

ENDING FINDERS, KEEPERS: THE USE OF TITLE INSURANCE TO ALLEVIATE UNCERTAINTY IN LAND HOLDINGS IN INDIA

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ABSTRACT

This paper proposes that a primary goal for any functioning system of land holdings should be to ensure that land can be transferred and held with certainty and predictability. In order to achieving maximum certainty and predictability, land holdings systems should contain both 1) a method to determine existing rights and 2) a method to protect against loss that could occur. Both requirements, a determination of existing rights and protection from loss, begin with an effective land title recording system, which could take one of a few forms and which, I propose, could potentially blur the traditional divide between the public and private sectors. Specifically, throughout this paper, I will explore how private title insurance can play an important role in both of these goals by establishing such a title records system (even when the records are part of a public system) and by providing certainty for holders and investors through insurance protection. I use India as a case study to demonstrate how title insurance could offer benefits in both of the prevalent methods of land recording systems – the recording systems and the Torrens system – and in a country with imperfect land records in place.

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INTRODUCTION

The centrality of property rights in securing one's place in society has been explored in depth by scholars across disciplines and jurisdictions, not only for the rights themselves but also in regards to the importance of the actual objects to which the rights attach and the other rights which flow from holding property rights.¹ And, while acknowledging the critical role of property rights in many societies, other commentators have expressed profound skepticism regarding the desirability of an expansion of such rights² or concern that privatizing all immovable property leads to an

¹ "Classic liberals consider the right of property to be the template for all individual rights." GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 3 (2006). "Property, not as a right but as the object of the right, or what one might call the stakes of property rights, is foundational. At least some basic assets are necessary for the meaningful exercise of all other rights. Indeed, they are necessary for life itself. In this sense, property, as the access to subsistence necessities, is also foundational for the exercise of all political and constitutional rights." *Id.* at 5. "Property is seen as a bulwark which protects material wealth, liberty, and autonomy" LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 1 (2003).

² Jorge L. Esquivel, *Titling and Untitled Housing in Panama City*, 4 TENN. J. L. & POL'Y 243, 270 (2008) (stating "[Titled property rights] permit a number of excesses, if not outright abuses, by titleholders often externalizing social costs, such as the harms associated with overbuilding, reduced quality of life to neighbors, and pollution. Commoditization of titles encourages practices of financial speculation on assets serving multiple needs, like sufficient

inflexibility regarding alternative forms of property regimes. Such alternative regimes are often envisioned to benefit populations which do not have formal property rights to their residences.

It is quite likely that an ideal system of property would have space for both the current formal private rights and acknowledgment of the legitimacy of communal and “informal”³ schemes. This paper argues that whichever system or form of property regime a society implements, such system depends on some predictability regarding who is entitled to which property and which rights are attached. Whether we believe the ultimate goals of a property rights regime should be individual autonomy, communal property, home ownership, high property values, or some other goal, a basic starting point is having a functioning records system which reflects rights-holders and holdings.

Once we have accepted that any modern system of property requires a records system, the issue of control arises: Who should be in charge of these records? Which entity should control the information from which the holders of rights to property are determined? Perhaps our instinct is to place such power and responsibility within the public sphere, where it appears to be most often located. However, as this paper will argue, the so-called public record is often a compilation of both public and private efforts. For example, in the United States, sales transactions generally include both the public system of verifying title and the private system of title insurance, whereby individuals take out insurance to protect themselves against claimants to their purchases. Furthermore, as explained later in this article, the private insurers often possess far more comprehensive records than its public counterpart. In this system, despite it being one where the public land holdings system is considered to be effective, the divide between public and private functions and responsibility begins to blur.⁴

Even this brief example of the U.S. system demonstrates how questions regarding the ideal private/ public divide of information and responsibilities

housing. An expansive allocation of property rights may frustrate other public policy goals.”) (Internal citations omitted).

³ *Id.* at 3 (stating “Legal informality in housing has its own particular forms. It can refer to legal yet unregistered ownership, illegal occupation of land, unauthorized subdivision of property, legally documented sale of squatted land, “squatters rights,” illegal sale of collective land, on-going violations of building and housing regulation.”).

⁴ Marc A. Weiss, *Real Estate History: An Overview and Research Agenda*, 63 THE BUSINESS HISTORY REV. 2, 267 (1989) (stating that “Regardless of whether the research focus [in the history of real estate] is on the private or public sector, their fortunes and activities are so intertwined that the historian inevitably is led to consider both.”). With respect to property rights regimes more generally, Greg Alexander provides a relevant discussion of the fallacy of the perceived dichotomy between public and private spheres of influence. See ALEXANDER, *supra* note 1, at 4 (asserting that particularly in regards to private property, the “[w]hole notion that private and public spheres can be kept categorically separate is a pernicious illusion”).

in a land records system can arise. What should the division be in other land records systems, where perhaps the public function has failed? This paper proposes that for both the functioning public system and for the failed one, public and private roles will not require a mutually exclusive choice, but rather a balance which depends on local conditions and accepted practices regarding property transfer. In determining the balance and the varying roles, it is important to consider what ultimate goals we are trying to accomplish within any system of land holdings, and then allocate roles to public and private actors accordingly.

This paper proposes that a primary goal for any functioning system of land holdings should be to ensure that property rights can be transferred⁵ and held (whether individually or communally) with certainty and predictability. Therefore, in order to achieve maximum certainty and predictability, land holdings systems should contain both 1) a method to determine existing rights and 2) a method to protect against loss that could occur.⁶ Both requirements, a determination of existing rights and protection from loss, begin with an effective (i.e. accurate and up-to-date) land title recording system, which could take one of a few forms and which could potentially blur the traditional divide between the public and private sectors. Specifically, throughout this paper, I will explore how private title insurance can play an important role in both of these goals by establishing such a title records system (even when the records are part of a public system) and by providing certainty for holders and investors through insurance protection.

Once accurate land records and insurance exist, the resulting predictable system of land holdings enables enforcement through legal recourse and a choice of the various systems above of individual, communal, or alternative property rights.⁷

After providing an overview of the two primary systems of land records – the “recording system” and the “Torrens system” - and explaining how title insurance may be integrated into both systems in Part I, I use India’s current land records system as a case study of attempting to achieve certainty and predictability in land holdings through public and private

⁵ THOMAS W. MERRILL AND HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES Ch. 8 (2007) (exploring how vital land records are in a system of property rights in order to evidence ownership and enable transfers).

⁶ Please note that a comprehensive review of the efficacy of judicial enforcement of land rights is outside of the scope this paper, but in light of this paper’s goal of exploring how best to achieve predictability through having accurate records, certain issues which arise when parties resort to the judicial system will be addressed later in the paper.

⁷ “. . . [T]he title system, or the system for protecting ownership rights, is clearly fundamental to the operation of land markets. . .” Thomas Miceli, Henry Menneke, C. F. Sirmans, Geoffrey K. Turnbull, *Title Systems and Land Values*, 45 JOURNAL OF LAW AND ECONOMICS 565, 1 (2002).

involvement in records and insurance in Part II.

India provides an ideal case to explore the appropriate public-private balance in land records and for the benefits of title insurance in such a scheme. First, the huge investment demand in India has spurred a pressing need for accurate land records and insurance. This need is driven by the large numbers of foreign investors interested in investing in Indian real estate as well as the rise of the domestic middle class who are buying homes. Second, as India's current land records have aspects of both prevalent land recording systems in the world – the recording system and the Torrens system – the Indian system not only holds the potential to benefit in various ways from title insurance, but they also present a rare opportunity to rethink our assumptions of public and private responsibilities and functions.

I. EXISTING SYSTEMS OF LAND RECORDS BENEFIT FROM TITLE INSURANCE

There are two primary kinds of title records systems that seek to achieve predictability through enforcement of existing purchased rights: the “recording system” and the “Torrens system”. The recording system is currently used in the U.S. and India. It involves registration of deeds in a system of “presumptive,” as opposed to “conclusive,” title.⁸ Land records in this system are not conclusive title determinations, but merely records of transactions and registration. Therefore, there is less incentive to register when registration does not guarantee conclusive rights to title.

Australia and New Zealand, among many other jurisdictions, use the “Torrens system,”⁹ which provides for conclusive title, where land title is determined by registration.¹⁰ The owner of the land is established by the actual registration of his or her name in the public record.

⁸ Rita Sinha, *Moving Toward Clear Land Titles in India: Potential Benefits, A Road-Map and Remaining Challenges*, 1 (2009) available at http://www.fig.net/pub/fig_wb_2009/papers/country/country_sinha.pdf. (Rita Sinha was the Secretary of the Department of Land Resources in the Ministry of Rural Development in India.).

⁹ MERRILL AND SMITH, *supra* note 5 (quoting Benito Arruñada and discussing the usage of Torrens or other similar registration systems around the world). The Torrens system in the United States has had a mixed response. While many states have experimented with it, not many use it as their primary system. One example of how Torrens was used in order to overcome a particular issue was in Cook County in 1897 in response to the loss of nearly all land records a fire. The Torrens type land registration system was implemented as a way to clear title during the rebuilding of the city. “Over time, however, the lost records proved less consequential, and the recording system again became viable for many properties. As a result, the two systems coexisted for decades until the Illinois Torrens legislation was repealed in 1996.” Miceli et al., *supra* note 7, at 566.

¹⁰ See, e.g., Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 671 (2003).

How does title insurance fit in to land records? Writing in 1928 and in reference to the United States, T.W. Haymond said that:

Modern, intensive development of commerce and industry, especially during periods of great national prosperity, creates a demand for safe investments for accumulated wealth. Out of such demand for safe investments arises the demand for title insurance – not a title insurance adequate only to meet the requirements of a colonial period of a nation, but title insurance capable of filling abundantly the needs of a full grown civilization, with its attendant complexities of life, dense populations, and wealth of resources in lands and buildings. In order to understand what title insurance must be to meet such needs, not only must there be a clear understanding of what is meant by the title to real estate, but the risks of title insurance must be ascertained, examined, and catalogued¹¹

Title insurance plays out differently in the two systems. After first explaining what title insurance entails, the next section will explore how title insurance met the need identified by T.W. Haymond for safe investments in the recording system, and how it provides additional benefits in a Torrens system. Although title insurance is far more prevalent in the recording system, for reasons explained below, it has clear and sometimes differing merits in both systems.

A. What is Title Insurance?

Title insurance protects against risks inherent in the uncertainty of land titles by delineating known defects of title and providing coverage for claims or losses due to the others. This coverage insures against any decrease in property value which would result from a successful challenge to title, and attorney's fees associated with litigating these title claims.

Title insurance policies are issued by private insurance providers after completion of a public record search (ideally covering any encumbrances on the land and any amounts due which, if not satisfied, would become a lien). A title insurance policy is not a representation that defects do not exist.¹² Defects may be acknowledged, negotiated, and then insured against. Even if

¹¹ T.W. Haymond, *Title Insurance Risks of Which the Public Record Gives No Notice*, 2 S. Cal. L. Rev. 139, 139 (1928-29) (internal note and citations omitted).

¹² Ronald G. Russell, *Understanding The Title Insurance Policy*, THE PRACTICAL REAL ESTATE LAWYER, May 2005, at 17.

an exception is carved out from coverage, the buyer still has the benefit of knowing it exists and weighing the risk accordingly.

The nature of the risk that title insurance covers is distinct from that of other insurances. In the latter insurance, the risk is assessed in regards to what might happen after the policy is issued (fire, accident, etc.), whereas with title insurance, the risk concerned is “whether or not the actual title and encumbrances differ *on the date of the policy* from the title and encumbrances specified in the policy in existence at the time that the policy is issued.”¹³ On the date of the policy, the possible specific cause for later damage exists, though the claimant (who brings with him/her the actual damage) may arise on a later date.¹⁴

This phenomenon has clear implications for the role of the insurer. In the “common” kind of insurance, the insurer is in no way implicated in the disaster that occurs after the policy is issued. “A house burns, a man is injured or a vessel is lost, but the insurer could not in any way control the cause of the fire, of the injury or of the shipwreck.”¹⁵ With title insurance, however, it is the role of the insurer to accurately assess the state of the title, and whether they will have to pay out directly depends on its ability and care in assessing the current title situation for a given property. “Extraneous causes have no effect upon its liability. It simply insures that in its opinion, based upon searches and legal knowledge, a title is of a certain quality and the property is subject to certain encumbrances.”¹⁶ A mistake on a title insurer’s part implies that they have incorrectly assessed the current state of title, not the likelihood of some exogenous event (as in the case of common insurance).¹⁷

Title insurance policies therefore serve a dual function. First, they assume and spread risk, like other kinds of insurance. Second, and uniquely, they operate to eliminate risk as well.¹⁸ The more rigorously record searches and negotiations are completed, the fewer uncertainties and risks that will

¹³ Romaine H. Crosby, *Law of Title Insurance*, 25 LAW. & BANKER & CENT. L.J. 271, 281 (1932).

