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## The Emergence of a Transnational Real Estate Market: Comments on Olivier De Schutter's *The Green Rush*

Responding to Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT'L L.J. 504 (2011).

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Katharina Pistor\*

Olivier De Schutter's *The Green Rush: The Global Race for Farmland and the Rights of Land Users* discusses how the conquest for arable land affects the local population in countries on the sell side of these transactions.<sup>1</sup> He suggests three possible scenarios that may result from these transactions and explains why his reform proposal is superior to the others both on humanitarian and environmental grounds.<sup>2</sup>

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\* Michael I. Sovern Professor of Law, Columbia Law School.

<sup>1</sup> Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 H. INT'L L.J. 504 (2011). I would like to thank Olivier De Schutter for inspiring these comments and the Harvard International Law Journal for the opportunity to share them with a wider audience.

<sup>2</sup> *Id.* at 540–59.

In these remarks, I will briefly summarize the main contributions of Professor De Schutter's article. I will suggest that all three scenarios assume, at least implicitly, that the transactions can be explained in terms of simple market-based supply-and-demand models that reflect increasing food prices fueling a greater demand for land, filled by countries that have an excess of arable land and a need for foreign direct investment. Professor De Schutter suggests that there are costs involved with this model – indeed he points to classic externalities: those currently occupying or using the land – typically small peasant holders, herders, indigenous people and other marginalized groups that do not have much of a voice – will be dislocated.<sup>3</sup> In addition, these transactions push towards large-scale agriculture, which is not necessarily the most environmentally sustainable form of land cultivation.<sup>4</sup>

In my comments I would like to emphasize some points that may not be fully accounted for in this supply-and-demand scenario.

First, while the hunt for arable land for food may explain many of the large transnational land deals, they appear to be part of a deeper structural change – the emergence of a transnational real estate market. What explains this change?

Second, if the supply/demand story was sufficient for explaining transnational land deals, we should observe primarily countries with excess land getting into this market on the sell side. However, available data on transnational land deals<sup>5</sup> suggest that many more countries are selling. Why is that? Conversely, on the buy side we should observe countries that cannot meet their current or future demands on world markets. However, this does not appear to be the case either. While many of the origin countries of major land acquirers – most of which are private – may face fuel or food shortage in the future, many other countries share that too, and yet they, or rather investors from their countries, are not buying land to meet those demands. So who is buying and why?

Finally, supposing that scarcity of arable land is indeed at the bottom of the “Green Rush,” then the relevant policy question is whether the market mechanism – even in the modified version that Professor De Schutter advocates, which makes land occupied by marginalized groups essentially nontransferable – is indeed best suited for dealing with the problem of scarcity of this particular good.

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<sup>3</sup> *Id.* at 524–39.

<sup>4</sup> *Id.*

<sup>5</sup> *See infra*, notes 37–39, and accompanying text.

## I. RATIONALIZING THE “GREEN RUSH”

Professor De Schutter describes the scope and scale of large-scale real estate transactions over arable land and offers three rationales for them. The first rationale is the “win-win,” or “transition scenario.”<sup>6</sup> Governments on the sell side benefit from capital inflows and investments, increased productivity, lower food prices, and new employment opportunities for local people. Investors benefit from return on their investment, trade in global food markets, and the ability to increase food security in their home countries. Professor De Schutter dismisses this scenario as based on unrealistic assumptions: it overestimates the benefits of large-scale agricultural production and underestimates the potential costs on peoples’ livelihood, food prices, and environmental impact. In short, the “win-win” scenario underestimates the negative externalities of these transactions. However, it does not question that demand/supply stories can, in principle, explain the rise of transnational land deals.

The second scenario is the “coexistence scenario.”<sup>7</sup> It suggests that large-scale land acquisitions can coexist with traditional forms of land use. They can be geared towards unused areas of land and structured to ensure that they are compatible with concerns about food safety and local land use practices of the domestic population. However, as Professor De Schutter points out, there is little evidence that actual transactions reflect these concerns or that the rights and interests of vulnerable people are sufficiently protected to give them any bargaining power. Instead, domestic governments and investors alike tend to play down, if not ignore, those with no voice, including indigenous people, forest dwellers, and small peasant holders. Moreover, local constituencies may not be able to compete with foreign investors and are therefore likely to be forced into the emergent secondary market for land.

