The Impact of Regulatory Takings by the Chinese State on Rural Land Tenure and Property Rights

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I. Introduction

With the realization of China's rapid ecological deterioration, partly caused by irresponsible logging, the Chinese government has in recent years taken a series of drastic measures to improve forest coverage. One important approach was to declare more than 61 million hectares of existing natural forests as the Natural Forest Protection Program (NFPP) zone spanning over 17 provinces and autonomous regions,[1] most of which is collectively owned forestland.[2] A complete logging ban was instituted within the NFPP zone, regardless of whether the forests were formed naturally or through tree-planting by farmers. Moreover, in non-NFPP areas, the cutting of trees in areas designated as ecological forests is also banned. These policy measures, while advancing the state's legitimate objectives of protecting land from soil erosion and improving overall ecological status, have negatively impacted the livelihoods of forest farmers who rely on forest production for living, in a way similar to that of state land expropriations.

Chinese land expropriation laws provide that the state may seize collectively owned land in the interest of public needs as long as a reasonable compensation is paid for such land expropriations.[3] The underlying principle, like land takings laws in most countries, is that a government act that benefits the public as a whole should not disproportionately affect individual citizens or a selected group of citizens. However, these laws are applied to physical land takings through which collectively owned land is converted to state-owned land. As to whether, and farmers should be compensated when a government action in the name of general public interest negatively affects their livelihoods by regulating the use of their own lands, existing Chinese laws are completely silent. The NFPP program appears to fall into this category of government acts, collectively termed "regulatory taking" under takings laws in countries with a developed legal system.

This paper will introduce and discuss regulatory takings laws in the US and some European countries. Section II describes the regulatory takings laws that govern the definition of regulatory taking, compensation standards for such takings and procedural requirements for filing a regulatory takings claim. Section III proposes a series of recommendations on legislative reforms on China's regulatory takings regime taking into account the unique characteristics of China's property rights institution.

II. Regulatory takings law in other countries

The governments of almost all countries possess eminent domain, which allows them to take private property for public use in order to improve the well-being of all citizens. For this type of government takings, the law in most countries, including China, requires compensation for the loss of property sustained by the individual holder of rights to the property. Derived from eminent domain, governments may regulate the uses of private property for the public benefit, which may also result in the loss of property value even though the government's regulatory act does not take physical possession of the property. This section will review laws in developed countries concerning such non-possessive government acts that lead to diminution of the property value.

Determination of regulatory taking

In the U.S., the judicial concept of regulatory takings was not introduced until the 1922 Supreme Court decision of Pennsylvania Coal Co. v. Mahon.[4] In this case, the state had enacted a statute prohibiting the mining of coal that could cause the subsidence of soil. When reviewing the statute at issue, the U.S. Supreme Court set up the proposition that if a "regulations goes too far, it will be recognized as a taking."[5] While Pennsylvania Coal recognized the idea of a regulatory taking, what exactly is meant by "too far" has been subject to debate for over 80 years.[6] Over this period of time, the American jurisprudence of regulatory taking has been gradually formed even though some aspects remain unsettled and need further fine tuning. In general, regulatory taking is defined as a government action to regulate the use of individual property for public benefit, in the absence of physical intrusion of the property that may diminish the value or usefulness of the property.[7] However, whether a regulatory

taking amounts to a compensable taking under the Fifth Amendment of the Constitution requires further inquiry.

The first inquiry is to see whether the claimed regulatory taking is equivalent to the denial of "all economically beneficial or productive use of land".[8] With respect to this type of categorical regulatory takings, the general rule is that the government must make compensation in order to avoid individual bearing of public burdens "which, in all fairness and justice, should be borne by the public as a whole."[9] In this situation, the government may only resist compensation if it can show that the property owner did not have the right to engage in the prohibited behavior to begin with, or if the prohibited activity was a nuisance.[10] For example, if a tract of forestland was acquired after a logging ban was instituted, the land owner might not be able to receive compensation even if the logging ban effectively wiped out all beneficial use of the land. Moreover, if a government restriction is designed to proscribe a noxious use, regulatory action may be considered as an exercise of police power to prevent potential harms, and therefore no compensation is necessary.