¹⁴ *Id.* at 281.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ European systems of title insurance are different. “[T]itle insurance in Europe offers a very different service from that provided in the U.S.. In America, it performs a preventive function, offering legal security a priori, because the title search and the title report lead to the removal of title clouds. However, in Europe the insurance only provides economic security a posteriori. Most of the costs in Europe are expected to be incurred in negotiating and defending claims ex post, instead of avoiding their occurrence by ex ante prevention.” Benito Arruñada, *A Transaction – Cost View of Title Insurance and its Role in Different Legal Systems*, 27 GENEVA PAPERS OF RISK AND INSURANCE 582, [21].

¹⁸ Michael J. Rooney, *Title Insurance: A Primer for Attorneys*, 14 REAL PROP. PROB. & TR. J. 608, 610 (1979).

exist. Because the title insurance companies are responsible for both uncovering and eliminating defects, as well as paying out claims that may arise as a result of faulty searches, they have a clear incentive to conduct thorough searches and maintain substantial records (“title plants”), thereby reducing actual risks in transactions.

There are two kinds of title insurance policies: an owner’s policy and a lender’s policy. An owner’s policy protects the owner for the full value of the property, and a lender’s policy protects the lender for the mortgage amount.¹⁹

The owner’s policy usually insures against loss or damage sustained or incurred because of: errors in the title examination (including negligence or fraud by the insurance company completing the title search),²⁰ defects, liens, or encumbrances on the title (including defects that would be disclosed by an examination that the company intentionally does not make and “some hidden defects not disclosed by a competent examination of public records, physical inspection of the premises, or survey”);²¹ unmarketability of the title;²² or a lack of a right to access the land.²³ The owner’s policy also usually states that “the insurer will pay the costs, attorney’s fees, and expenses incurred in defense of the title, as insured.”²⁴

A typical lender’s policy includes protection for loss or damage as a result of the clauses above, as well as: the invalidity or unenforceability of the lien of the insured mortgage upon the title; the priority of any lien or encumbrance over the lien of the insured mortgage; the lack of priority of the lien of the insured mortgage over certain statutory liens for services, labor, or materials; assessments for street improvements which have gained priority over the insured mortgage; or the invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is detailed in the policy.²⁵ The lender’s policy also typically includes litigation and defense costs.

Excluded from such policies are: defects disclosed by the title examination or that would have been disclosed by a physical inspection and survey, losses resulting from violations of government land use or police power regulation; defects occurring subsequent to the policy; defects known, created, assumed, or agreed to by the insured prior to the date of the policy;

¹⁹ PBA Srinivasan, *Immovable Property Title Insurance: A Complete Viability and Need Analysis*, LEX WITNESS, Aug. 16, 2009, at 15.

²⁰ Quintin Johnstone, *Title Insurance*, 66 YALE L. J. 492, 495 (1957).

²¹ *Id.* at 495.

²² Russell, *supra* note 12, at 18.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

title to personal property; and “hidden defects not disclosed by a competent examination of public records, physical inspection of the premises or survey.”²⁶

Title insurance policies are not paid in installments, but rather as an upfront premium. Once the policy goes into effect, it continues as long as the insured can suffer any loss from the risks covered.²⁷ Therefore, a lender’s policy ends when the mortgage is paid, and an owner’s policy ends when the insured conveys all his interest in the property.²⁸

B. Title Insurance Played a Crucial Role in the Development of Land Records in the United States

In order to understand the role of title insurance in the recording system of land records, we must examine how title insurance first emerged. In the United States in the early 20th century, real estate demand changed in at least two ways. First, investors became interested in land across state lines, where they did not have connections. Second, the market for investments expanded to include a new secondary mortgage market. These changes took place in a system with poorly maintained land records which varied across state lines. The two changes in investment increased purchaser unfamiliarity and uncertainty, and combined with the lack of existing records, catalyzed the need for title insurance.

With respect to location, the institutional demand to invest in real estate across state lines was a large part of the establishment of title insurance in the U.S.²⁹ Many of the investors were not familiar with and did not have access to the local public records systems, located on paper, in other states. The creation of title plants and the insurance against claims provided the

²⁶ Quintin Johnstone, *supra* note 20, at 496-7 (stating additionally that “more risky defects . . . are often expressly excepted. They include mechanic’s and materialmen’s liens . . .; and dower, curtesy, community property and homestead rights of the insured’s spouse.”).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Hugh A. Brodkey, *Use of Title Insurance in International Transactions*, 9 INT’L BUS. LAW. 257, 258 (1981) (stating, “The development of title insurance in the United State can be traced directly to the needs of mortgage lenders who began loaning money in other than those in which they were accustomed to doing business. Since each of the states in the United States has its own law concerning real property ownership and the perfecting and enforcing of security interests in real estate, the lender in one state was faced with the same problems in making a loan secured by land in another state as the lender on one country has when making loans secured by land in another country.”). This phenomenon of non-local investment as a catalyst for title insurance is not unique to the United States or India. While title insurance does not seem to have widely developed outside the United States, it is worth noting the foray of European insurance provider, L&E into it. This company offered it in to British customers who wished to purchase property on the Mediterranean coast. *See Arruñada, supra* note 17.

institutional investors sufficient security in their transactions. This security allowed for investors to place their confidence in the title insurer and system of insurance as opposed to previously unknown sellers of property.

The type of real estate investor changed as well. During the early 1900s, title insurance companies in the United States were able to generate enough revenue to launch their businesses because large investors - life insurance companies - entered real estate and drove demand for a secondary mortgage market. These large foreign institutional investors had different needs than the real estate market had to meet previously. These investors wanted standardized protection and wide coverage, and, importantly, they were capable of paying for it.³⁰

Another driving force in the establishment of title insurance for United States' investors was the growth of a secondary mortgage market.³¹ Larger investors, like the life insurance companies, wanted to buy loans from mortgage banks and others.³² Title insurance provided crucial standardized protection necessary for mortgage banks to increase lending to potential homeowners by assuring the land was readily marketable if foreclosure became necessary.³³

Finally, these investors ran up against the problem of a lack of comprehensive, reliable, land records.³⁴ Potential buyers of real estate would begin with a public records search, but were unable to discover all existing and potential claims to title, due to incomplete public records. Title insurers were able to address this concern as well, in two important ways. First, title insurance companies were encouraged to create their own thorough 'title plants' - records of all ownership, use, and lien claims on land. In the U.S. currently, these databases are more comprehensive than public records. Title insurance companies' officials understand that better title plants mean the less likelihood of claim payouts. Second, the guarantee of title insurance claim payouts provided a patch over defective public records, thereby influencing buyers to have confidence in their transactions.

The introduction of title insurance was a clear solution to the public services gap of fragmented records systems and poorly maintained records.

³⁰ See Johnstone, *supra* note 20, at 502-503 (discussing the nature of national life insurance companies in the United States who hold large amounts of mortgage debt in respect to land far from their business operations, and who wanted standardized forms of title protection so that their security would be "readily marketable" should foreclosure arise).

³¹ Arruñada, *supra* note 17, at 4.

³² Johnstone, *supra* note 20, at 503.

³³ *Id.* at 503-504 (stating "[M]ost life insurances are reluctant to accept lawyers' opinions because the examination criteria and reports are much less standardized than those of title insurance . . .").

³⁴ See Arruñada, *supra* note 17 (regarding title insurance as a response to the poorly organized systems of deed recording in the U.S. in the last third of the 19th Century).

To summarize, three factors which catalyzed the introduction of title insurance were: 1) The new type of “non-local” investor with newly emergent needs of standardized and reliable records, 2) The new type of investor with deep pockets willing to pay more for a reduction of investment risk, and 3) The lack of comprehensive records and the urgent need to rectify this.

Over 100 years later, title insurance is an important part of the land records and sales system in the United States. “At the end of the 20th century, title insurance was taken out in 85 per cent of residential sales and purchases in the United States.”³⁵

C. While the Torrens System Provides More Certain Title than the Recording System, Title Insurance Could Still Have an Important Role in It

The system of indefeasible title, referred to as the Torrens system, was pioneered in Australia in 1858 and continues to be used there, as well as in other countries such as Singapore, Saudi Arabia, the Philippines, Fiji, New Zealand, Canada, and Thailand.³⁶ In the United States, some states have used Torrens in the past, but few continue to use any form of it today.³⁷ In the Torrens system, land title is determined by registration.³⁸ The owner of the land is established by the actual registration of his or her name in the public record. Further, the government certifies title and indemnifies those defrauded or harmed by the certification process.³⁹

Torrens systems typically operate with four principles:

- (1) a single agency should handle property records;
- (2) property records should reflect the reality on the ground at all times (the “Mirror Principle”);
- (3) the record of a title should be conclusive, and therefore, looking into past transactions and titles is unnecessary (the “Curtain Principle”); and
- (4) title guarantees and insurance for indemnifying property holders against loss due to inaccuracies should exist.⁴⁰

³⁵ *Id.* at 5, quoting J. Webster, “Title Insurance Set for Growth in the UK.”

³⁶ Trevor Mills, *A Case for Torrens’s System of Title Registration*, International Real Estate Society Conference, Jan. 26, 1999, at 14, available at http://www.prrs.net/Papers/Mills_A_Case_for_Torrens_system_For_Title_Registration.pdf.

³⁷ *Id.*

³⁸ See Szypszak, *supra* note 10, at 671.

³⁹ *Id.* at 663.

⁴⁰ Sinha, *supra* note 8, at 1-2.

Although some form of title insurance is a part of the Torrens system, as shown in pillar 4 above, commentators have called for separate private offerings of title insurance to supplement coverage offered by the public systems.⁴¹ Their arguments focus on benefits which emerged as a result of title insurance in the recording system above, namely 1) increased efficiency in transactions, partially as a result of better records and also pre-litigation dispute resolution; 2) aligned incentives of the insurer and the risks; 3) greater knowledge of risks on the ground and therefore more accurate records; 4) more appropriate resources (risk allocation) and 5) increased coverage of protection and indemnity than Torrens public coverage. These benefits will be examined each in their turn. Though they are relevant for title insurance in both the recording and Torrens systems, they are examined in this section for two reasons – first, because they offer benefits above and beyond those which exist in a Torrens system (even one which includes some form of public title insurance), and second, because they are commonly offered with regards to current Torrens systems around the world.

1. Increased Efficiency

Title plants are more efficient than public records because they include more information than is gathered by public records. They include “recorded instruments, records of real estate tax payments, probate court records, and records of judicial proceedings [such as] quiet title suits, actions resulting in liens on realty, foreclosures and divorce proceedings.”⁴² They may also include “unofficial plants and indexes to title descriptions” for unplatted urban land.⁴³ Mandating and maintaining registration of all taxes, encumbrances, claims to title in a single place in the public record would be expensive and ineffectual. Sellers and buyers would not actively register

⁴¹ “Comparative analysis of land titling systems suggests that title insurance is most appropriate under deed recording. . . . However, even in jurisdictions based on registration of rights, there might be potential demand for title insurance, either because of insecure conveyance or ineffective registration. Even though European public registers generate fewer errors than those in the U.S. and in almost all countries they not only file documents but also ascertain, purge and establish rights, there may be a substantial unsatisfied demand for security, of both the legal and economic kind, for several reasons. First, the liability of conveyancers, including notaries public even in some countries where they enjoy a professional monopoly, is often limited to negligent conduct and, in most countries, is difficult to enforce. Second, the existing systems follow behind demand because they adapt too slowly for today’s economy. New types of risk are often left uncovered and outside the registration system for many years. Also, some jurisdictions continue enforcing many unregistered rights (overriding interests, either possessory or tacit mortgages) as rights in rem.” Arruñada, *supra* note 17, at 18 (internal citations omitted).

⁴² Johnstone, *supra* note 20, at 507.

