policy and practice upon its economic goals, the Standing Committee of the National People's Congress increased farmers' land tenure security by adopting the Rural Land Contracting Law, which grants farmers thirty-year land use rights on their parcels of land. The Rural Development Institute estimates that by recognizing, clearly defining, and securing farmers' in rem rights to land, this new legislation will have unleashed land with a market value of at least $500-600 billion. Chapter 13 of the proposed Property Code, if passed, will reinforce that the farmer holds a right in rem in the particular parcel, not merely a contract or credit right, with all available remedies for enforcing a right in rem.

Example 2: Rights Created by Operation of Law That Override the Registry. Even where a nation's property rights institution enforces registered private rights in land, the political institution still may give greater weight to certain rights of others. Two categories of unregistered rights in land commonly are permitted to "override the registry." First, the law may recognize private rights based on possession that might have been ascertained by an inspection of the land or by inquiry of persons in possession, such as residential

157. Id.
158. Id.; see also Rural Land Contracting Law, art. 20 (Aug. 29, 2002), translated by Rural Development Institute, Seattle, Wash.

Questions remain, however. Even if technically farmers can mortgage their land use rights, will lenders be willing to loan money when they can only acquire in foreclosure subject to the agricultural collective's rights? The lender would be limited to selling in foreclosure only to someone else in the collective or subject to the collective's right. Also, the thirty-year limit on the farmer's land use right raises the concern of insufficient loan funds for operations during the last years of the term, since resale value of the land use right decreases as the end of the term nears and a lender would not loan more than its market value.

160. Property Law of People's Republic of China, ch. 13, art. 127 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).

161. See, e.g., the list of "overriding interests" to which registered land may be subject in England pursuant to § 70 of the Land Registration Act. Land Registration Act 2002, c. 9, sched. 3.
leases and easements by necessity, despite absence of a registered
document creating that right. A second category of overriding
interests include public rights, such as land taxes, land use reg-
ulations, certain public easements, and the government’s right to
take privately owned land through eminent domain.\textsuperscript{162} The publicity
generated when eminent domain or confiscatory regulation occurs
causes property owners to dread this risk to investment in land
even in developed countries. Moreover, when eminent domain or
confiscatory regulation occurs in a nation where private property
rights are relatively new, alarms are raised that can seriously
reduce purchasers’ and investors’ confidence in the nation’s property
rights institution.

In China, recognized overriding interests that might be ascer-
tained by inspection of the land or by inquiry of persons in posses-
sion include neighborhood rights, spousal rights, and family rights.
The second category of overriding interests includes land taxes, land
use regulations, certain public easements, and the government’s
right to terminate a transferee’s land use right in the public interest
with appropriate compensation to the holder for loss of the land use
right.

Certainly, in China it has been true that the publicity generated
when the State terminates private land use rights and recovers the
land makes this one of the most feared risks. This risk was recently
illustrated by the Beijing district government’s reclaiming the rights
to a man’s 350-year-old traditional courtyard house in order to sell
the land to a bank for a ten-story bank building. The city compen-
sated the owner of the land use rights, but, according to newspaper
reports, the compensation represented only one-tenth of what the
government stood to receive from the bank being built on the site.\textsuperscript{163}

It also was highly publicized when a Beijing McDonald’s lost its
twenty-year lease for the world’s largest McDonald’s.

\begin{flushright}
[I]n December 1995, 2 years into the lease, McDonald’s noticed
bulldozers leveling the structures adjacent to the ‘Great Palace’.
To their chagrin, Hong Kong-based Li Kshing, one of the world’s
wealthiest men, was backing a commercial-residential redevel-
\end{flushright}

\textsuperscript{162} Id.
\textsuperscript{163} Ian Johnson, \textit{House Demolition Marks the End to Suit}, ASIAN WALL ST. J., Oct. 27,
opment site two blocks away from Tianammen Square and this meant Ronald had to pack his McNuggets and leave. Industry experts say that McDonald's should more or less accept this as a "part of doing business in a country whose rulers have placed a higher emphasis on rapid redevelopment than on contractual niceties." Though they complained quite publicly and managed to get a weak promise from the administration to receive a future comparable site, McDonald's appears to understand that this is the risk of doing business in China.

To reduce their effect on investment, legal scholars recommended in general that any laws preserving public or private rights in land over purchasers' and lenders' registered rights should be express and as clear as possible. As a particular example, legal scholars recommended that China clarify its law by codifying the measure of compensation the State is to pay when terminating a private land use right. Legal scholars also recommended that the State's power should be expressly limited for legitimate public purposes. If the State frequently and unevenly imposes confiscatory regulations, misuses the right of eminent domain for private benefit, or refuses to pay compensation equal to the fair market value of the land use right, then a market for land and the availability of credit with real

164. Id. The Asian Wall Street Journal reported that McDonald's China Development Company President, Marvin Whaley, considers its "continuing tussle with central and Beijing government officials over the fate of its flagship restaurant on the corner of Beijing's busiest shipping street" to be no more than a "bump on the road." Id. Mr. Whaley says the media may have mistakenly overblown what is essentially a commercial and urban-planning decision into a soap opera pitting foreign business against the Chinese government and a Hong Kong billionaire. He says McDonald's fully expects to give way to progress and knows it will receive an equitable settlement. "Things are very complicated in China because they're trying to do so much," he says. "We'll come to an agreement that is suitable for us and suitable for them. We have a very good working relationship with the city. They'll compensate us."

165. Schwarzwalder, supra note 20, at 185. The risk of "overriding interests" that are not reflected in the public land title registry is one reason that investment analysts have begun to recommend private title insurance when investments involve land, even in countries with strong land title registration systems. Palomar, supra note 4, at 13.