For non-categorical regulatory takings, sometimes referred to as "partial takings," where a regulation has taken away significant, but not all, value from a piece of property, the law requires a case-by-case ad hoc inquiry into the regulation and its impact.[11] The underlying rationale for doing more fact-specific inquiries is that whether a particular restriction of land use causes certain losses and thus requires for compensation depends largely upon the circumstances in that case.[12]

In Penn Central Transportation Company v. New York City, the Supreme Court outlined three factors to the original Pennsylvania Coal analysis in order to clarify whether a regulation should be considered a compensable taking when there is still some value remaining in the property.[13] These factors include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed interests, and the character of the government action.[14] Thus, for any regulatory action that falls short of a categorical regulatory taking, the ad hoc inquiries should be conducted within the framework crafted under Penn Central.[15]

With respect to diminution of economic value of the property as a result of the government's regulatory act, the US jurisprudence requires an inquiry to the extent of the diminution as against the remaining value of the property.[16] If such diminution is not significant enough to place a heavy burden on the property owner, the regulatory action may not give rise to a compensable regulatory taking,[17] since the property owner might be able to operate at a profit even with the regulation in place.[18]

Pursuant to the constitutional requirements, several states grant their residents additional protection from regulatory takings. For example, Oregon's regulatory takings bill provides that "[i]f a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation."[19] Texas requires the state to compensate for any land-use regulations that reduce property value by 25% or more.[20] In Florida, the state must compensate private landowners for any regulation that causes the landowner to be permanently unable to attain the reasonable, investment-backed expectations for her property, or bears permanently a disproportionate amount of the burden imposed by the public good.

With increasing public awareness of the potential impacts on individual property rights posed by government regulations in an effort to protect the environment, some European countries have developed regulatory takings jurisprudence either through codified laws or judicial practices, or both. In Sweden, the Constitution requires compensation "to a person whose use of land or buildings is restricted by the public institutions in such a manner that ongoing land use in the affected part of the property is substantially impaired, or injury results which is significant in relation to the value of that part of the property."[21] Under Sweden's constitutional standard, a government regulation may be viewed as a regulatory taking if the individual property is substantially impaired or the property value is significantly reduced.

Poland appears to be way ahead of other European countries in protecting individual property rights in the case of government restrictions on the use of the property. Under Polish law, if a land-use plan or an issuance of a development permission "limit[s] in an essential manner" or destroys the ability to use property as it had been previously used, the landowner may demand compensation for the actual damage or that the municipality purchase the lost interest in the land.[22] However, when unregulated land is being used for one particular purpose with no plans for a change, and a zoning ordinance is passed that solidifies this use as the sole use of the property and prohibits any other use, the prohibition would not be considered a regulatory taking even if it may interfere with the property owner's right to develop the property.[23] That is to say, if land is currently used for forest production, a regulation that prohibits any other uses may not trigger a regulatory taking even if the "other use" may be more profitable.

Finland takes a different approach to regulatory takings jurisprudence, with more emphasis on social obligations of property owners than in Poland. In general, when determining whether land-use restrictions amount to a compensable regulatory taking, a proper balance should be struck between individual property interests in land and an individual's social obligations.[24] Under Finnish land laws, a property owner must suffer a threshold loss from government land use restrictions before the government action can be considered a regulatory taking that deserves compensation. Such a threshold varies depending on the legislation, including the owner's failure to use the land "in a manner generating reasonable return",[25] or his or her sustaining of "significant inconvenience."[26] Moreover, if the restrictions are not generally or non-discriminatorily applied to the general public, they may amount to a regulatory taking.[27]