⁴³ *Id.*

unless they wanted to, and the government would waste resources trying to maintain such records. "There is ordinarily no financial inducement to put property into Torrens, for the judicial proceeding required by the initial registration is both slow and expensive, and the financial benefits of the system accrue only to subsequent transferees."⁴⁴ The fear of lacking title until one registers would hardly be enough to encourage registration, because even now, despite problems in transaction with unclear title, lack of registration is a widespread problem in places with cloudy title, such as India. For these reasons, and because Torrens alone does not provide adequate opportunity for negotiation between parties, it does not eliminate the risks, frauds, and unknowns factors, as title insurance does through its extensive searches, inspections, title plants, and subsequent negotiations.

When title insurers maintain their title plants, they include a 'vast collection of tax data, copies of recorded instruments, and copies of documents filed in judicial proceedings' which allow them to prepare an abstract or search from their own company records without the hassle of locating and visiting multiple public offices.⁴⁵

In addition to the efficiency explained above, title insurance potentially results in lower transaction costs in large deals. First, title insurance reduces attorney time by presenting them with completed title reports, rather than placing the onus of compiling public records on them. Also, title insurance could reduce attorney time and fees related to completing due diligence in the case of numerous small titles when ownership of land is fragmented. If the investor is willing to pay the premium necessary to insure against the possibility of small claims arising, he saves himself huge potential attorney due diligence costs.⁴⁶

The increased efficiency from the use of title plants could lead to quicker negotiation processes, decreased transaction costs, and more deals with less risk. Title insurance companies also provide expedited negotiation and settlement of claims which arise. They can settle disputes faster and with less disruption to the defendant than courts. Insurance holders can conduct their daily business without having to be dragged to court at every dispute.⁴⁷

⁴⁴ *Id.* at 514; see also Szypszak, *supra* note 10, at 681.

⁴⁵ Johnstone, *supra* note 20, at 507.

⁴⁶ J. Carmichael Calder and S. H. Spencer Compton, *What You Need To Know About Title Insurance In International Real Estate Transactions*, THE PRACTICAL REAL ESTATE LAWYER Mar. 2005, at 7 (offering the following example: "A UK property company obtained a loan from a UK lender to be secured by a ground rents portfolio. To avoid a due diligence exercise in which solicitors would have had to examine over 90,000 titles that make up the portfolio, a title insurance policy insured the lender against title losses. The policy saved large amounts of time and expenditure of legal fees.").

⁴⁷ *Id.*, at 8-9.

2. Aligned Incentives

As explained in Section A above, a system of title insurance aligns the risk of payouts with the insurer's incentive to perform their searches well. If they do not correctly assess current title and encumbrances, they may face a payout. Furthermore, because they are not only searching the records, but also keeping and maintaining them, they have a clear incentive to keep accurate, up to date, and searchable records. When the public sector is in charge of record maintenance but not pay outs, the incentives are misaligned to perform effectively. Or even if they do have to pay out, it comes from public coffers, not private profits.

Therefore, because privately created title plants move the cost of creation and maintenance to the private actors who have the incentive to do the job well, title insurance leads to a reduction of the potential losses taken on by buyers and title insurance companies. These reduced risks include fewer unknown claims and encumbrances, less potential litigation suffered by buyers, and fewer claim amounts issued over time. These effects are a result of the aligned incentives of title insurance companies to do comprehensive upfront searches and reports in order to prevent payouts. Additionally, the entire system of insurance reduces overall risk through transfer of risk to insurers and distribution of risk across pools of insurance policies. As such, "risks experienced by individuals as random and unpredictable become quantifiable when transferred to insurers."⁴⁸

3. Knowledge Creation

Not only do title insurers have greater incentives than public record keepers to maintain their records and therefore to maintain more comprehensive and easily searchable records in "superior indexing systems,"⁴⁹ they also add their own diligence and notes to the public record. Their title plants include information about title, taxes, and other particulars of the land holdings which often draw from different public sources and also often include information gained from their own private due diligence. Some risks are discoverable only upon actual inspection of real property, which title insurers would uncover as part of their diligence, but which would fall outside the realm of public record.⁵⁰ The comprehensive nature of keeping title plants led one commentator to observe, "[a] large title plant

⁴⁸ Pamela O'Connor, *Double Indemnity – Title Insurance and the Torrens System*, 3 Queensland Univ. of Law and Tech. Law and Justice J. 142, 17, available at <http://www.law.qut.edu.au/ljj/editions/v3n1/pdf/oconnor.pdf> (page numbers refer to version available online).

⁴⁹ Johnstone, *supra* note 20, at 507.

⁵⁰ For an in depth exploration of the limits of the public record as a source for title encumbrances, see Haymond, *supra* note 11.

is operated essentially as a factory, with many semi-skilled employees performing highly specialized and mechanized tasks.”⁵¹

4. Appropriate Allocation of Risk (and Reward)

The question of appropriate resource allocation arises at multiple points during a sales transaction and records search. Title insurance places much of the dynamic part of the record keeping function in private hands, which are the same actors who will benefit from a job well done. In some places (such as India, as I will explain below), placing it in public hands does not lead to more effective records. Questions regarding appropriate resources also come up in regards to dispute resolution. Dispute resolution in the Torrens system would depend on the judiciary to settle claims, whereas a system of title insurance institutes a process of due diligence and negotiation which could more efficiently eliminate potential disputes. Relying on the judiciary to settle disputes leads to slow resolution of cases, inefficient use of public funds, public budget limitations regarding indemnity funds,⁵² and perhaps even a violate separation of powers.⁵³

Furthermore, as one commentator has argued, the “ability to conduct aggressive advertising and promotion” is an advantage that title insurance has over other systems of title protection.⁵⁴ Such insurers are not restricted from advertising directly to companies or lawyers who may seek title protection for their clients. Private attorneys who wish to advertise their ability to conduct public records searches for real estate transactions are generally restricted from such aggressive advertising.⁵⁵ Likewise, government agencies are generally not empowered to advertise their record keeping facilities the way title insurers are. With greater advertising and greater use of title insurance, title plants and private records become more comprehensive.

5. Broader Insurance Coverage

Finally, private title insurance goes beyond the coverage of public title insurance in Torrens. Torrens systems typically have gaps in protection, such as the ability to attack initial registration only for a limited period, the

⁵¹ Johnstone, *supra* note 20, at 507.

⁵² Szypszak, *supra* note 10, at 680.

⁵³ *Id.* at 675 (referring to *Ohio v. Guilbert*, 47 N.E. 551 (Ohio 1897), which determined that the role of the public recorder in reviewing evidence, applying the law, and making a decision about rightful ownership was clearly a judicial function).

⁵⁴ Johnstone, *supra* note 20, at 509.

⁵⁵ *Id.* (explaining the success of private title insurers in using advertising to further their business in a way that is not possible in either recording or Torrens systems).

lack of coverage between settlement of the deal and registration of title, and a lack of protection against all encumbrances or unrecorded mechanics' liens.⁵⁶ This inadequate protection has been "sufficient to deter many institutional lenders from loaning on Torrens titles."⁵⁷ Title insurance generally offers protection for these gaps by insuring for the risks such as challenges to title after settlement which prevents an owner's interest in the land from being registered; rights, easements, or rights of way; other rights arising out of a lease, contract, option, right of possession or access order; defects in title from fraud, forgery, duress, incompetency or incapacity; and any other defects which affect title.⁵⁸ Therefore title insurance generally runs from the date of settlement, as opposed to the date of registration, and a buyer may purchase additional coverage from the date of the contract for purchase, and offers additional protections for encumbrances.

II. THE INDIAN CASE FOR TITLE INSURANCE REVEALS POTENTIAL BENEFITS FROM THE EXISTENCE OF BOTH TYPES OF LAND RECORDS SYSTEMS

India's current real estate market and newly introduced regulations present an interesting case study in how government might work towards predictable land holdings through public-private cooperation for several reasons. First, international and large investor interest in real estate have spurred demand for accurate and accessible land records and insurance to protect investments. Second, while India's records currently follow the records system, they are in the process of shifting to a Torrens system. As such, their case presents the similarities, differences, and drawbacks of both systems. Third, due to the presence of both systems during the long transition period, title insurance could offer all of the benefits explored above. Fourth, alternative methods currently used to meet the demands of predictability and enforcement of land holdings are insufficient. And fifth, this moment of transition is a unique opportunity to explore how to capture the benefits of both systems through re-examining the public-private divide and title insurance's role in establishing and maintaining effective records. Each of these arguments will be explored in its own section below.

A. *Increased Demand for Investment Opportunities in Indian Real Estate Means Increased Demand for Adequate Land Records*

The current failure of the public function in land records is particularly salient in the current environment of increased investment. In an effort to

⁵⁶ *Id.* at 514; O'Connor, *supra* note 48, at 9.

⁵⁷ Johnstone, *supra* note 20, at 514.

⁵⁸ O'Connor, *supra* note 48, at 11-12.

rectify the fragmented records systems which are under the purview of each State, the Central Indian Government introduced the National Land Records Modernisation Programme (NLRMP). Before exploring this program in detail in Section B, this section will focus on the nature of the demand for safe investments in real estate and therefore for accurate records.

In 1991, the Indian government liberalized its economy and jettisoned the encumbrances of “License Raj.”⁵⁹ These reforms included capital liberalization, deregulation of domestic businesses, trade reform, and the reduction of government red tape. These reforms were milestones for the previously protectionist Indian government. Since their passage, India has grown at an average of 6% per year.⁶⁰ Despite this progress, the government remains wary about credit and FDI expansion, and continues to restrict the market through regulation, as discussed in Section D.

The combination of economic growth, urbanization, and a rising middle class has spurred a real estate boom that has attracted attention from across the world.⁶¹ Despite regulatory difficulties, as of 2006, “international funds had reportedly invested some \$2.5 billion in Indian real estate. Nearly two dozen domestic funds have raised another \$3.5 billion for similar investments.”⁶² Huge investors, including Goldman Sachs, J.P. Morgan, Morgan Stanley and Merrill Lynch, have considered (or taken) investment opportunities in Indian real estate.⁶³

Foreign investors have been seeking partnerships with local developers in order to invest securely.⁶⁴ These partnerships are seen as necessary from both parties’ viewpoints. Foreign investors are worried about being

⁵⁹ License Raj refers to the numerous licenses, regulations and the red tape that were required to set up business in India from 1947-1990. *Political Economy of India*, Maps of India, at <http://business.mapsofindia.com/india-economy/political.html>. The License Raj regime lead to “labyrinthine bureaucracy” and to “absurd restrictions - up to 80 agencies had to be satisfied before a firm could be granted a license to produce and the state would decide what was produced, how much, at what price and what sources of capital were used.” “India: The Economy,” BBC NEWS, December 3, 1998, available at http://news.bbc.co.uk/2/hi/south_asia/55427.stm.

⁶⁰ RREEF RESEARCH, BUILDING UP INDIA 3 (May 2006).

⁶¹ India Brand Equity Fund, *Real Estate*, available at <http://www.ibef.org/industry/realstate.aspx>, (last modified Apr. 2, 2007) (stating “The development of real estate in India focuses on two primary areas: retail and residential. . . . The global real-estate consulting group Knight Frank has ranked India 5th in the list of 30 emerging retail markets and predicted an impressive 20 per cent growth rate for the organised retail segment by 2010.”).

⁶² *Why U.S. Investors Are Building Their Hopes on Indian Real Estate*, KNOWLEDGE@WHARTON, (Oct. 31, 2006), <http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4106>.

⁶³ *Id.*

⁶⁴ *Id.*

“suckered” by Indians with local knowledge⁶⁵ and local developers need substantial financing for new large projects.

According to Sameer Nayar, Managing Director and Head of Real Estate Finance, Credit Suisse, India “is one of the most difficult real estate markets to invest in in the world.”⁶⁶ He cited the “complex web of regulation” as the largest difficulty.⁶⁷ Because “it is almost impossible for foreign investors to make informed decisions,” Credit Suisse invests in a mix of joint venture projects and companies, and is “not an on the ground investor.”⁶⁸ He also believes that local partnerships are important, though it is difficult to find good local partners who are trustworthy, and even harder to find any developers with experience beyond a few years.⁶⁹

Developers themselves are struggling to keep up with the new level and nature of real estate demand. Urbanization⁷⁰ and modernization have spurred demand for high rise residential buildings, shopping malls and hotels of “international standard,” high tech office parks, and planned communities (“townships”).⁷¹ According to an estimate from the McKinsey Global Institute, population in urban areas in India will increase from 340 million people in 2008 to 590 million by 2030 and 700 – 900 million square meters in commercial and residential space will have to be built per year in order to meet demand.⁷² By their calculations, this is the equivalent of building a

⁶⁵ For Surendra Hiranandani, *the Future of Indian Real Estate is ‘Definitely Bullish’*, KNOWLEDGE@WHARTON, (Nov. 16, 2006), available at <http://knowledge.wharton.upenn.edu/india/article.cfm?articleid=4120&CFID=3747416&CFTOKEN=52250917>.