166. See, e.g., Palomar, supra note 4, at 7; Joyce Palomar, Comments on the Draft Property Law of People's Republic of China, supra note 128; Comments by Prof. Patrick A. Randolph & Prof. Lou Jianbo, supra note 48.
property collateral will be hindered. Conversely, if these protections are express in the law and the rule of law controls, then the risk to private owners from these overriding interests should not be so great as to deter investment in land.

China has implemented some of the recommended clarifications of its law. Article 16 of the Rural Land Contracting Law that became effective in March 2003 expressly provides that even in agricultural collectives, if land must be expropriated according to law, the land use rights holder has a right to compensation.\textsuperscript{167} Additionally, the proposed Property Code for China mandates in Article 44 that the government may only acquire private property for the public interest and must pay compensation.\textsuperscript{168} Article 177 reaffirms these principles in the context of rural homestead rights, providing that a “rural collective economic organization may reclaim a homestead for the sake of building public facilities or improving public welfare, but the holder to the use of homestead should be compensated and given a reallocated homestead.”\textsuperscript{169} Article 45 adds that if the government needs to use private property in case of emergency, disaster relief, or war, the expropriatee shall be compensated and expropriated land shall be returned to the expropriatee after the need for its use has ceased.\textsuperscript{170}

3. Risks from Conflicts with Other Institutions' Goals

Just as the policies and practices of a nation's political institution and finance and credit institution must be balanced with those of the property rights institution, so must the policies and practices of a nation's other institutions be examined for their impact on land tenure and investment security. Within the family protection institution, risks to purchasers' land titles and investors' expectations can exist as a consequence of spousal rights, homestead rights, liens for child support, and claims of heirs.\textsuperscript{171} Within the state's

\textsuperscript{167} Rural Land Contracting Law, art. 16 (Aug. 29, 2002), \textit{translated} by Rural Development Institute, Seattle Wash.

\textsuperscript{168} Property Law of People's Republic of China, art. 44 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author).

\textsuperscript{169} Id. at art. 177.

\textsuperscript{170} Id. at art. 45.

\textsuperscript{171} See, e.g., \textit{PALOMAR, PATTON & PALOMAR ON LAND TITLES}, supra note 40, at ch. 5, § 225,
police power and criminal justice institutions, risks to lenders' security interests and investors' expectations exist from laws and enforcement mechanisms providing for forfeiture of land used in perpetration of a crime or purchased with the proceeds of a crime. Within a nation's business organizations institution, rules that empower business entities to acquire, hold, and transfer land also prescribe the authority and formalities required for such entities to transfer land validly; lack of authority or breach of formalities can result in invalidity or unenforceability of a transfer. Weak institutions charged with building regulation create a risk that the value of improvements to land will depreciate to an amount lower than the borrower's loan balance, encouraging defaults on repayment of mortgage loans and discouraging mortgage lending.

As demonstrated above, legal scholars can positively assist economists and development specialists with this sort of analysis of an emerging economy's institutions. If they can discern where risks exist, legal scholars, development experts, and legislators then will be able to devise appropriate means for reducing those risks.

CONCLUSION

This Article illustrated that risks to purchasers' land rights and investors' security interests in land exist when various institutions in an emerging economy implement policies and practices that inadvertently oppose the laws, enforcement mechanisms, and supporting institutions of its property rights institution. This Article also illustrated that risks to land tenure security arise when lack of familiarity with the institution of private property rights in land makes it difficult initially for legislators to promulgate laws, regulations, and enforcement mechanisms that are sufficiently comprehensive and clear. In addition, this Article has shown that risks to land tenure security exist due to failure of process in implementing existing laws and registering private titles to land. It has demonstrated further that risks to land tenure security and economic development exist when the law must make a conscious

\[\text{ch. 8, §§ 395-400, ch. 10 & ch. 11, §§ 573, 575-576, 595-597.}\]
\[172. \text{See, e.g., id. at Ch. 12, § 660.}\]
\[173. \text{See, e.g., id. at ch. 8, §§ 402-417.}\]
choice in balancing interests of other institutions against interests of private owners of land rights.

After exposing such risks to land tenure security, the next step will be for legal scholars to help economists and development specialists devise institutions for reducing risks to the property rights institution's goals. The means of risk reduction simply will differ depending on the reason for the risk. Part II of this Article illustrated how legal scholars in China reached to the rule of law and legislation as mechanisms for supporting the nation's property rights institution and reducing risks to land tenure security and investment in land. The draft of a new Property Code proposed to the National People's Congress recognizes and supports diverse forms of private rights in land with the goal of sustaining China's socialist market economy.174

Risks to land tenure security also may be reduced by improvements to land title registration systems and through private contracts of indemnification. Future work by legal scholars should consider means of tailoring these two institutions for land title assurance to the needs of emerging economies. A forthcoming work by this author will recommend adaptations to make land title registry systems sustainable as well as types of private contracts of indemnification best suited to reduce risk of loss to purchasers, lenders, and investors in emerging countries.175

174. Property Law of People's Republic of China, ch. 1, art. 3 (June 2003) (draft for comments presented by Professor Jiang Ping, translated by Tsinghua Univ. law students, and on file with author) ("Individual economy, private economy and other nonpublic economy are important constituents of a socialist market economy. In the primary stage of socialism, the State holds as the basic economic system the common development of the diverse forms of ownership, with the public ownership as the mainstay.").

175. The author, in Broadening Perspectives on Land Registration Systems for Credit Enhancement in Emerging Economies (unpublished manuscript), will recommend: (1) mortgage impairment insurance to stimulate a market for residential mortgage-backed securities, instead of title insurance, and (2) a system of recording title evidence rather than a registry of rights in certain types of localities.