In Germany, the social obligation element is even more pronounced in its regulatory takings law. The German Constitution imposes a duty on property owners that "use should also serve the public wealth."[28] Based on this constitutional principle, German courts use four general tests to distinguish between a taking and a sacrifice due to social obligation. The first, called the "doctrine of intensity" or "reasonableness" test, assesses the burden that a restriction places on owners, and if found too harsh, necessitates compensation. The second, termed the "doctrine of individual sacrifice", asks whether the regulation forces a special sacrifice from an individual that other similar owners are not required to bear. The third test, the "doctrine of situational commitment", examines the regulated property with the view that certain types of property are inherently burdened with greater social obligations than others, and that owners of these properties take the social encumbrances along with ownership. The fourth approach, the "private use" test, says that it is constitutionally permissible to restrict a proposed future use of property if the present use is profitable, it has never been used for the proposed use, and if the proposed use is incompatible with the location or conditions of the property.[29] However, even under German takings law which appears to be greatly inclined to imposing a social obligation on property owners, if a government regulatory action targets a selected group of people and causes substantial negative impact on their property, it may be deemed as a compensable regulatory taking.

Compensation for regulatory taking

Once a government regulation is viewed as a regulatory taking, the next step is to determine the compensation for such a taking. In the US, when compensation is sought, the constitutional mandate of "just compensation" applies.

While the assessment of what exactly comprises "just compensation" under the Fifth Amendment was once a matter of state law, the adoption of Rule 71A of the Federal Rules of Civil Procedure in 1951 brought procedural as well as substantive issues in federal condemnation cases under federal control.[30] Under the established criterion, just compensation is represented by the market value of the property taken. The following definition, based upon a compendium of Supreme Court cases addressing the definition of market value in federal eminent domain cases, has been adopted by appraisers of federal land acquisitions.[31]

> Market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would have sold on the effective date of the appraisal, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the appraisal.

Although it is widely agreed that takings should be compensated by the fair market value of the property taken, appraisers valuing the same property's market value may reach very different results.[32] In addition, many of the details of the compensation are resolved in trial or on remand, so are in the hands of district and intermediate appellate courts. The approach to compensation taken by the courts may reflect a stronger or weaker view of protection of private property, since the legal entitlement of a taking is virtually meaningless if the compensation is inadequate. Christopher Serkin identified several specific valuation mechanisms currently used by courts to measure compensation for regulatory takings, which are listed below.[33]

1. *Harm versus Gain* – The first valuation decision that must be made by any court is whether to measure the harm to the property owner or the gain to the government caused by the taking. In many cases, harm and gain will be symmetrical, but this is not always true. The benefits approach may sometimes include additional value due to the benefits created by the government's use of the property. On the other hand, the harm approach may not reflect the owner's entire harm because courts generally prohibit taking into account consequential damages, such as the cost of relocating a business, or the property owner's subjective value, such as a particular view.

2. *Highest and Best Use* – Black letter law provides that the fair market value is based on the value of the property as put to its most profitable use. This rule mimics real market behavior because a real buyer would consider the property's highest and best use to arrive at a fair transaction price. The price should not be reached just by subtracting the costs of improving a property from its value at its highest and best use, but should be further discounted to reflect the risk inherent in development.

3. *Permissible but Un-enacted Regulations* – The value of property is affected by the existing regulatory framework. In addition to preexisting regulations, a property may potentially be subject to regulations that for whatever reason have not been enacted as of yet. To reflect the possibility of these un-enacted regulations becoming active, the fair market value of the property should be discounted by the impact of a potential regulation and the chance that the regulation will be enacted.

4. *Benefit Offset and Average Reciprocity of Advantage* – In the case of a partial taking, the compensation is generally offset by any benefit conferred by the regulation. For example, if a new road is built through part of a property, the compensation due to the property owner is offset by the enhanced value to the property as a result of the new road.