⁶⁶ Sameer Nayar, Panel Discussion at Columbia Business School (Apr. 6, 2007) (on file with author).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ RREEF, *supra* note 60, at 11-13, (stating “[T]here were a total of 27 cities with more than one million inhabitants in 2001. . . . By 2005 this has risen to 35 cities. . . .” and “The United Nations Population Division (UNDP) expects the degree of urbanization to grow to over 40% by 2030, implying that urban population will grow by 2.5% per annum in the next 25 years . . . while the rural population increases only marginally. . .”).

⁷¹ India Brand Equity Fund, *supra* note 61 (stating “Driving the demand for high rise residences is the young middle class, who are more likely to buy high rise apartments from property developers than their parents, twenty years ago, who were more likely to buy a piece of land and construct a single (extended) family house.”).

⁷² MCKINSEY GLOBAL INSTITUTE, *INDIA’S URBAN AWAKENING: BUILDING INCLUSIVE CITIES, SUSTAINING ECONOMIC GROWTH* (Apr. 2010), at 17-18, available at http://www.mckinsey.com/mgi/reports/freepass_pdfs/india_urbanization/MGI_india_urbanization_fullreport.pdf. It is worth noting, as many skeptics have, that this rapid urbanization may be, in part, a result of efforts of McKinsey to guide India toward their own conception of urbanization and development and that such efforts are likely to lead to massive displacement of current residents. A full discussion of the role of title insurance and displacement is beyond the scope of this paper, but I remain hopeful that if current residents are given the opportunity

new Chicago or two new Mumbais every year.⁷³ Other market analysts estimated the housing shortage to be 20 to 30 million units as of 2006, with a projection of additional growth of demand of 4.7 to 8.7 million units per year until 2030.⁷⁴ The retail market has been expanding as well, as a result of the decreased protection of domestic retail (such as the allowance of international single brand retail stores in 2006), the increased popularity of the shopping mall format, and the rise in consumer purchasing power.⁷⁵ Forecasts for growth in the retail sector are very favorable, provided that the government eases such restrictions on international retailers.⁷⁶ High tech office parks are facing a supply shortage as well, in both the major cities of Delhi, Mumbai, and Bangalore (known as Tier I cities) as well as the smaller, up and coming cities such as Pune, Hyderabad, and Goa (known as Tier II and Tier III cities).⁷⁷ The real estate market has enormous potential to grow in these areas, and the capital market has potential to expand its products, including commercial lending, private equity, and private debt.⁷⁸ It is worth noting that although commercial real estate lending increased by more than 500% in recent years, it still represents “only a minor role on the banks’ balance sheets . . . [and] is very likely to continue its growth trend.”⁷⁹

As explained above, the nature of the investor – nonlocal and deep pocketed – parallels the nature of the turn of the century investor in the U.S. The next section will explore how this increased demand for investments is meeting obstacles due to inadequate land records.

B. This Demand is Being Hindered by Problems Which Arise from Both the Recording System and the Torrens System

Despite the huge potential for deals offered by incoming foreign direct investment (FDI), and the Indian government’s lukewarm welcome of it, real estate deals are often stalled due to title verification problems. Complications regarding title may arise during the long, unpredictable

to establish more secure title or at least insure themselves against uncertainty, they would be in a better position to borrow against their home or bargain with would-be developers.

⁷³ *Id.* at 18.

⁷⁴ RREEF, *supra* note 60, at 28, 29.

⁷⁵ *Id.* at 23. It should be noted that this market evolution has occurred despite many existing government restrictions on retail, such as a proscription on international department and chain retail stores offering more than their own single brand.

⁷⁶ *Id.* at 25.

⁷⁷ *Id.* at 20.

⁷⁸ *Id.* at 2, 37 (stating, “[C]ommercial bank lending seems to be the most efficient way of raising capital in India. But both the private equity and private debt markets are also set to grow significantly over the coming years, profiting from further project developments and more foreign direct investment.”).

⁷⁹ *Id.* at 34. Please note that these figures are for the period from 2002 – 2006.

process of title verification or even well after all claims are seemingly addressed. These frequent problems drain valuable time and financial resources and are a powerful deterrent to many real estate financing endeavors.⁸⁰ Private equity funds in particular are very conservative regarding risk after facing large losses in 2007-2008.⁸¹ Although these firms are willing to invest, they generally are looking for low risk investments.⁸²

India's land records are currently under a recording system which differs across state lines. Each state is in the process of transferring land records to the Torrens system through a Central Government program. The problems which exist in the current recording system will be explored in Section 1, and those from the upcoming Torrens system in Section 2.

1. The Recording System Problems are Widespread and Debilitating for Investment

a. *The Chronology of Title Verification in an Ideal Real Estate Transaction Rarely Occurs in Practice*

At the start of an ideal Indian commercial real estate transaction,⁸³ the purchaser's lawyer receives the title documents from the seller. These documents include past sale deeds, documents relating to property tax assessments, and a sketch of the property. Typically, the purchaser's lawyer also visits the Inspector General of Stamps and Registration's local office,⁸⁴ and checks all encumbrance records for the past thirty or forty years.⁸⁵

After the purchaser's lawyer has been satisfied with the title documents, the purchaser issues a public notice in the newspaper. This notice states the purchaser's intent to purchase the land and calls any claimants to title or encumbrances to come forward within 30 days.

⁸⁰ MCKINSEY CONSULTING, INDIA: THE GROWTH INITIATIVE 15, 16 (Sept. 2001) available at <http://www.mckinsey.com/mgi/reports/pdfs/india/Housingconstruction.pdf> (stating "the manager of a new . . . mortgage bank cited the lack of clear titles as the main factor hampering his market growth").

⁸¹ Telephone Interview with a Real Estate Developer, in Delhi, India (Dec. 23, 2009). (on file with author) [hereinafter "Delhi Real Estate Developer"].

⁸² *Id.*

⁸³ I will use the term "commercial transaction" to denote deals involving office complexes, hotels, warehouses, multi-family/ high-rise residences, factories, and plants; and "residential transaction" to denote single homebuyer sales.

⁸⁴ The Inspector General of Stamps and Registration is a large bureau of government with offices in every locality in India. They are responsible for certifying many official documents for the public, from marriage licenses to property deeds. They charge a tax ("stamp duty") for their services, which varies by State.

⁸⁵ Telephone Interview with a Real Estate Developer, in Bangalore, India (March 6, 2007). (on file with author) [hereinafter "Bangalore Real Estate Developer"].

If no one comes forward, and if the buyer is satisfied and has negotiated any issues outstanding with the seller, then the transaction is finalized.

b. Inadequate Land Records Lead to Multiple Complications at the Transactional Level

Not surprisingly, transactions rarely work as smoothly as the one described above. Unclear title is a frequent problem in real estate transactions. According to a report from McKinsey, there is a lack of clear title for the *vast majority* of the landholdings in India.⁸⁶ “As a result of unclear titles, organized developers devote much of their time to sorting out legal issues and cutting through red tape to ensure that theirs are quality projects.”⁸⁷

Several specific problems commonly arise during the verification process due to missing information. First, when the seller’s lawyer discloses the title documents, s/he may not disclose all the documents and claims, and the buyer’s lawyer would not be aware of missing claims or documents. The seller may even withhold information such as the existence of a Memorandum of Understanding (MOU) or agreement to sell to another party.⁸⁸ Another gap in a lawyer’s research may be regarding any pending court cases. When a dispute arises between competing title claimants, the matter may stay in court for years. These matters are also not in the public record, so buyers may be unaware of pending claims.

Furthermore, the buyer’s lawyer may not be able to assemble a complete picture of title because not all transactions related to title or encumbrances are actually registered. While the law states that sales documents must be registered, often sellers and buyers fail to do this, in part because of high stamp duties.⁸⁹ These high stamp taxes raise transaction costs for deals and deter people from registering sales transactions. A common problem that results from this situation occurs when a dishonest seller sells their property to more than one buyer. Subsequent buyers would not have any way of knowing that their property has already been sold to someone else. And, despite not being registered, the sales documents have

⁸⁶ MCKINSEY CONSULTING, *supra* note 80, at 2 (emphasis added).

⁸⁷ *Id.* at 16.

⁸⁸ Delhi Real Estate Developer, *supra* note 81.

⁸⁹ Stamp duties are taxes required to be paid on all registered documents. The rate differs by state. Madaan, *Foreign Direct Investment: Investing in Real Estate in India*, <http://www.madaan.com/realestate.html> (last visited July 9, 2010) (stating, “With stamp duty rates of 13 per cent in Delhi, 14.5 per cent in Uttar Pradesh and 12.5 per cent in Haryana, India has perhaps one of the highest levels of stamp duty. Some states even have double stamp incidence, first on land and then on its development.”); MCKINSEY CONSULTING, *supra* note 80, at 27; Bangalore Real Estate Developer, *supra* note 84.

legal force. The problem of unregistered sales is compounded by the fact that, until recently, no state required land records to be updated.⁹⁰ While in theory, the full implementation of the NLRMP would provide a comprehensive, computerized national land records database, it remains unclear when such database will be in place, or how accurately it will reflect actual land holdings, as further explained below.

Even if documents are properly registered, and there does not appear to be a problem with missing information in the transaction, the documents themselves may be misrepresentations of actual title for at least two reasons. First, the registration process merely records a transaction, and is not meant to prove title.⁹¹ When a document is registered with a government office, the “registering authority is only concerned with the registration of the document, and not with the authenticity or validity of title.”⁹² “Under the Registration Act of 1908, a document registering a property is a registered document of assurances and such assurances of title given by the vendor to the purchaser” and is not registration of title.⁹³ “Therefore, if the representation as to the title is proved to be wrong, the purchaser loses the property to be rightful owner despite the assurances.”⁹⁴ Compounding this problem is “an increase in the number of cases of blunders and frauds in recording deed transfers” in recent times, according to Rajive Kumaraswami of ICICI’s Reinsurance & Financial Institutions Group.⁹⁵

The second reason a registered title may not be an accurate reflection of who has rights (or believes they have rights) to a property is activity on the black market (the “unorganized sector”). The unorganized sector plays a large part in India’s economy, particularly in real estate. It is estimated to account for 25-50% of India’s GDP.⁹⁶ Its consequences are felt throughout India – it is both a cause and effect of corruption, leading to a much lower tax base for India to finance necessary public services and infrastructure, and compounding problems in the real estate market.⁹⁷ In real estate, the

⁹⁰ B. Yerram Raju, *Reforms skip the land market*, THE HINDU, June 4, 2002. *But, see* Rajat Guha and Mayur Shekhar Jha, *Computerisation of land titles may soon be made mandatory*, THE ECONOMIC TIMES, March 13, 2007, available at http://economictimes.indiatimes.com/News/Economy/Policy/Computerisation_of_land_titles_may_soon_be_made_mandatory/articleshow/1755635.cms.

⁹¹ Srinivasan, *supra* note 19, at 13.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 14.

⁹⁶ J. Naryan, *Breaking the realty-black money nexus*, THE FINANCIAL EXPRESS, November 3, 2006.