Against this background Professor De Schutter offers a third scenario, the “reform scenario.”<sup>8</sup> In this scheme, the government of the country targeted by investors would channel investments into agriculture as part of a comprehensive program to reduce poverty and promote development. Preferential tax treatment, government procurement measures, training programs, and teaming up foreign investors with local producers could foster these goals. A cornerstone of this proposal is to strengthen the legal rights and interests of vulnerable people by limiting the alienability of land. This could be done, for example, by switching to contract systems and/or by titling communal rather than individual land rights. These reforms would give greater legal protection against the government and other parties without exposing the community to the risk of alienation from the source of its sustenance.

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<sup>6</sup> De Schutter, *supra* note 1, at 540–43.

<sup>7</sup> *Id.* at 543–47.

<sup>8</sup> *Id.* at 548–56.

This “reform scenario” aims at protecting the most vulnerable groups by endowing them with legal rights, including rights to communal property. It essentially advocates a modified coexistence – one backed by legal rights rather than just wishful thinking. This, of course, raises the question of how meaningful such rights are in the context of an evolving transnational real estate market. Observers of attempts in the global North to use zoning rules and other legal devices to tame these markets have concluded that there are “limits of law.”<sup>9</sup>

## II. THE EMERGENCE OF A TRANSNATIONAL REAL ESTATE MARKET

A conquest for land, in particular for arable land, is nothing new in human history. In the past, such conquests were mostly carried out by physical force. Wars have been fought to secure settlement and food protection, and countries have been colonized for very similar reasons. The proliferation of transnational land deals suggests that control rights over land no longer require military contest. Large-scale reallocation of these rights can instead be conducted via the market mechanism. How did this transnational real estate market come about?

If history is any guide, markets in general (other than the typical town and village markets) and real estate markets in particular do not emerge spontaneously. The development of real estate markets in modern times required active government intervention. A famous example is the English Black Act of 1723,<sup>10</sup> which eroded customary land usage practices and endorsed the individualization of property rights in land. The ‘enclosure movement’ effectively reallocated control rights over commonly held agricultural land to wool merchants wishing to expand sheep farming to supply the nascent wool industry. There is now substantial evidence that common ownership was far less inefficient than often asserted.<sup>11</sup> It did, however, stand in the way of the commercialization of land for the benefit of wool production.

Conventional accounts of the emergence of private property rights frequently suggest that property rights emerge spontaneously in response to the inefficiencies associated with common ownership, or the “tragedy of the commons.”<sup>12</sup> Harold Demsetz, for

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<sup>9</sup> See, e.g., NEIL KOMESAR, *THE LIMITS OF LAW* (2001).

<sup>10</sup> See Terra Lawson-Remer, Property Insecurity, Conflict, and Long-Run Growth 6 (May 2011) (unpublished manuscript) (on file with author), for a brief summary and further references.

<sup>11</sup> See Robert C. Allen, *Community and Market in England: Open Fields and Enclosures Revisited*, in *COMMUNITIES AND MARKETS IN ECONOMIC DEVELOPMENT* 42, 43 (Masahiko Aoki & Yujiro Hayami eds., 2001).

<sup>12</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1243 (1968), famously coined the ‘tragedy of the commons,’ i.e. the inherent inefficiency of collective ownership. However, Elinor Ostrom has asserted the prevalence and efficacy of ‘governing the commons’ in work that has earned her the Nobel Memorial Prize in economics. See ELINOR OSTROM,

instance, used the example of native peoples in North America to suggest that their exposure to fur trade led to a natural adaptation of property regimes from common to individualized ownership.<sup>13</sup> How this process actually took place is left somewhat unexplained. Indeed, as Carol Rose has suggested,<sup>14</sup> accounts about naturally evolving property rights, like this one, frequently shift from analytics to storytelling – and for a good reason. These theories tend to emphasize the individual aspect of property rights, as a political right or as the foundation for efficient markets, but conceptually do not allow for active cooperation by individuals each in pursuit of his or her wealth-maximizing strategy.