5. *Timing of Valuation* – Takings are to be valued on the date the property is taken. This, however, can be problematic because the knowledge of imminent government condemnation can devalue the property significantly. To counteract this effect, some courts have rolled back the valuation date to an earlier time. However, other courts have simply denied any compensation for loss of value due to this "condemnation blight."

6. *Fees and Expenses* – Federal law permits courts to shift attorney's fees and other expenses to the prevailing party in a section 1983 action to enforce the Takings Clause. The Supreme Court has also held that prevailing plaintiffs should ordinarily recover attorney's fees unless special circumstances would render such an award unjust.

7. *Replacement Value* – Courts have occasionally used the cost of replacement as an alternative to fair market value when the market value of the property is not readily available or, where otherwise unable to be compensated, consequential damages would be very high.

An example of these valuation mechanisms in use may prove illustrative. In *Bassett, New Mexico LLC v. United States*,[34] the EPA halted Basset, New Mexico LLC's mining operations by taking its quarry due to the discovery of hazardous materials on the site. In assessing the amount of just compensation due to Bassett, the United States Court of Federal Claims sought to place Bassett "in as good a pecuniary position as if the government had not taken his property."[35] In order to do this, the court first determined the fair market value of the property, which it based upon the property's highest and best use before the taking.[36] The court found that the property's highest and best use, which could include potential uses, included mining, residential development, and water sales.[37] Then, the court determined compensable damages by measuring the degree that the taking decreased the value of each of these uses and adding these amounts together.[38] The court did not accept the government's argument that the compensable value should be offset because Basset benefited by having less contaminants on its property because the government could not show how this benefit would increase the property's value.[39]

Poland also applies its constitutional mandate of "just compensation"[40] to regulatory takings. The Land Planning Act of 2003 requires that if a land-use plan is determined as a regulatory taking, government must pay compensation for the actual damage or purchase the lost interest in the land.[41] Although the law does not provide the formula for calculating the purchase price, the market value of the property before it became blighted is generally used.[42] If the injured owner instead chooses to limit his claims to monetary compensation, it is limited to "actual damages" to the property, excluding hypothetical damages such as lost profits. The Environmental Protection Law of 2001 also requires the government to make compensation or purchase for the property whose use has been restricted for environmental reasons based on the property's market value.[43] This law further requires that this market value price be determined by a "valuator".[44]

In Finland, determination of compensation is governed by the Expropriation Act, which spells out three aspects of compensation. First is "object" compensation, which is the fair market value for the property or property right being taken. The second is "severance" compensation, which compensates an owner for the nuisance caused by the loss of rights in situations when only a portion of the property is the subject of expropriation. Finally, "damage" compensation is to reimburse owners for specific damages and expenses incurred due to the expropriation, such as moving costs or loss of profits.[45] The amount of compensation is assessed in a study conducted by the National Land Survey Office.[46]

Procedural requirements

Unlike physical takings claims, where an alleged aggrieved party can directly file a lawsuit with the courts, the US procedural laws governing regulatory takings require exhaustion of administrative proceedings. In practical terms, this means that a case is not ripe for litigation until a final administrative decision has been made. That is to say, an aggrieved property owner must seek for administrative remedies before filing a complaint with courts. For example, if a zoning ordinance prohibits the development of land, the landowner must first apply for exceptions or variances that might allow such development.[47] This is because a court cannot decide on whether a regulation goes "too far" to fall into a regulatory taking unless it knows "how far" the regulation stands.[48]

However, if seeking a final administrative decision is deemed futile or unmeaningful, the requirement for exhaustion of administrative remedies may be waived. There are at least two situations where an aggrieved landowner may directly seek judicial review of an alleged regulatory takings claim. First, when the administrative agency denies an application for change of land use pursuant to a zoning ordinance, but does not suggest other economically viable uses for the property, additional administrative proceedings will be deemed unnecessary.[49] Second, if a regulation is so influential in its practice that it is impossible for the landowner to obtain an administrative remedy, direct judicial review will be available.[50]

Finland also adopts the principle of exhaustion of administrative remedies before filing a legal claim for compensation with respect to regulatory takings. Under the Land Use and Building Act, a landowner encountering a land-use restriction must request an exemption filed with the zoning authority, and only if the zoning authority denies the exemption, may the owner file for compensation.[51] This provision gives the zoning authority the flexibility to avoid costly compensation by granting individual exemptions or reducing the affect of the regulation so that it does not cross the compensation threshold.