⁹⁷ *Id.* (stating, “[i]n India, real estate is the sector which feels the impact of black money the most. Land prices are shooting up irrationally. True, land is a scarce commodity and can’t

unorganized sector is fueled by high stamp duties as sellers try to undervalue their prices in order to reduce tax liability.⁹⁸ Once a property is undervalued, sellers will pay lower duties based on what they have officially listed as the sale price, and the buyer will make up the difference with the actual sale price with cash. This undervaluation leads to difficulties for potential buyers, who cannot afford the cash payouts necessary for purchases. The black market also contributes to incomplete or incorrect public land records. In the words of B. Yerram Raju of *The Hindu*, “[t]he mafia and politically powerful have their own ways of acquiring land and retaining their position, caring little about legitimacy or legality. Land is partitioned for various purposes and these do not go on record.”⁹⁹

If the purchaser’s lawyer attempts to confirm the authenticity of the seller’s documents, s/he may be unable to do so with absolute certainty. Because land regulations vary across state lines, several difficulties arise. First, buyers may find it confusing or impossible to comply with complex regulations or procedures which are different from their home state. Laws may depend on state jurisdiction or categorization of land area; for example, different laws exist for agricultural land and government leasehold lands.¹⁰⁰ There is also the problem of multiplicity of language.¹⁰¹ Finally, each document requires authentication from multiple government bureaus. Therefore, if forgery is suspected, separate government departments would have to be visited in order to verify each document (for example, the Revenue Department or the Stamp and Registration Department).¹⁰² Not only are there multiple government departments in each state, but the relevant department varies across state lines. For example, some states use a “Survey and Settlement Department” to verify encumbrances and register transfers and mortgages, while other states use a “Consolidation Department” to handle these functions.¹⁰³

States differ also in how rigorously they attempt to solve problems. Certain states are now separately addressing the problem of high stamp duties, with varying results.¹⁰⁴ Interestingly, the more rural southern states

be created. This supply constraint is aggravated by our cultural obsession with land. Far too many people are in search of land as a safe investment outlet.”).

⁹⁸ *Id.*

⁹⁹ Raju, *supra* note 90.

¹⁰⁰ See Padma Ramakrishnan, *Title Insurance Is Difficult Here*, THE ECONOMIC TIMES, Sept. 9, 2005, available at, http://economictimes.indiatimes.com/Markets/Real_Estate/Realty_Trends/Title_insurance_is_difficult_here/articleshow/msid-1226619,curpg-2.cms.

¹⁰¹ *Id.*

¹⁰² Sinha, *supra* note 8, at 2.

¹⁰³ *Id.* at 2.

¹⁰⁴ *Why U.S. Investors Are Building Their Hopes on Indian Real Estate*, *supra* note 62. Karnataka (the state where the city of Bangalore is located) has made some attempt to reduce

of Kerala and Tamil Nadu are known to be more efficient at addressing administrative problems, whereas, in the modern city of Bangalore, in the state of Karnataka, buyers may be “totally in the dark about many transactions not recorded in registrar.”¹⁰⁵

Additionally, differing state regulation means a lack of a national database for property records. When computerized or at least organized records do exist, they are in different forms across state lines. This disaggregation and heterogeneity of systems makes it harder to buy across state lines, and harder for investors who only deal in big cities to buy land outside these areas. The NLRMP attempts to correct these problems through computerization and the establishment of a national land records database; however, as this project is in the beginning stages, it will most likely be years before a comprehensive database exists.¹⁰⁶

These problems are only a few of the ones that commonly occur. Many other complications may arise, including unrecorded claims resulting from adverse possession and fragmented land rights due to strong heritage rights or legal protections of squatters.¹⁰⁷ Illegal encroachers on government property often are able to use the land as a result of misuse or abuse by revenue authorities and are sometimes even given title by default.¹⁰⁸

c. Inadequate Land Records Also Lead to Untapped Financing and Development Opportunities

Uncertainty of title has contributed to the specific complications described above, as well as to untapped opportunities of a more structural nature. The market suffers from fewer transactions, lower productivity, and less collateral-based financing than its full potential.¹⁰⁹ Without clear title, homeowners cannot use their purchases as collateral in their investments.¹¹⁰ This impediment, as well as government restrictions, has meant that the mortgage market in India remains underdeveloped.¹¹¹ Because banks have not reached their lending limits, they have not had any impetus to start trading debt and developing more advanced capital market offerings. Development of capital markets could also be driven by demand from

stamp duties, but until government office facilities are upgraded, it is unclear how effective these reforms will be. N.C.S. Raghavan and Arvind Raghavan, *For smooth land deals*, THE HINDU, March 24, 2007.

¹⁰⁵ Bangalore Real Estate Developer, *supra* note 85.

¹⁰⁶ Sinha, *supra* note 8, at 5-6.

¹⁰⁷ Raju, *supra* note 90.

¹⁰⁸ *Id.*

¹⁰⁹ MCKINSEY CONSULTING, *supra* note 80, at 16.

¹¹⁰ *Id.*

¹¹¹ RREEF, *supra* note 60, at 30.

emergence of large institutional investors, such as pension funds and life insurance companies, should such companies be able to expand their investment opportunities and thus their capital.

Once a secondary mortgage market develops and banks diversify their holdings, homeowners will be able to enjoy more financing alternatives and more competitive prices.¹¹² The lack of home financing impedes output and productivity in two ways. First, owners have to build their homes “one room at a time” as they find enough capital to fund their purchase.¹¹³ Second, because developers fund their projects with consumer financing through upfront payments and periodic deposits, a lack of funds available to homeowners adds risk and uncertainty to real estate projects.

Lack of certainty of title also affects patterns of development. Currently, real estate developers are often forced to buy land from government on the outskirts of cities or rehabilitate slum land within cities. Because of unclear title and fragmented ownership, land assemblage for large projects within cities is not possible. Title insurance would enable developers to buy land from many small holders with confidence – either because the holder had good title, or because the developer was insured against unknown claimants arising later. Furthermore, it could actually protect the rights of the small landowner, who would hold title insurance themselves and be protected against unscrupulous land assemblers, or who might be the beneficiaries of a claim against a land assembler with their own title insurance.

2. The Switch to the Torrens System Through the NLRMP is Not Sufficient to Overcome the Inadequacy of Land Records

While the recording system has evolved to function effectively in the United States, as explained above, it remains underutilized in India, as evidenced by the under reporting and inadequate land records which exist.

In light of these concerns, in 2008, the Ministry of Rural Development began implementation of the NLRMP. The ultimate goal of this ambitious program is to have conclusive land title in India, meaning that a registered owner of land will have “an indefeasible State guaranteed title, which will be assumed as valid, enforceable and free from adverse prior-unregistered interests.”¹¹⁴

The NLRMP will attempt to accomplish the lofty goal of implementing

¹¹² MCKINSEY CONSULTING, *supra* note 80, at 16 (stating, “Besides increasing the choices available to consumers, the presence of a secondary market also puts pressure on [Multi-family home] developers by increasing the supply of cheaper (used/ remodeled) homes.”).

¹¹³ *Id.*

¹¹⁴ Madhumita D. Mitra, *Introducing Guaranteed Land Titles in India*, HALSBURY’S LAW MONTHLY (Aug. 2009), at <http://www.halsburys.in/Introducing-Guaranteed.html>.

these principles through extensive computerization of land records, resurveying of land, computerization of the registration process, settlement of any disputes arising through the new records, and indemnification of those deprived of their rights due to a defective determination of title.¹¹⁵ Each of these tasks will require massive allocation of resources by both the Central Government as well as the States, estimated to be approximately 56.56 billion Indian Rupees total (30.98 billion from the Central Government and 25.58 billion from the States).¹¹⁶

The program is massive in its scope. In order to establish accurate land records, the plan calls for surveying of approximately 2.16 million square kilometers of land.¹¹⁷ The plan also involves resurveys and computerization of land records, as well as the settlement of disputes, and a certification by each owner that they are satisfied with the survey. The government estimates that there are over 430 million such records for rural areas alone.¹¹⁸ In urban areas, the government estimates that it will resurvey approximately 55 million households, door – to – door.¹¹⁹ As of 2008, India also had 4018 registration offices, of which, 1896 had yet to be computerized.¹²⁰

a. Drawbacks to the NLRMP Are Likely to Significantly Hamper its Effectiveness

While conclusive titling under the Torrens system is theoretically far more efficient and effective than the alternative of voluntary registration of title (the system used currently in India), it would be very difficult to implement, both generally and in India specifically. Generally, although registration process in the Torrens system reduces some of risk in that it produces a “single certificate of registration reflecting the entire title picture,” this single certificate does not reflect the reality of off-record matters or fraudulent records.¹²¹ This is bound to be a problem in India particularly, due to the scope of undocumented sales transactions, possessors, and the scale of the NRLMP. P.B.A. Srinivasan, who advocated

¹¹⁵ *Id.*; see also Sinha, *supra* note 8.

¹¹⁶ A. Srivasthasan, *State to Guarantee Title of Registered Property*, THE HINDU (Aug. 31, 2008). These figures are approximately 1.2 trillion U.S. Dollars, 650 billion U.S. dollars, and 530 billion U.S. Dollars respectively.

¹¹⁷ Sinha, *supra* note 8, at 8.

¹¹⁸ *Id.* at 8-9.

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.* at 10.

¹²¹ Szypszak, *supra* note 10, at 676; Johnstone, *supra* note 20, at 514 (raising concerns regarding the lack of financial inducement to put records in the Torrens system, gaps in protection due to timing and encumbrances, and the lack of physical inspection, which would have illuminated other unrecorded liens).

for a system of title insurance in India in *Witness* magazine, is concerned that the computerization of the recording system will not correct defects in title, and that “the computerization of the records is not intended to correct the title defects, though it would facilitate the examination and issuance of title policy.”¹²² And, in the event that title is disputed between claimants, the computerization will doubtlessly be stalled. While the NRMLP does call for some dispute resolution system for owners, it remains to be seen how effectively the government can resolve disputes over the entirety of land holdings in the second most populous country in the world. Furthermore, many people in India live on land for which they cannot prove title. Some are bona fide purchasers, some are not. As such, how such title disputes will be decided, when they are finally heard, is unclear.

The timeline for implementation is not clear. This project might take decades to be completed, if it ever is. Finally, it is unclear how the costs will be borne. As noted by Merrill and Smith, the Torrens system is more expensive to administer than the recording system.¹²³ While there are estimates of how much this program will cost time will tell if the Central Government and the States prioritize it highly enough to implement it. Prior to 2008, other efforts had been made to computerize land records by resurveying and reconciling village maps with actual property lines. However, those efforts were never entirely successful due to resource constraints.¹²⁴ Furthermore, part of the cost involved includes training officials who will administer the records. The absence of corruption is essential for such a system to function¹²⁵ – otherwise there exists enormous potential to end up with inaccurate records (and therefore title).

These drawbacks to the NLRMP are significant. As explained in the following section, title insurance could provide a short and medium term solution for the NLRMP’s shortcomings.

¹²² Srinivasan, *supra* note 19, at 18.

¹²³ MERRILL AND SMITH, *supra* note 5, at 28.

¹²⁴ Raju, *supra* note 90.

¹²⁵ MERRILL AND SMITH, *supra* note 5, at 28. It is unfortunate that a full discussion of corruption is outside the scope of this paper, but it should be noted that any switch to Torrens and conclusive title comes with it the enormous task of preventing land title records from accepting bribes. As the NLRMP has already been passed, I present this paper to advocate for a public-private title insurance hybrid in order to hedge against the massive potential for abuse presented by the existing methods of determining title through government workers. It may be argued, however, that the current state of cloudy title, even if inefficient, was still better than the massive disputes that will doubtlessly arise from the NLRMP’s attempt to determine all urban and rural land records conclusively.

C. As India's Records System Transitions and Has Aspects of Both Systems, Title Insurance Could Benefit the Indian Real Estate Market

In the early 1900s, the real estate sector in the United States responded to several similar market conditions that India faces now and created title insurance to facilitate transactions. In short, large, wealthy institutional consumers want to invest across state lines in properties with which they did not have close contact and they are not confident in relying on deficient public records to determine title. The conditions faced by investors in the U.S. then are very similar to those faced by foreign investors who wish to invest in the Indian real estate market today. Title insurance proved to be an appropriate solution then because it reduced risk for investors to a level sufficient to encourage investment, without depending on the slow moving train of government reform. And, if implemented appropriately, could serve to help alleviate uncertain title in India today.

Moreover, the Indian real estate market is in a unique position. Regulation, which will entirely change how title is determined and which could lead to massive changes in efficiency and transaction costs, has been approved, and yet it remains unclear how long it will take to be fully implemented. Even once this regulation is in full force, there will remain shortcomings in the protection it provides for buyers and sellers. Title insurance offerings could provide solutions to market shortcomings both before and after the NLRMP is fully effective. In the short term, prior to the full deployment of the NLRMP, title insurance could provide many of the same benefits it provided to the United States at the turn of the 20th century when private offerings of title insurance were first implemented. Specifically, title insurance could provide certainty and ease transaction costs for the new type of investment emerging in India and facilitate the development of adequate land records. After the NLRMP is in place, title insurance could play a role similar to the role it plays in the Australian real estate market – working within the Torrens system to overcome some of its shortcomings in protection.