Cooperation is, of course, only one possible strategy for changing property rights regimes, the other being coercion. Coercive reordering of property does not preclude formalization and legalization. It is only the first step in a pattern that has been commonly observed, and which runs from establishing control to legally endorsing and formalizing de facto control rights.<sup>15</sup>

If, contrary to standard accounts by property rights theorists, one takes seriously the notion that property rights *regimes* do not arise spontaneously, but require an affirmative act of cooperation, if not coercion, then the emergence of a transnational real estate market also requires more of an explanation than a change in the demand for land. Unless land is propertied and commodified, a real estate market cannot arise.<sup>16</sup> Indeed, as Professor De Schutter suggests in his paper, zoning and titling were critical steps for the emergence of this transnational real estate market.<sup>17</sup> Once land has been delineated into transferable rights and market forces have been unleashed, it is difficult to predict how land will be used and by whom, other than it being likely that the highest bidders will win. And even when it is not formally transferable,

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GOVERNING THE COMMONS - THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (her foundational piece).

<sup>13</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351–52 (1967).

<sup>14</sup> See Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 39 (1990).

<sup>15</sup> See Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 396 (1995). Lueck asserts that rights are granted to those who already managed to acquire possession.

<sup>16</sup> An alternative to a full fledged property rights regime are long term leases, as practiced by some governments in countries whose constitutions prohibit the transfer of full title in land. See LORENZO COTULA ET AL., IIED ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 6 (2009), available at [http://www.ifad.org/pub/land/land\\_grab.pdf](http://www.ifad.org/pub/land/land_grab.pdf).

<sup>17</sup> See De Schutter, *supra* note 1, at 527.

experience suggests that such constraints can be circumvented, for example, by long-term leases.<sup>18</sup>

Turning to the forces that created a transnational real estate market, one cannot help noting the many technical assistance programs over the past two decades or so that emphasized the importance of property rights, introduced zoning and titling programs, and established outright privatization. The ‘Washington Consensus’<sup>19</sup> famously noted that privatization, stabilization, and liberalization were *the* roads to prosperity – and the World Bank and its sister organizations dutifully implemented programs to this end.<sup>20</sup> The notion that individualized rights are more efficient than collective rights pervades these various programs, even though some studies have taken note of social and distributional costs that often go hand in hand with the introduction of private property rights regimes.<sup>21</sup> Hernando de Soto<sup>22</sup> has vigorously advocated titling programs as a means for enhancing the economic welfare of the poor around the world.<sup>23</sup> Bilateral and multilateral development projects frequently include assistance for zoning and titling of land. Even if land remains in state ownership, zoning and titling are critical elements in the development of a viable real estate market<sup>24</sup> in which the government itself frequently participates. Zoning and

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<sup>18</sup> See COTULA ET AL., *supra* note 16, at 75 (showing that countries with constitutional restrictions on the alienability of land have used this device already).

<sup>19</sup> See John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 5, 18–19 (John Williamson ed., 1990) (stating the key policies that the Washington institutions agreed upon based on their experience in Latin America).

<sup>20</sup> See generally WORLD BANK, BUREAUCRATS IN BUSINESS (1995). See also ALAN GELB ET AL., WORLD BANK, FROM PLAN TO MARKET (1996). On land policies specifically, see generally KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION (2003) and more recently KLAUS DEININGER ET AL., RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS (2011) [hereinafter DEININGER, RISING GLOBAL INTEREST].

<sup>21</sup> See DEININGER, RISING GLOBAL INTEREST, *supra* note 20, at 69–70 (suggesting that women often lose out when property rights are formalized because they lack access to information and power).

<sup>22</sup> See HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (Harper & Row 1989) (detailing the costs of informal economies for those trapped in them).

<sup>23</sup> Whether empirical results bear out his theory is a different matter. See, e.g., Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122 Q.J. ECON., 1561, 1561–62 (2007). Field’s article shows that titling produced positive benefits but not the predicted emergence of credit markets.

<sup>24</sup> See Annelies Zoomers, *Globalisation and the Foreignisation of Space: Seven Processes Driving the Present Global Land Grab*, 37 J. PEASANT STUD., 429, 431 (2010) (detailing the various policies and institutional reforms that facilitated the emergence of the transnational real estate market).

titling also frequently trigger the first social transformative processes, as those who expect to lose out abandon the land or migrate to other places.<sup>25</sup>

Other policies have contributed to the development of a transnational real estate market less directly. They include, among others,<sup>26</sup> (1) the promotion of foreign direct investment (including investments in food production) and the protection of foreign investors in bilateral investment treaties,<sup>27</sup> (2) the expansion of the free movement of services, including tourism services, and the proliferation of foreign-owned resorts in countries around the world, and (3) the establishment of 'free economic zones' to attract foreign investment, which frequently grant private property rights in land, even if national law does not. In short, there has been a plethora of interventions over the past two decades to actively promote the emergence of a transnational real estate market.