III. Recommendations

With increasing environmental awareness and intensifying government efforts to curtail ecological deterioration, more regulatory actions on forestland use are expected. However, while such regulations designed to improve overall ecological well-being for China may be necessary, they may, in the long-run, have a negative economic impact on farmers' rights to collective forestland. Consequently, their livelihoods, especially those who depend on forest production for a living, will suffer. Currently, China does not have a regulatory takings law. As a result, the government is not required to pay compensation to affected farmers for its regulatory actions that benefit the public as a whole.

While the legislative and judicial experiences of foreign countries on regulatory takings are helpful or even instructive, designing a legal framework for regulatory takings in China must take into account the country's unique characteristics. We offer a series of specific recommendations on the development of China's own regulatory takings law.

Adopt the "no worse-off" principle in the regulatory takings legislation

Making legislation to address the issue of regulatory takings in China is tantamount to drawing a picture on a piece of blank paper. The starting point is to set up the overarching principle for designing a fair and balanced regulatory takings regime. In recent years, Chinese government has issued a series of policy guidelines for forthcoming legislative reforms on China's land expropriation regime, which have substantial instructive values for legislators on regulatory takings.

The most important guideline, as outlined in the State Council's Document No. 28 of 2004, for physical takings reforms is the prevention of a reduction in farmers' living standards and insurance of their long-term livelihoods. The new Property Law also requires the concept of "ensuring the affected farmers' livelihoods and protecting the affected farmers' lawful interests" as the principle for determining compensation for physical expropriations. Such guidelines should also be adopted in the regulatory takings legislation. Although a physical expropriation is distinctive in many aspects from a regulatory taking, the ultimate impacts on affected farmers are no different. Under both types of takings, affected farmers will lose economic use of the land that their survival relies on. Any government action benefiting the whole society, whether in the form of drastic change of land ownership or in the form of regulating the use of land, should not impose a disproportionate economic burden on individuals. Likewise, such an action should not lead to a deterioration of affected people's livelihoods.

With respect to the NFPP program, people who are most likely to be severely affected by the logging ban restriction are also those who would need government assistance in reducing their poverty even without the logging ban. For example, 90% of the forestland in Guizhou, under the NFPP restrictions, is collectively owned forestland,[52] much of which is located in remote mountainous areas where farmers' livelihoods are already below the national average. As the central budgetary revenues have substantially increased over the past years,[53] there appears to be no reason to require such poor farmers to bear the costs of improving China's ecological system through logging ban, especially when taking into account the fact that the living standards of the farmers in the NFPP zones are already far below the national average and many of such farmers are the target of China's poverty reduction efforts.

Define regulatory takings in consideration of China's distinctive nature

As in developed countries, individual property rights to collective forestland must be balanced with the government's interest in improving the state's ecological status when defining the scope of regulatory takings in China. While farmers with forestland rights should not be singled out to bear the costs of ecological improvements, it appears undesirable to overburden the state for every measure it takes in combating ecological deterioration. However, it should be noted that unlike the nature of developed countries, where government restrictions on development of private forestland tend to affect large land owners, China's logging ban on collectively owned forestland primarily restricts perhaps the only means of survival of poor farmers in remote areas. Therefore, regulatory takings with respect to collectively owned forestland should be defined in line not only with the requirement that the state bear the costs of public projects that benefit the public as a whole, but also with consideration of the peculiar implications of forestland rights to the livelihoods of farmers, especially those living in remote and poor areas within the NFPP zones.