1. *Title Insurance Could Play a Stabilizing Role for Investors in India as It Did in the United States at the Turn of the 20th Century*

In early 20th century United States, real estate demand changed in at least two ways. First, investors became interested in land across state lines, where they did not have connections. Second, the market type for investments expanded to include a new secondary mortgage market. These two changes increased purchaser unfamiliarity and uncertainty, and catalyzed the need for title insurance. In India, demand has changed in terms of proximity of investor and investment, and a change in type of investment market could be forthcoming.

With respect to location, the institutional demand to invest in real estate across state lines was a large part of the establishment of title insurance in the U.S.¹²⁶ Similarly, the institutional investors interested in India want to invest in large properties located far from where they operate. Many of the investors are not familiar with and do not have access to the local public records systems located on paper in Indian government offices. The creation of title plants and the insurance against claims could provide the institutional investors sufficient security in their transactions. This security would allow for investors to place their confidence in the title insurer and system of insurance as opposed to previously unknown sellers of property.

The type of real estate investor has changed as well. During the early 1900s, title insurance companies in the United States were able to generate enough revenue to launch their businesses because large investors - life insurance companies - entered real estate and drove demand for a secondary mortgage market. While these types of secondary investors (insurance companies and pension funds) have been slow to emerge in India, there has been an entrance of another kind of large investor - foreign and non-resident Indian (NRI) investors. Their entrance in India parallels the entrance of life insurance company investors in the U.S. in a few ways. These large foreign institutional investors have different needs than the Indian real estate market has previously had to meet. These investors want standardized protection and wide coverage, and, importantly, they are capable of paying for it.¹²⁷

Title insurance offers the stability needed in order for international investors to be confident in their investments in projects and companies.¹²⁸

¹²⁶ Brodkey, *supra* note 29, at 258 (stating, “The development of title insurance in the United State can be traced directly to the needs of mortgage lenders who began loaning money in other than those in which they were accustomed to doing business. Since each of the states in the United States has its own law concerning real property ownership and the perfecting and enforcing of security interests in real estate, the lender in one state was faced with the same problems in making a loan secured by land in another state as the lender on one country has when making loans secured by land in another country.”). This phenomenon of non-local investment as a catalyst for title insurance is not unique to the United States or India. While title insurance does not seem to have widely developed outside the United States, it is worth noting the foray of European insurance provider, L&E into it. This company offered it in to British customers who wished to purchase property on the Mediterranean coast. *See* Arruñada, *supra* note 17.

¹²⁷ *Why U.S. Investors Are Building Their Hopes on Indian Real Estate*, *supra* note 62; *See* Johnstone, *supra* note 20, at 502-503 (discussing the nature of national life insurance companies in the United States who do not concentrate on land close to their business operations, and who wanted standardized forms of title protection).

¹²⁸ Srinivasan, *supra* note 19, at 16-17 (stating that “lack of title insurance in the Indian real estate market is preventing many new NRIs and international investors from investing in our Indian real estate market” and “property consultants believe that the availability of title insurance products will boost private equity investment in Indian real estate since most of the institutions are very particular about clear titles.”).

These large foreign investors are able to pay high premiums in order to invest securely in India. If these high premiums could be used to finance the upfront costs of title insurance companies, then perhaps title insurance for individual homeowners could develop as well, and the mortgage market could develop to a level conducive to spur debt markets.

The second driving force in the establishment of title insurance for U.S. investors was the growth of a secondary mortgage market.¹²⁹ Larger investors, like the life insurance companies, wanted to buy loans from mortgage banks and others.¹³⁰ Title insurance provided crucial standardized protection necessary for mortgage banks to increase lending to potential homeowners by assuring the land was readily marketable if foreclosure became necessary.¹³¹ While India has not yet had the drive for debt markets by large players such as pension funds or life insurance companies, title insurance could facilitate the development of the initial mortgage market and alleviate limited financing for homeowners. Lenders would be more secure in allowing home buyers to use their homes as collateral, a mortgage market could fully develop, and eventually, secondary investors (such as pension funds or life insurance companies) would be willing to trade loans tied to less familiar land with confidence.

2. Fixing Inadequate Land Records Through Title Insurance Records Could Be More Efficient than Through Public Systems in India as in the U.S.

In India, as in the United States circa 1900, comprehensive, reliable, land records do not exist.¹³² Potential buyers of real estate begin with a public records search, but may not be able to uncover all existing and potential claims to title, as explained in Section B.

One way to overcome the transactional problems caused by incomplete records could be through private industry, as title insurance does. Title insurance addresses this problem in two important ways. First, title insurance companies are incentivized to create their own thorough ‘title plants’ – records of all ownership, use, and lien claims on land. In the U.S., these databases are more comprehensive than public records. Title insurance companies understand that better title plants mean less likelihood of claim payouts. Second, the guarantee of title insurance claim payouts provides a

¹²⁹ Arruñada, *supra* note 17, at 4.

¹³⁰ Johnstone, *supra* note 20, at 503.

¹³¹ *Id.* at 503-504 (stating “[M]ost life insurances are reluctant to accept lawyers’ opinions because the examination criteria and reports are much less standardized than those of title insurance . . .”).

¹³² See Arruñada, *supra* note 17 (regarding title insurance as a response to the poorly organized systems of deed recording in the U.S. in the last third of the 19th Century).

patch over defective public records, thereby influencing buyers to have confidence in their transactions.

However, in order to overcome the inadequacy of land records, the government has passed the NLRMP and mandated registration of title in order to have a right to title and maintain effective land registries. This method was not appropriate for the U.S. in the late 1800s because of prohibitive upfront costs and the difficulty of implementing such a solution when land was regulated at the local level.

Prohibitive upfront costs and local control issues present problems for India as well, though for slightly different reasons. In India, the systems for land registry are in place, but do not function effectively. There are systems at the state level to trace title through sales, partitions, and wills. These land registries are maintained by the State Inspector Generals of Stamps and Registration, who have numerous registrars and subregistrars for their different jurisdictions. However, the existence of these systems does not ensure their effectiveness. As explained in Section I, too many variables operate outside this system for it to be reliable.

Despite these potential problems with implementation, the Indian government has enacted the NLRMP in order to improve public land records. As explained in the following section, even with the introduction of this new program, title insurance could still play an important role in alleviating uncertainty of title.

3. Title Insurance Would Make Up for Some Deficiencies of the NLRMP

In the late 1800s, many commentators argued that the Torrens system, similar to the one embodied in the NLRMP, should be adopted in the United States. These proponents argued that the Torrens system was more straightforward, gave “absolute security” to purchasers,¹³³ and appropriately spread the risks from individual property owners to the community. However, as one commentator explains, looking back a hundred years, these ends were eventually achieved more efficiently, reliably, and with more meaningful indemnity through the development of a combination of an improved public record system and private title insurance system.¹³⁴ In India’s current lack of land records is similar to the U.S.’ situation a hundred years ago, and the combination of public record and private title insurance could offer similar potential advantages (especially considering that the NLRMP is probably going to go forward with implementation). The combination system would avoid several pitfalls of Torrens as well as offer some additional benefits.

¹³³ See Szypszak, *supra* note 10, at 671-2.

¹³⁴ See *Id.*

Title insurance offerings in India could increase efficiency due to the better records, faster searches, and decreased litigation. Furthermore, it offers particular benefits in India. As the system currently stands, the registration of title in the implementation NLRMP may misrepresent actual facts, as noted in Section B. This situation is complicated by the fact that India already has land registration systems in place, which need to be computerized and more fully utilized. Because these systems have not already been utilized enough, the change mandated by the NLRMP is not a reworking of a complete dataset, but rather a reworking of incomplete records, without an increased encouragement to register. Title insurers could address this concern by conducting their own comprehensive searches and compilation of records as well as for providing protection in the form of pay outs should mistakes occur.

Attempting to implement the Torrens system in India through the NLRMP will likely give rise to governance problems as well. Dispute resolution in the Torrens system will inevitably rely on the already over-saturated Indian judiciary to settle claims. The judiciary in India is notoriously back logged, and the dispute resolution problems explained in Section D would only be exacerbated in this context. Title insurance, however, could offer some relief through its due diligence and requirement of negotiation before suits are brought.¹³⁵

This reduction in risk is complemented by more confident investment and more return for real estate companies. In the United States, when title to real property in a securitized transaction is insured, the transaction is considered less risky by credit rating agencies.¹³⁶ Therefore, investors are more secure in lending money. Title insurers' role in reducing risk in large transactions is particularly relevant in the Indian context. As explained in Part I, title plants reduced attorney public record search time significantly in the case of numerous small titles when ownership of land is fragmented. As such, title insurance enables land assemblage, which involves buying up small parcels of land in order to build larger projects. Land assemblage to build large projects is widespread in the Indian real estate market. In fact, at least one investment fund in India restricts its project to those involving land already assembled, as explained in Section D.¹³⁷ Title insurance would enable transactions involving land with fragmented ownership to proceed

¹³⁵ See MERRILL AND SMITH, *supra* note 5 at 28 (stating that "Recording systems, which rely mostly on competing private actors (attorneys, title insurance companies) are more flexible [than registration/ Torrens systems], in the sense that the resources devoted to title questions and the speed with which title issues are resolved can be varied according to the value of the property and the urgency of completing any given transaction").

¹³⁶ Calder and Compton, *supra* note 46, at 9.

¹³⁷ Interview with the founder and manager of a real estate investment fund (April 6, 2007). (on file with author).

more efficiently.

Private actors may be the only ones willing to commit the massive funds needed to deploy agents to do on the ground diligence as well as public records checks. Their incentives and abilities to perform comprehensive searches come from charging high premiums, especially at the outset. However, with international investor interest and “local labor” at play, it is highly likely that price points both parties will agree on could be negotiated.

Additionally, regarding resources, private insurers may also prove to be the only actors financially and politically able to assemble accurate records in India. Though the NLRMP has been passed as a government endeavor, as explained in Section D below, previous government efforts to improve records have failed as a result of a lack of resources. Firstly, a Torrens system requires high initial costs to set up because it requires a very comprehensive land public record. These initial costs would fall on the government, as previously explained, which is the least likely actor to front them. Additionally, others have observed that spreading the risk onto the public (through the payouts for losses in the system), and not the private actors involved is a flawed goal itself.¹³⁸

A comprehensive title insurance program may also give the government an opportunity to explore several social welfare goals which are currently not accounted for in the NLRMP. In particular, newly settled title, and title insurance with it, could be targeted toward those disenfranchised by the current systems of allocating title and property rights. For example, assessments of households by the hybrid public-private model suggested below may focus on allocating title and insurance to the female members of household, or jointly to male and female household members in an effort to promote gender equality and opportunity within (and outside) the household.¹³⁹ Additionally, the title insurance itself could allow for potential landlords to be sufficiently secure in their land holdings to rent to tenants. Not only might this enable older segments of the population to provide for themselves through rental income, but it might open new residential opportunities for those who are currently landless and unable to afford to purchase holdings.

In short, similarly to how title insurance has been proposed in Australia, title insurance in India could work effectively alongside the NLRMP to

¹³⁸ Szypszak, *supra* note 10, at 672. The NLRMP does include an indemnity scheme, but its details remain unclear as of the time of writing.

¹³⁹ A complete discussion of the benefits of moving towards female title holdings is beyond the scope of my current project, but for more information on this fascinating topic, see generally, BINA AGARWAL, *A FIELD OF ONE’S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA* (1995).

make up for some of its shortcomings as well as enable other goals to be pursued. The Torrens system alone does not offer the same range of protections as title insurance. While the details of the indemnity scheme in the Indian context are yet to be known, it is likely that it will suffer similar shortcomings to other Torrens systems.

D. Alternatives for Investors Are Not Sufficient to Overcome Uncertainty of Title

No satisfactory methods to protect a developer from an unscrupulous seller currently exist.¹⁴⁰ Some developers resort to the methods described below, and some also issue a public notice in the paper regarding any properties which they are considering purchasing. While some claimants may come forward in response to a notice, it is usually unclear whether such claims are legitimate, and because of the slowness of the judiciary system, “probably some pay off will happen” so as to make the claimant withdraw the claim.¹⁴¹ Furthermore, the lack of political will to fully commit to revising land records is indicative of a larger lack of will to reform regulations in general regarding investment and real estate.