Advocates of these reforms view them as indispensable for promoting economic development.<sup>28</sup> However, as social theorists from Karl Marx to Karl Polanyi<sup>29</sup> have pointed out, the commodification of land does not come without social costs – many of which Professor De Schutter also highlights in his contribution. For Marx and Polanyi, of course, these are not side effects, but an inherent feature of the capitalist system and its destabilizing forces. Polanyi goes as far as attributing the emergence of Fascism and Communism in the first part of the 20<sup>th</sup> century to the social transformative forces that were unleashed by society on the market.<sup>30</sup> Recent studies lend more current empirical support to this argument. In a study that uses indicators of property rights insecurity, Lawson-Remer shows that the insecurity of property rights of marginalized groups is positively associated with economic growth.<sup>31</sup> What matters is the security of the elites' property rights. Yet, this holds only up to a point;

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<sup>25</sup> See Michael Dwyer, *Seeing Within the State: Internal Legibility in Laos's "Global Land Grab"* 1–6 (2010) (unpublished manuscript) (on file with author) (detailing the political processes that accompanied land zoning and land titling in Laos).

<sup>26</sup> See Zoomers, *supra* note 24, at 439–40 (also listing acquisitions of migrants in their home countries as well as land acquisitions by retirees in their new retirement homes).

<sup>27</sup> For a review of the causal relation between BITs and FDI flows, see Deborah Swenson, *Why do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 145–54 (2006).

<sup>28</sup> See DE SOTO, *supra* note 22, at 151–72. Note also that advocates of human rather than market development also emphasize the ability to hold property as a critical 'individual capability'. See MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 34 (2011) (emphasizing the right to hold property on equal terms with others).

<sup>29</sup> See KARL MARX, *DAS KAPITAL* (Lawrence and Wishart 1974) (1867); KARL POLANYI, *THE GREAT TRANSFORMATION* (Octagon Books 1975) (1944).

<sup>30</sup> See POLYANI, *supra* note 29, at 223–48.

<sup>31</sup> See Lawson-Remer, *supra* note 10.

if and when these transformative processes result in civil war, they may undermine whatever growth has been produced in the first place.<sup>32</sup>

The critical point for our purpose is that property rights reforms have nominally depoliticized control over land. Property rights have become neutral legal entitlements that can be defended against any third party, including the state,<sup>33</sup> and transferred to the highest bidder in a decentralized, market-driven process. This process is no longer controllable by governments – in fact, the policies aimed at creating private property rights regimes were designed to reduce governmental control over the economy.<sup>34</sup> As in the development of domestic real estate markets in modern Europe, it took government action to take the government out of land management.

### III. SELLERS AND BUYERS

Once a transnational real estate market had been established, it is conceivable that countries with excess amounts of arable land offered their land to the highest bidder. One would therefore expect mostly countries with excess amounts of arable land to appear on the sell side of transnational real estate deals – in particular Brazil, Argentina, Sudan, Democratic Republic of Congo, Mozambique, Tanzania and Madagascar, which hold the largest remaining reserves of arable land globally.<sup>35</sup> However, these countries are neither the only nor necessarily –given their asset base – the most prominent sellers.

To find out who is selling and who is buying land, we have compiled data that includes all negotiations over transnational land deals that have been reported over the past ten years.<sup>36</sup> Although we have only just begun to analyze these data, some general patterns emerge from our preliminary analysis and are summarized below.

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<sup>32</sup> *Id.* at 28–31.

<sup>33</sup> On the far-reaching effects of introducing private property rights, such as those included in standard bilateral investment treaties, into legal systems, see Amnon Lehari & Amir Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115 (2011).

<sup>34</sup> This is quite explicit in BUREAUCRATS IN BUSINESS, *supra* note 20. For a reassessment of this policy strand, see WORLD BANK, ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM (2005), which notes that government does play an important role in managing economic growth and development.