For these farmers, forestland is not only the most valuable asset, but may be the only means of maintenance as well. Such forestland is usually located in undeveloped geographical areas, and non-agricultural job opportunities are relatively scarce. Moreover, due to the insufficiency of arable land, farmers are primarily dependent on forest production for living. A complete logging ban, no matter how beneficial it may be to the public, could mean a loss of survival means to most, if not all, farmers in these areas.

In view of the unique implications of collective forestland rights for farmers' livelihoods, the regulatory takings legislation in China should be defined broadly enough to cover all circumstances where farmers' livelihoods are at stake. First, any regulatory action on logging restrictions that deprives farmers of all viable economic use of forestland should be viewed as a regulatory taking. For example, if harvesting trees is the only functionally beneficial use of farmers' forestland rights, a logging ban is deemed a regulatory taking under which compensation is required, as in case of physical takings.

Second, for a logging ban that does not amount to a total loss of all beneficial uses, a two-pronged approach may be introduced to determine whether the regulation is tantamount to a taking. At first, the remaining use must be functional, practical or reasonably foreseeable. For example, if the development of eco-tourism business as a result of reduced logging and improved ecological environment is listed as such remaining use, this kind of potential should be either immediately available or imminently functional with reasonable certainty. That is to say, if such eco-tourism business is not possible without substantial investments or, if its use is in direct conflict with existing rules on tourism, then eco-tourism should not be qualified as a functional remaining use. Second, even if such remaining use does exist, the logging ban can still be treated as a regulatory taking as long as the remaining use cannot fully restore affected farmers' livelihoods.

Third, a concept of partial regulatory taking should be introduced to deal with situations where only a portion of trees owned by farmers are subject to the logging ban. In the U.S. for example, a regulation-induced diminution of land's value alone is not sufficient to determine a regulatory taking when the land can be put to profitable use, even if less profitable use. Under the U.S. regulatory takings law, a government action that diminishes the value of the land is treated either as a "total" taking or non-taking depending on special circumstances other than diminution of the land's value. Adopting such an "all-or-nothing" approach in China, however, may not be appropriate.

Chinese farmers are already in a disadvantaged position as compared with their urban counterparts in terms of earned income, accumulated wealth, and non-agricultural employment. Farmers in the mountainous NFPP zones, where most of collectively-owned land is forestland, are even more disadvantaged in all of these aspects. These farmers need economic and social assistance even if there were no logging ban. Any diminution of land's value as a result of a government action may further drive farmers into poverty, thereby impeding the realization of a harmonious society. It appears desirable,

from a public policy standpoint, that any diminution of forestland value be viewed as a sufficient claim for proportionate compensation associated with regulatory takings.

Fourth, a government action designed to regulate a noxious use should not be treated as a regulatory taking and, therefore, no compensation would be needed even if it were expected to negatively impact farmers' economic use of their forestland. However, it is necessary to define 'noxious use' in order to prevent an abuse of power in an attempt to evade compensation. In general, a noxious use is one that may cause injury or harm to the public or to other private individuals and is not protected under existing laws on property. For example, a government prohibition of camping on certain forestland to minimize fire hazards is an attempt to curb noxious use. Also, if existing laws on property prohibit, or are intended to prohibit, a more profitable use before the property is acquired, the value of the property should be viewed as being commensurate with the obligation. For example, forestland rights were allocated to farmers with a condition that the land not be used for non-forest development; any additional regulatory action restricting non-forest use should not be regarded as a regulatory taking.

Determine compensation based on actual loss

Once a government regulatory action is determined as a regulatory action, compensation should be required even though ownership of forestland and trees rights remain unchanged. In China, compensation for physical takings is determined based on statutory standards as stipulated in the LML. For expropriation of forestland, the LML authorizes each of the provinces to promulgate its own compensation standards.[54] This localization of compensation determination appears to be to the detriment of farmers with forestland rights, thus, further reforms are imperative.[55] Discussion of necessary reforms on the compensation regimes for forestland takings is, however, beyond the scope of this paper. We offer several recommendations with respect to the determination of compensation for regulatory takings.