1. The Lukewarm Central Government Efforts to Facilitate FDI in Real Estate Without Integrating Revised Land Records is Symptomatic of the Lack of Political Will

International investors are banging down India’s door. However, complex and cumbersome regulation restricts what and where they can build, how much they can invest, and how smoothly the investment process runs. In the event that foreign investors do invest, there are extensive registration requirements and investment limits.¹⁴²

The government reforms of 2005 and 2006, while significant, are not enough to channel this investment into all of its potential modes. The Reserve Bank of India (RBI), in particular, has prevented easier investment and growth in real estate by restricting credit and FDI.¹⁴³

Restrictions on foreign investment in land development were finally loosened somewhat during 2005 and 2006. The reforms facilitate the entrance of FDI through joint ventures and pre-initial public offer (IPO)

¹⁴⁰ Delhi Real Estate Developer, *supra* note 81.

¹⁴¹ *Id.*

¹⁴² Amelia Ames, *Foreign Institutional Investment in India: What a Portfolio Manager Needs to Know about the Past, Present, and Future of India*, 4 INT’L L. & MGMT. REV. 143, 177 (2007-2008). This article also provides a very helpful overview of non real estate barriers to foreign institutional investment in India.

¹⁴³ *See id.*

placements of domestic developers.¹⁴⁴ These government reforms are important steps toward making real estate investment more attractive and possible.¹⁴⁵ The reforms also continue the permitted foreign investment of up to 100% in a township, but are designed to allow more investors to participate in smaller projects as well. “Investors told the Indian government that a 100-acre minimum project size was a hurdle; another was a requirement that it be part of a township project.”¹⁴⁶ The government responded by reducing “the minimum project size to 25 acres for housing, and about 8 acres (50,000 sq. meters) for other product types. In addition, investments in hotels, resorts and hospitals were permitted even if these were not part of a township.”¹⁴⁷

However, foreign investors are still restricted in several ways. First, they must construct within a specific time frame (in order to ensure that they do not hold on to land for speculative purposes). There is also a minimum capitalization requirement of \$10 million for wholly-owned subsidiaries and \$5 million for joint ventures with Indian partners. This is “an attempt to attract only serious investors.” Furthermore, foreign investors cannot repatriate their investments in less than three years. “They also won’t be permitted to sell undeveloped lots, or those without roads, water supply, street lighting, and drainage and sewer connections.”¹⁴⁸

Compounding these difficulties is the lack of political will on the part of India’s central bank, the Reserve Bank of India (RBI). The governors of RBI have been less than welcoming of both domestic and foreign real estate financing. RBI continues to restrict FDI and mortgage lending.¹⁴⁹

2. State Efforts to Improve Land Records Are Fragmented and Inadequate

Prior to the NLRMP, several state governments instituted several reforms to improve the problem of incomplete public records. Several states, such as Karnataka, Goa, Tamil Nadu and Gujarat attempted to computerize their systems before the announcement of the NLRMP, which

¹⁴⁴ *Why Do We Call Press Note 1 So?*, THE ECONOMIC TIMES, November 21, 2006; Sanjeev Sharma and G. Ganapathy Subramaniam, *Green Signal for FIIs in Realty IPOs*, THE ECONOMIC TIMES, May 26, 2006 (stating “In a move that could open up the flow of foreign investment in the real estate sector, the commerce and industry ministry has said that foreign institutional investors (FIIs) can take part in the pre-IPO placement of real estate companies. Since FIIs are already allowed to subscribe to shares offered through IPOs by real estate companies, the move opens up the sector in a big way.”).

¹⁴⁵ India Brand Equity Fund, *supra* note 61.

¹⁴⁶ *Why U.S. Investors Are Building Their Hopes on Indian Real Estate*, *supra* note 62.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See Ames, supra* note 142.

includes placing records data on the internet in some cases.¹⁵⁰

The southern state of Kerala has also attempted to alleviate problems related to the title through several reforms. They have given title to some of the landless.¹⁵¹ They have also made some effort to end the multiple bureaucratic channels which buyers and sellers must navigate. They have begun to link various offices under one government bureau to facilitate land registration and land records updates.¹⁵²

Their fragmented efforts, however, will now have to be recalibrated to meet NLRMP requirements, and taken in aggregate, are a small part of the entire NLRMP scope.

Title insurance is not the only possible solution to India's problems, nor is it an obvious choice. Some countries prefer mandated attorney conducted land searches. However, as explained below, title insurance is the most appropriate system for the Indian real estate market. Relying on current remedies and fixes is not enough, as evidenced by the underdeveloped real estate and secondary mortgage market.

3. Legal Remedies Lead to Uncertain Results

While plaintiffs sometimes resort to contract warranties, protection for bona fide purchasers, the implied covenant of title from the Transfer of Property Act,¹⁵³ and the enforcement of the use of escrow accounts when title complications arise, often these remedies are not practical to use due to prolonged, expensive suits with limited results.¹⁵⁴ This is not to say that

¹⁵⁰ *Centre Proposes to Launch Comprehensive Modernisation of Land Records Scheme*, HINDUSTAN TIMES, Apr. 1, 2007.

¹⁵¹ *Plan to Issue Title Deeds to the Landless*, THE HINDU, Jan. 7, 2007.

¹⁵² T. Nandakumar, *Plan to Network Revenue and Registration Departments*, THE HINDU, JULY 16, 2005.

¹⁵³ The Transfer of Property Act states that "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same: Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it. The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested." INDIAN TRANSFER OF PROPERTY ACT Sect. 55(2).

¹⁵⁴ Srinivasan, *supra* note 19, at 13 (stating that "if the representation as to title is proved to be wrong, the purchaser loses the property to the rightful owner despite assurances. The only remedy available to the purchaser is to seek damages for breach of the covenant of the title by resorting to costly litigation."). For more information regarding long time in court, see PRS Legislative Research, *Vital Stats: Pendency of Cases in Indian Courts* (Aug. 26, 2009), available at [http://www.prsindia.org/administrator/uploads/general/1251796330~Vital %20Stats%20%20Pendency%20of%20Cases%20in%20Indian%20Courts%2026Aug2009](http://www.prsindia.org/administrator/uploads/general/1251796330~Vital%20Stats%20%20Pendency%20of%20Cases%20in%20Indian%20Courts%2026Aug2009)

these protections are not useful when parties take it upon themselves to uphold their commitments. However, if they do not, resorting to the judicial system can be costly and may not lead to adequate resolution. Even when cases are resolved, decisions which hinge on these concepts for remedies often avoid settling title and demand damages only if loss has occurred.

In a seminal case, *Muhammad Siddiq and Ors. v. Muhammad Nuh* in 1930, an unknown claimant to title arose well after multiple transfers of the property had occurred.¹⁵⁵ The Allahabad High Court ruled in favor of the buyer, against the new claimant to the land, but did not settle title. In their holding, the Court focused on the fact that the buyer was in actual possession of the property, and held that as long as a buyer remains in possession of a property “and is in receipt of the profit,” then the buyer is receiving consideration for his money, and “it [would be] difficult to say that the consideration has already totally failed merely because a suit has been decreed against him. . . . a mere apprehended breach of covenant of title may not entitle him to a claim for damages when no loss has actually occurred.”¹⁵⁶

In short, because there did not appear to be any threat of the claimant acquiring possession of the land, the court avoided determining who held actual title. The late emerging heir and claimant is a fairly typical fact pattern in India, and as such, this holding has been cited and upheld numerous times in courts in similar cases.¹⁵⁷

The efficiency and increased certainty of pay out with title insurance would be a viable alternative to these civil suits, and the existence of title insurance would sidestep the problems associated with moral hazard of parties to a contract who are aware that the other party is not likely to resort to litigation to be made whole on a breach of a title covenant.

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¹⁵⁵ *Muhammad Siddiq v. Muhammad Nuh*, (1930) I.L.R. 52 (All.) 604.

¹⁵⁶ *Id.*

¹⁵⁷ *See V. M. Rv. Mr. Ramaswami Chettiar v. R. Muthukrishna Iyer And Others*, (1966) S.C.R. 603, 611 (reiterating the Indian legal principle that “the party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed”); *See also Gulabchand Daulatram v. Suryajirao Ganpatrao*, A.I.R. 1950 Bom. 401, at para. 11 (stating that “So long as the transferee remains in peaceful possession of the property there is no breach of the covenant [of title and quiet enjoyment]. The possibility of a person, who has since the date of the sale acquired title to the property, initiating steps to obtain possession of the property cannot amount to a breach of the covenant. [If it did,] it would lead to the startling result that a right to file a suit for damages for breach of a covenant of title and quiet enjoyment would arise before any injury is suffered by the vendee . . .”).

4. The Lawyer Opinion System Does Not Provide Sufficient Comfort for International Investors

If a real estate developer is experienced and has good standing in the real estate community, there are a few options s/he might use to overcome the uncertainty of title during a sales transaction.

One developer in Bangalore gives potential buyers a letter from specialized housing finance institutions (lending institutions for private housing loans). These lending institutions extend homeowner loans for 80% of all properties, and therefore have an interest in working with reliable developers with whom they have long relations. These letters are “a bit of a stamp of authority.”¹⁵⁸ These institutions also conduct their own searches, and review all the documents in a sale.

Although the entrenchment of these few developers might lead to fewer title problems, adverse consequences result for consumers. Choosing a developer becomes a function of their track record of assurance of valid title, not price competitiveness.¹⁵⁹

Additionally, developers may procure legal opinions confirming the validity of their interest in lands from local counsel. These letters, while not as secure as title itself, provide some comfort for potential investors.

Finally, many developers have purchased agricultural or slum land from the government. While this solves the title problem because claims against a government issuance would not survive, this strategy as a way to avoid transaction costs relating to title is not sustainable. Once individual apartment and building owners begin to sell their properties to new owners, or the most attractive government land is sold, title problems will arise in relation to these properties again.

At least one investor, a large real estate investment fund, invests solely in projects linked to land holdings that are purchased from the government or that have already been assembled by land aggregators in order to assure clean title.¹⁶⁰ While the emergence of land aggregators – individuals who purchase plots of land and hold them for some time to ensure that no claimants emerge – has facilitated real estate investment, title insurance would be a more efficient, quicker, way for investors to ensure title or insure against it in projects.

Many drawbacks to relying on local legal opinion exist, including standard of care issues, lack of standardized examinations and reports, and other quality concerns.¹⁶¹ The primary shortcoming, however, is that such

¹⁵⁸ Bangalore Real Estate Developer, *supra* note 84.

¹⁵⁹ MCKINSEY CONSULTING, *supra* note 80, at 16.

¹⁶⁰ Interview with the founder and manager of a real estate investment fund, *supra* note 137.

¹⁶¹ Johnstone, *supra* note 20, at 504. Moreover, high overhead in law offices and

a system does not provide indemnity against future claims, which is necessary for international, institutional investors to invest with security and confidence. Additionally, title insurance would allow investors to place their confidence in regulated insurance companies as opposed to individual local counsel.

E. A Hybrid System Which Involves Both the Public and Private Sectors Could Work Effectively in India

The current situation holds a huge opportunity to explore the possibility of a public-private hybrid land records system. NLRMP is just getting started, while the entire method of recording land ownership is in transition. The Indian Central Government could seize this opportunity to improve upon traditional Torrens by shifting costs, and increasing efficiency and accuracy in land records.

Undoubtedly, set up costs for a new system of land records and for title insurance are significant. As the NLRMP is already moving forward on land records, there exists an opportunity for government and private industry to work together to catalyze the establishment of a fully adequate land records as well as title insurance. As explained in this section, both players could have important contributions to make to a hybrid system of records and insurance.

1. The Indian Government Has a Potential Role in a Title Insurance Regime

While title insurance provides an important private sector patch when public records are incomplete, an effective title insurance regime benefits from a limited government role.

The ideal role of government in title insurance has been likened to its role in securities regulation – ensuring transparency.¹⁶² According to one commentator, “meaningful disclosure must occur at two levels: the industry, where financial stability and rate setting practices can be understood; and, the transactional level, where informed consumers and their advocates can consider costs, benefits, and limitations.”¹⁶³ Industry disclosure is aimed at “ensuring title insurers are financially responsible and not engaging in unfair and deceptive practices.”¹⁶⁴ This includes rate monitoring, application of

economies of scale in insurance offices have made the lawyer’s opinion system “completely unprofitable in many large cities.” Johnstone, *supra* note 20, at 515.