<sup>35</sup> Eric F. Lambin & Patrick Meyfroidt, *Global Land Use Change, Economic Globalization, and the Looming Land Scarcity*, 108 PNAS 3465 (2011).

<sup>36</sup> Information is difficult to come by although increasingly facilitated by monitoring groups that have built their own databases and made them available on their websites. See, e.g., INTERNATIONAL LAND COALITION, [www.landcoalition.org](http://www.landcoalition.org) (last visited Oct. 13, 2011). In addition, we have used news sources and web-based blogs. The data has been compiled by Catherine Keys at the Center on Global Legal Transformation, Columbia Law School.



Table 1: Land Deals (negotiated), 2000-2010<sup>37</sup>

Selling Country	HDI Ranking <sup>38</sup>	TI Ranking <sup>39</sup>	Cumulative Area (ha)	Buyers' Country of Origin
Brazil*	73	69	20160000	China, Japan, Netherlands, Brazil
Congo	126	154	10000000	South Africa
DR Congo*	168	164	6944000	China
Sudan*	154	172	5922240	UAE, Syria, Norway, USA
Philippines	97	134	2564000	China, Qatar, Bahrain
Cambodia	124	154	2005028	China, Vietnam, Cambodia
Argentina*	46	105	1629400	USA, China, Italy, South Korea
Russia	65	154	1588400	Russia, Sweden, China
Indonesia	108	110	1510000	Saudi Arabia, South Korea
Kazakhstan	66	105	1000000	China
Liberia	162	87	934239	Malaysia, UK
Ethiopia	157	116	636000	India, Saudi Arabia, Egypt
Chile	45	21	630000	USA
Madagascar*	135	123	623414	UK
Pakistan	125	143	526400	UAE, Saudi Arabia
Tanzania*	148	116	503843	UAE, Bangladesh, UK
Mali	160	116	358959	Mali, Libya, China, South Africa
Cameron	131	146	300000	Malaysia
Ukraine	69	134	247000	Russia
Australia	2	8	223000	USA
USA	4	22	216862	Japan

<sup>37</sup> Countries with an asterisk are those with the largest arable land reserves according to Lambin & Meyfroidt, *supra* note 35.

<sup>38</sup> JENI KLUGMAN, UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT tbl. 1 2010 (Comm'ns Dev., Inc. eds. 2010), *available at* <http://hdr.undp.org/en/statistics/>.

<sup>39</sup> TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2010 2 (2010), *available at* [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results). Transparency International rankings run from numbers 1–178. Note that TI data gives countries with the same score the same ranking, which explains duplicate ranks.

Selling Country	HDI Ranking	TI Ranking	Cumulative Area (ha)	Buyers' Country of Origin
Lao, Dem. Republic	122	154	200000	China, Vietnam
Zambia	150	101	186698	<i>Not known</i>
Tajikistan	112	154	110000	China
Mozambique*	165	116	96000	UK, <i>not known</i>
Namibia	105	56	70000	UK
Uganda	143	127	70000	Bangladesh
Ghana	130	62	50000	UK
Kenya	128	154	50000	Italy
Egypt	101	98	40470	Saudi Arabia
Sierra Leone	158	134	26000	Switzerland

Table 1 lists all countries that appeared as parties to negotiations over major land deals in news reports and other sources. Only transactions of over 10,000 hectares (ha) of land were included in this table; we list total area of land under negotiation in column 4.<sup>40</sup> Cumulatively, these large deals alone account for close to 60 million ha of land worldwide. The majority of these transactions are transnational – although this should not divert attention from the fact that transactions over smaller amounts of land (another roughly 50 million ha) often have local elites on the buy side. The only exceptions are Russia and Mali, where domestic buyers dwarf transnational ones. And in all cases, governments, rather than private investors, were on the sell side of these deals.

The second column lists how the selling country ranks on the Human Development Index (HDI), which measures development in terms of human capabilities rather than purely economic outcomes. Of all the 31 countries that have participated as sellers in major land deals, only a few rank in the upper 10 (Australia and the United States), whereas the majority of countries rank rather low: on a scale from 1 to 169, the mean ranking for all countries in Table 1 is 112 and the median is 125. When including Transparency International's "Corruption Perception Index" (CPI) (see Column 3), similar results are obtained. Most countries that appear as sellers in transnational land deals are well below the median, suggesting high levels of corruption.