First, the determination of compensation for regulatory takings should follow the principle of "maintaining farmers' original living standards and ensuring their long-term livelihoods" as set forth for physical takings. For farmers living in the NFPP zones, forest production may be the primary or even the sole means of survival; any restriction on economic use of their contracted forestland, no matter how important it might be to the public interest in ecological improvement, would almost definitely affect their livelihoods. As in the case of physical takings, forest farmers should be paid compensation sufficient to restore their livelihoods for the loss of economic use of their forestland as a result of government's logging ban restrictions.

Second, since there is an active lumber market almost everywhere in China, compensation standards for regulatory takings should be relative to the market value of the trees affected by the logging ban. Most countries with a developed legal system adopt the market value of the property as the standard for compensation for expropriating the property where a market exists. China should be no exception. As an alternative, the government may also choose to purchase these trees at the market price.

Third, the market-value-based compensation should be made for the actual loss in order to prevent unjust enrichment and meet investment-back expectation of individual households. The logging ban applies to both the trees that existed before farmers acquired forestland rights, and also the trees planted and managed by individual farmers themselves after they contracted the collective forestland. For the latter group, compensation should be made directly to individual farmers because they have invested both labor and capital in planting trees and managing individual forest farms. As to the trees that grew through natural or man-made processes overseen by members of the collective before the adoption of the household responsibility system (HRS), compensation should be allocated between the collective entity and individual households. Determination of the allocation ratio should take into account the number of years individual households have possessed and managed their contracted forestland under HRS. The longer a household has held individual rights to the land, the greater the portion of compensation that they receive.

Fourth, compensation for regulatory takings may be offset by government investments in the provision of functional, non-forest opportunities. With increased consensus on building China into a harmonious society, further government actions and financial inputs to assist farmers in the NFPP zones are expected, either in the form of poverty reduction efforts or as transfer payments by the central government. If any of such activities are transformed to practical, income-generating opportunities, such as eco-tourism, that could replace forest farmers' losses from regulatory takings, the government may reduce or waive the compensation to be offered to farmers.

Introduce a sensible procedural mechanism in dealing with regulatory claims

Several Western countries adopt a procedural mechanism that requires administrative remedies to be exhausted before the affected people can lodge a lawsuit. However, given the drastic nature of the NFPP program and the mandatory uniformity in implementing the program, it is meaningless to require farmers to file an application first for an exception to the logging ban. Therefore, farmers should be allowed to directly file a regulatory takings claim with the judicial system once the regulatory takings concept is formalized by law.

However, a judge-presided mediation seems desirable before formal court hearings take place. The doctrine of exhaustion of administrative remedies is adopted in Western countries because it gives the government the option of purchasing the property or grant as an exception, when compensating for a regulatory taking is more costly than other alternatives. While recognizing the rationalities of providing the government with such options, it is important to note that their objectives can be achieved through a mediation session presided over by an impartial judge.

References

[1] Yao Shunbo, Innovated Research on China's Non-Public Forest Institutions, 41 (2005).
[2] NFPP Office of the State Forest Bureau, Advance with the Times, Study and Solve problems, Improve Policies and Propel development of NFPP: Research Report on Policy Issues concerning NFPP, in Zhou Shengxian ed, China's Sustainable Development: Research reports on Forestry Strategy, 69 (2002).
[3] The Constitution of the People's Republic of China, art. 10; the Land Management Law (1998), art. 2.
[4] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
[5] *Pa. Coal*, 260 U.S. at 415.
[6] James S. Burling, A Short History of Regulatory Takings – Where We Have Been and What Are the Hot Issues of Today 28-29 (The American Law Institute 2007) (Created for the American Law Institute-American Bar Association Course of Study, April 12-14, 2007).
[7] See 26 Am. Jur. 2nd Eminent Domain, § 11.
[8] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
[9] Armstrong v. United States, 364 US 40, 49 (1960).
[10] Lucas, at 1027; see also Keystone Bituminous Coal Assoc. v. DeBenedictis, 480 U.S. 470 (1987).
[11] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122.
[12] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[13] *Id.*
[14] *Id.* at 124.
[15] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122.
[16] See Palazzolo v. Rhode Island (2001), 533 U.S. 606, in which a regulation precluding use of fill on wetlands while permitting landowner to build substantial residence on uplands portion of tract did not amount to deprivation the landowner of all economic use of entire parcel. See also *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470 (1987), in which a regulation requiring 50% of the coal