¹⁶² Szypszak, *supra* note 10, at 693.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 700 (citing John C. Christie Jr., *The Title Insurance Industry: A Reexamination Revisited*, 18 REAL EST. L. J. 354, 356-58 (1990)).

antitrust and anticompetitive regulation, and rate and statistical filing requirements in order to increase the flow of information to regulators, legislators, and consumer advocates.¹⁶⁵ Transactional disclosure seeks to inform the title insurance consumer of all aspects of their title insurance policy. For example, it includes full disclosure of all charges from actors involved in the transaction. This would include a breakdown of closing fees collected by their lawyer or by their title insurance company.¹⁶⁶

Government regulation of title insurance companies could lower risk for investors by setting mandatory reserve, deposit, and reinsurance requirements for title insurance companies. These requirements, as well as guaranty fund mechanisms,¹⁶⁷ protect the investors' ability to recover funds and decrease the risk associated with deals. In the U.S., these requirements have been found to be more necessary in financial industries when there is decreased competition and increased chance of monopoly and exploitation. In India, these regulations could facilitate the development of secure title insurance companies, should they come into existence. Furthermore, as was recommended in the U.S., "[n]ationally uniform methods of computing losses should be required so that comparative loss ratio statistics would be more meaningful. . . ."¹⁶⁸ And, the government should monitor advertising "in order to prevent exaggeration of title risks and insurance coverage."¹⁶⁹

Regarding regulatory barriers to real estate deals, the Indian Central Government should coordinate efforts across states to reduce red tape. The inconvenience associated with going through multiple bureaucratic channels currently deters owners from registering their land acquisitions.¹⁷⁰ Buyers may also avoid registering due to the high stamp duties, which should be reduced.

Current strong tenant rights actually lead to increased inefficiency and transaction costs and should therefore be re-examined and possibly revised. Legal as well as illegal occupants have de facto rights in the property they occupy, leading to large amounts of time spent and paperwork necessary before a rightful owner of a property can actually exercise his ability to sell.¹⁷¹ Unfortunately any reform in this direction is likely to disadvantage those who are least likely to have access to clear title, through no fault of their own. An "excessive" emphasis on heritage rights is another problem – often leading to fragmentation of land holdings as land is passed through

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 702.

¹⁶⁷ *Id.* at 699.

¹⁶⁸ Johnstone, *supra* note 20, at 517.

¹⁶⁹ *Id.*

¹⁷⁰ MCKINSEY CONSULTING, *supra* note 80, at 27.

¹⁷¹ *Id.*

generations.¹⁷²

The Urban Land Ceiling Act is another major impediment in the market. It restricts the land ownership to 500 square meters in many urban areas.¹⁷³ This requirement starkly conflicts with the minimum amount of land required to build a township, leading to unclear title and inefficiency. “In an attempt to keep their large plots, owners sometimes break up their landholdings, registering them under different variations of their names.”¹⁷⁴ When the owners want to sell their land, however, these inconsistencies in the name of ownership often result in long legal proceedings, as courts attempt to corroborate the owner’s identity.¹⁷⁵

The government could also increase suburban infrastructure.¹⁷⁶ Without such infrastructure, new construction is limited to city limits, and building on large plots necessary for suburban developments is not feasible. The ability to invest in large scale operations would further attract international investors, who are necessary for the initial financing of title insurance.

Through the NLRMP, the states will be expected to maintain better public record systems in order to increase ease of searches. They will work to computerize land records in standardized systems across states. The resurveying and recording of all land records is expected to take years to complete.

An alternative method to reduce work done by the government would be to coordinate title plant creation with title insurance companies. If title insurance companies would create reliable title plants, local governments could pay part of the maintenance costs, and title plant copies of recorded real property instruments could be made official indexes.¹⁷⁷ This kind of coordination could also reduce the massive government outlay of funds for this project. Moreover, it would distribute some of the costs to the private actors who will benefit from clear title records and lower transaction costs (namely, insurance companies as well as owners and lenders in real estate who pay insurance premiums).

Coordination of this type could also lead to an efficient linking of insurance assessments and official granting of title. A primary concern with any land records program in India must be how to create title when so many parcels have cloudy records. However, if a landowner has held a parcel of land for generations, and when there are not any other legitimate claimants

¹⁷² Raju, *supra* note 90.

¹⁷³ MCKINSEY CONSULTING, *supra* note 80, at 27.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 16.

¹⁷⁷ See Johnstone, *supra* note 20, at 518.

to the land, a private appraisal by an insurer and a subsequent government grant of title based on that appraisal could prove to settle title in many cases. Because the insurer will be on the hook for incorrect assessment, this process could also reduce the possibility of corrupt practices dictating who is named as the title holder.

2. The Private Sector Could Play a Significant Role As Well

The Indian private sector, specifically the insurance industry, cannot be forced to develop title insurance, but should consider several courses of actions. First, they should evaluate the potential profitability of title insurance and remain flexible regarding the structure of policies. For example, they could sell different levels of policy coverage. They could start with an affordable base coverage with multiple exclusions, and include options for increased levels of coverage with higher prices and fewer exclusions. They could also price the policies based on a sliding scale related to the availability of title documents, or the kind of land to which the title is attached.

Second, given that constrictive real estate market regulations will not be reformed unless the private sector pressures the government, they could lobby for lower stamp duties or other taxes on transactions which have the security of title insurance. They could also work with the government to have them outsource public land record keeping, if the endeavor seemed profitable.

Finally, banks should continue to develop commercial lending and debt markets. The investors on these markets, as well as emergent pension funds and other investors with deep pockets, could drive demand for title insurance.

3. The Hybrid Model's Applicability Beyond India

Pioneering the next generation of efficient records and insurance in India could prove to be educative for other records systems in at least two dimensions: the public and private roles, and the nature of the insurance itself.

In 1957, Quintin Johnstone commented that the existence of multiple title plants is expensive, duplicative, and economically wasteful.¹⁷⁸ He proposed having a single plant per city, which could be operated by several insurers, or by one insurer who has won the operating rights. He went on to propose two even more daring arrangements, stating “. . . perhaps the best solution would be to divorce the business of title plant maintenance from

¹⁷⁸ *Id.* at 517.

that of examining and insuring, thereby eliminating the waste of title plant duplication and retaining competition in examination and insurance.”¹⁷⁹ A drawback to such an arrangement, however, might be that we end up with a similar mismatch of incentives to maintain a proper record and have to pay out insurance policies, which existed when the public record was the only purported comprehensive record in existence. On the other hand, his second suggestion more closely follows the proposal in this paper:

Private plants are also economically wasteful to the extent that they duplicate public records. Greater attention should be given to eliminating the need for private title plans by introducing more complete and efficient indexes and arrangements of public records. To the extent that government record offices can not or will not adapt themselves to efficient title searching, consideration should be given to reducing the costs of these offices if complete private title plants are locally maintained... Title plant copies of recorded real property instruments could be made the official copies and the title plant indexes the official indexes. Companies with title plants could then be paid by the counties for part of the plant maintenance cost... The companies would of course be required to make recorded data available to those interested¹⁸⁰

Despite his and other comments regarding reworking title insurance, such experimentation remains to be seen, and India could be the perfect system for the next generation of efficient records and insurance.

Furthermore, the actual scope of title insurance could be adapted to the local conditions of India, conditions which also exist in many countries with incomplete records of land holdings. One example of title insurance of a different scope can be found in United Kingdom: “The risks covered in the UK... are the following: ‘confusion from similarity of names; forged or missing documents; signatures of minors or mentally incompetent persons; signatures made under duress; mistakes in recording legal documents; undisclosed or missing legal documents; undisclosed or missing heirs; fraud; invalid divorces; misrepresentation of marital status; unpaid taxes; clerical errors in public records; wills not probated; erroneous searches; inadequate rights of access; inaccurate boundary descriptions; voidable or invalid deeds.’”¹⁸¹ Not only is this example informative for how title insurance can

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 518.

¹⁸¹ Arruñada, *supra* note 17, at 16, quoting Pratt, *Catchy Title*, MORTGAGE FINANCE, Nov.

vary according to local conditions, it also shows us that it can, in fact, vary. Indian conditions, some of which appear in the United Kingdom example, are certainly varied from other areas where title insurance exists widely and are varied within the country as well. Title insurance schemes in India, therefore, could provide multiple levels of variation depending on local conditions and multiple resulting lessons for foreign systems.

4. Why India Doesn't Already Have Title Insurance: Challenges to Implementation

In spring of 2007, the government of the state of Karnataka proposed a title insurance scheme, whereby insurance companies recognized by the Insurance Regulatory and Development Authority would offer title insurance policies, and the government would charge a concessional stamp duty in the transactions with such insurance. While it is noteworthy that the government has made an effort to encourage title insurance, at least one commentator holds that “the cost of providing insurance cover and the cost of legal exercise required for verification of title to property in the background of local laws and conditions will be prohibitive.”¹⁸²

This author is not as cynical as the commentator, above, however. Domestic insurance companies have not yet had the deep pockets of larger scale investors needed to overcome initial costs. According to P. Ramesh, Head of the Infrastructure of Credit Rating and Information Services of India (CRISI), the country's leading rating agency, the issue is pricing.¹⁸³ Title insurance companies would be torn between low pricing and ensuring that payouts do not exceed insurance premiums.¹⁸⁴ “Only a company with deep pockets, and looking at long-term growth, . . . that as part of attracting customers, prices the insurance low and is ready to tide over the losses in the initial few years of operation” as the Indian market learns to appreciate title insurance, would survive.¹⁸⁵ However, the kind of investors waiting at India's door today might be willing to invest securely with relatively high premiums, which insurance companies could then leverage to offer title insurance in homeowner transactions. Furthermore, with the partial efforts of the Indian Government to revise records, the current environment could be an ideal opportunity to rethink the public-private division of labor in land records systems. These challenges – inadequate land records and high start up costs – are significant barriers which must be addressed for title insurance

1998, at 24.

¹⁸² See Nandakumar, *supra* note 152.

¹⁸³ Ramakrishnan, *supra* note 100.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

to function. Such restraints, however, are the same ones being currently faced (and potentially overcome) by the government's NLRMP. When the door of such widespread reform is already open, title insurance could make a welcome entrance and help pave the way toward better records and predictability.

Finally, although international companies are considering offering international title insurance in India, they lack the domestic expertise that local insurance companies could offer. International insurance companies are more likely to have higher costs of operation, as well as less ability to effectively navigate the Kafkaesque bureaucratic channels of India, leading to even higher premiums.

CONCLUSION

With the lynchpin position of property rights in most societies, not surprisingly, one scholar has observed that "[w]ith this visceral power of property comes similarly visceral outrage when property needs and claims – so obvious to those who assert them – are not honored."¹⁸⁶ If we consider these ideas – the importance of property rights and the subsequent pressing need for their protection – then we must also consider how best to protect them within current legal systems. I have argued that such protection must begin with a functioning and reliable record of holdings, in which title insurance has and can play a crucial role.

The Indian case has provided, I hope, a convincing account of the role that title insurance could play in achieving certainty and predictability in land holdings. Since the 1990s, economic growth, a rising middle class, and willing FDI have been driving a sustained demand for real estate in India. Even more FDI is waiting in the wings. However, lukewarm government attempts to facilitate the flow of this FDI through financial reforms have not been adequate. Many impediments in the real estate market remain, such as illiquidity, complex land use regulation, poor infrastructure, and uncertain title. Uncertainty of title negatively impacts individual deals as well as the real estate market structurally.

A title insurance regime could alleviate some of the problems described above by reducing the risk present both in individual deals and across the market. Title insurance companies provide more comprehensive searches and records than are currently available in India under either the recording system or the Torrens system. Such a regime could also provide insurance against future claims and losses.

Though title insurance offerings in India would have to adjust premium levels to account for the current cloudy state of title, many commentators are

¹⁸⁶ UNDERKUFFLER, *supra* note 1.

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hopeful that international investors would have the deep pockets necessary in the beginning stages of implementing title insurance.¹⁸⁷ Such a system would be best conceptualized through a public- private hybrid, which could harness the public reach and access, and private resources and efficiency. If the hybrid model were to prove effective in the Indian context, with its size, complexity, and current state of fragmented records, a convincing case could be made for adapting such a system outside of India as well – to both recording and Torrens systems.

¹⁸⁷ Srinivasan, *supra* note 19 at 1 (affirming that the investors in large transactions in urban areas would be prepared to pay premiums to insurance companies and that such a system would go well with the computerization or recording documents).