This data can be interpreted in different ways. One possible reading is that these countries have little else to sell globally and are taking advantage of new opportunities of rising food prices to attract foreign expertise and capital in the hope that this may help them advance socioeconomically by turning them into important food exporters.

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<sup>40</sup> We do not have reliable data about which of these deals have been finalized or are in fact being implemented. The data are thus only indicative of the scale of transnational land deals.

As Professor De Schutter has pointed out, this interpretation is based on realistic assumptions, but it also ignores other possible interpretations.<sup>41</sup> First, whether the receipts from the land deals or the development spurt expected from them will actually advance the socioeconomic well-being of the people in those countries cannot be taken for granted. The dismal ranking of many selling countries in the CPI certainly does not bode well.

Second, there is yet another way to read these data, namely that *investors* are taking advantage of the opportunities of the emergent transnational real estate markets; investors are buying land as a safe place for storing value in times of substantial worldwide volatility in financial markets, with the expectation of substantial returns when land and food scarcity are felt more urgently in the future. In short, they are long term value investors but not necessarily strategic investors with a direct stake in either food or biofuel production. This interpretation would suggest that buyers with excess cash reserves, rather than immediate needs for food or substantial expertise in agricultural or biofuel production, dominate the buy side of these deals.

There is some support for this in the data. We do not have complete data for all entities that appeared on the buy side of these negotiations, but we do know the country of origin of most. Survey studies suggest that most buyers are organized as private entities; indeed some suggest that neither Sovereign Wealth Funds (SWFs) nor state-owned enterprises play a major role.<sup>42</sup> However, we find that if we rank the buyers' country of origin by total area of land deals negotiated, three of the top five are countries with huge foreign exchange reserves, namely China, UAE and Saudi Arabia – the other two being the United States and South Africa. China dwarfs all countries of origin – with over 30 million ha of land deals (or about 50 percent of all deals for which we have data) negotiated by entities of Chinese origin.<sup>43</sup> South Africa appears among the top countries of origin because of a single sizeable transaction between the Association of South African farmers and the Republic of Congo— this one clearly being a strategic investment. Buyers from the United States are a mixed group of institutional investors (TIAA-CREF with a land transaction in Australia), agribusiness, and national park developers. The identities of most entities from China are not known; the major investor from Saudi Arabia is the Bin Laden Group, and from UAE several entities with unknown affiliations.<sup>44</sup>

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<sup>41</sup> See De Schutter, *supra* note 1, at 520.

<sup>42</sup> See COTULA ET AL., *supra* note 16. Their research, however, focuses on five countries in Africa and is somewhat dated.

<sup>43</sup> Unfortunately, we lack sufficient data to assert the total amount that capital investors from these countries have spent on these deals.

<sup>44</sup> Data compiled by the Project on Globalizing Property Rights at the Center on Global Legal Transformation (on file with author).

What we do know about China and the Gulf states, however, is that they hold the world's largest foreign exchange reserves.<sup>45</sup> Various entities from these countries, including some of the SWFs and other investment arms of individual Sheiks, are investing in assets worldwide with the goal of protecting, if not improving, the value of these assets in the long term.<sup>46</sup> In fact, given the amount of reserves they control, the notion that these countries should acquire land globally for purposes of food security is not entirely convincing. They certainly have the wherewithal to buy food on global markets even at elevated prices. Biofuel might be of greater concern, especially for China, which does not have oil resources. However, at current world prices this is not a pressing issue, suggesting that these are also long-term value investments. This should not be taken to suggest that China is not or should not be concerned about securing essential resources – including water – for its people. Still, all of these are longer-term concerns. Buying land might be viewed as buying security, but only if the value extracted from the land is indeed greater than the price at which these resources can be bought at world market prices.

The structure of the deals lends further support to the notion that many of them are financial, not direct, investments in the classic sense. Data is difficult to come by. Most of the deals are not public – indeed some countries in East Africa have invoked state secrecy laws to protect their confidentiality.<sup>47</sup> However, studies that have been able to get access to the contracts have concluded that they are extremely simple and amount to not much more than straightforward land deals.<sup>48</sup> They do not specify future investments or other obligations of the buyer (lessee), much less the rights of people currently living on the land. One would not expect any more than that for financial investments.