beneath certain surfaces be kept in place to provide surface support was not found to have triggered a regulatory taking.

[17] *Keystone,* at 493.

[18] *Id.* at 496.

[19] Or. Rev. Stat. § 197.352 (2004).

[20] Daniel Cole, Pollution and Property: Comparing Ownership Institutions for Environmental Protection 272 (Cambridge University Press 2002) (cite from draft of chapter)

[21] Regeringformen [RF] [Constitution] Art. 18 (Swed.)

[22] Land Planning Act (2003), art. 36(1).

[23] Id., art. 36(3).

[24] Katri Nuuja & Kauko Viitanen, *Finnish Legislation on Land-Use Restrictions and Compensation*, 6 Washington University, Global Studies Legal Review 49, 50 (2007), available in http://law.wustl.edu/wugslr/issues/volume6_1/p49NuujaViitanen.pdf.

[25] Land Use and Building Act, § 101.

[26] Nature Conservation Act (1996), § 55.

[27] According to the Parliament Constitutional Law Committee, if the restrictions do not affect the normal, reasonable, and sensible use of the property, and are generally and non-discriminatorily applied, then the restrictions do not infringe on property ownership and are not compensable. See Katri Nuuja & Kauko Viitanen, supra note 24, at 50.

[28] The Constitution of the Federal Republic of Germany, art. 14(2).

[29] Tonya R. Draeger, Comment, *Property as a Fundamental Right in the United States and Germany*, 14 Transnat'l Law. 363 at 399 (2001).

[30] United States Department of Justice Website**,** st http://www.usdoj.gov/enrd/land-ack/Legal.html.

[31] *Id.*

[32] Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw. U. L. Rev. 677, 684 (2005).

[33] *Id.* at 687-703.

[34] Bassett, New Mexico LLC v. United States, 55 Fed. Cl. 63 (2002).

[35] *Id.* at 69.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 76.

[40] The Constitution of the Republic of Poland, art. 21(2).

[41] The Land Planning Act (2003), art. 36(1).

[42] Microslw Gdesz, *Compensation for Depreciation of the Property Value According to Polish Land-Use Law*, 5 Wash U. Global Stud. L. Rev. 559, 569 (2006).

[43] Environmental Protection Law of 2001, art. 32,

[44] Id., art. 33.

[45] Expropriation Act, § 30-33, 35, 37.

[46] Nuuja & Viitanen, *supra* note 24, at 54.

[47] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[48] MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986).

[49] Burling, *supra* note 6, at 32.

[50] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[51] Land Use and Building Act, § 102.

[52] NFPP Office of the State Forest Bureau, Advance with the Times, Study and Solve problems, Improve Policies and Propel development of NFPP: Research Report on Policy Issues concerning NFPP, in Zhou Shengxian ed, China's Sustainable Development: Research reports on Forestry Strategy, 69 (2002).

[53] China's fiscal incomes were more than double in recent five years from 19 trillion yuan in 2002 to 39 trillion yuan in 2006. See http://www.mof.gov.cn/news/20070227_3194_24463.htm.

[54] The Land Management Law (1998), art. 47.

[55] Li Ping and Keliang Zhu, A Legal Review and Analysis of China's Forest Tenure System with an Emphasis on Collective Forestland.