This preliminary analysis suggests that these deals do not simply reflect a change in the demand for arable land. There are far too many countries involved on the sell side in light of the high concentration of arable land reserves, and on the buy side we find that countries with huge foreign exchange reserves dominate the picture. Instead, we can see the makings of a traditional real estate market, which often is investor-driven; excess money is poured into land after it has been commodified, driving up prices,

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<sup>45</sup> See Kyle Hatton & Katharina Pistor, *Maximizing Autonomy in the Shadow of Great Powers: The Political Economy of Sovereign Wealth Fund*, COLUM. J. TRANSNAT'L L. (forthcoming 2011) (analyzing the history of sovereign wealth funds from China and the Gulf states and their investment practices).

<sup>46</sup> See *id.*

<sup>47</sup> It is quite common in that part of the world for data to be obscured by state secrecy laws. Interview with Anonymous Official, East African Development Bank.

<sup>48</sup> See COTULA ET AL., *supra* note 16, at 7.

which attracts even more investments – a self-enforcing effect that not infrequently results in an asset bubble.<sup>49</sup>

Looking at the land deals as symptoms of a market in investment goods changes the perspective on these deals. Investors on the lookout for safety, but with the prospect of substantial long-term returns, are passive investors, and as such may prove less responsive to the integrative reform proposal Professor De Schutter is advocating. In the medium term this may reduce the vulnerability of people currently occupying land that has been sold or leased, as land may simply serve to store value; however, when the time is ripe to use the land or to resell it, those currently occupying it will have few options to protect their interests. That is precisely the purpose of a real estate market built on well-protected property rights – that is, for those who have such rights. Contractual protections aimed at protecting local populations would have only limited bite, lest the rights of *investors* (not only current occupants) to transfer land would be eliminated or conditioned on government approval. From a property rights perspective, these kinds of restrictions would be tantamount to destroying this new market.

#### IV. THE MARKET MECHANISM AS A GOVERNANCE DEVICE FOR GLOBAL LAND SCARCITY

This then raises the more crucial question of whether the market mechanism is a suitable governance device for checking increasing land scarcity. First, there is indeed increasing evidence that arable land is becoming scarce. Even if estimates for additional productivity are included, recent studies suggest that the world will have exhausted its remaining reserves by some point between the late 2020s and the 2050s.<sup>50</sup> How should this scarce resource be governed? Neoclassical economics suggests that markets are the best mechanism for allocating *any* resources; those who can pay the highest price for an asset are most likely to use it efficiently and generate the highest yields. Moreover, it is frequently suggested that more efficient use of the land may protect reserves longer as higher yields can feed more people.

Professor De Schutter has extensively criticized this line of argument by pointing out that it ignores data that suggest that small-scale agriculture tends to produce higher yields and is also more sustainable on environmental grounds than large-scale agriculture.<sup>51</sup> Others have pointed to even more complex interdependencies: “Land use change is driven by multiple, interacting factors that originate from the local to

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<sup>49</sup> See HYMAN P. MINSKY, *STABILIZING AN UNSTABLE ECONOMY* 130 (1986) (discussing the dynamics of financially driven markets giving rise to investor-driven asset bubbles)

<sup>50</sup> Lambin & Meyfroidt, *supra* note 35, at 3466.

<sup>51</sup> De Schutter, *supra* note 1, at 545–46.

the global scales, involve feedback loops, and cascade through land use system.”<sup>52</sup> Such a complex system may not be governed optimally by a governance regime that emphasizes absolute rights over clearly demarcated assets. Indeed, Lambin and Meyfroidt suggest that the effects of globalization may be better harnessed “if land use is understood as being part of open and complex human-environment systems dominated by long distance flows of commodities, capital and people.”<sup>53</sup> They do not indicate how such a new conceptualization might be translated into governance institutions. Whatever form it might take, it is likely to differ substantially from the model we currently have in place: well-protected individual property rights and a system that rewards the highest bidder irrespective of the cascading effects the exercise of “his” property rights might create.

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<sup>52</sup> Lambin & Meyfroidt, *supra* note 35, at 3468.

<sup>53</sup> *Id.* at 3471.