

2. Land market and taxation issues

2.1 Introduction

2.1.1 Background

Rights (e.g. leases, grants and rental agreements) to immovable property change hands in the 'land market'.

It may be 'informal', in so far as buyers and sellers do not have recourse to the law if one or other fails to meet the agreed conditions. The high demand for land in and around urban areas in Botswana has led to a rise in illegal and extralegal transactions in adjacent tribal land. Many of these fall between customary and statutory law, conforming to neither, but nonetheless meeting the immediate needs of the poor. This is often the case in informal settlements, where the poor are likely to be preyed upon.

Alternatively, the land market can be 'formal', in so far as transactions are carried out according to the law. An efficient land market encourages transactions between individuals which are underwritten by the law and by registered private service providers. An efficient land market requires only minimal day-to-day government intervention and supervision. In Botswana formal market transactions still receive a relatively high level of official sanction. While there are strong reasons for Government to underwrite tenure security by bringing as many transactions as possible within the ambit of the formal land market, it could probably achieve its economic and social objectives with less direct involvement.

Intelligent information and communications technology that makes cadastral information available to various private service providers and government departments, in a flexible and efficient manner, brings substantial economic benefits. Information in cadastral and legal land registers is an essential infrastructural component with an immense capital value. For this purpose modern Land Information Systems (LIS) have been developed. The term is applied to systems that focus on land parcels (land holdings) as units of information. In other words, they are land administration based. A LIS would permit the rational integration of the work of DSM, DL, Deeds Registry, Land Boards and DTRP as well as the revenue authorities.

By comparison with other countries in the region, facilitation of the land market is relatively advanced in Botswana. Customary tenure has been relatively successfully integrated with a modern and democratic system of land administration. The successful experience of Botswana has been used by development economists to back the view of Hernando de Soto, a Peruvian economist, who has proposed a stronger approach to land titling in poor countries (see Box on following page). However, in a fast developing country, stresses and strains are emerging in the operation of the land market.

The development of the land market provides an opportunity for citizens to generate capital through the formal acquisition of property assets. Without access to the benefits of property ownership, people will remain poor.

Fixing the Economic Potential of Assets

The representation of property (e.g. a house, workplace or farm) in the form of a title, a contract or other such record converts a dead asset into live capital. In the legal (as opposed to the extralegal) sector, property can be used for a loan; as equity exchanged for investment; as an address for collecting debts, rates and taxes; as a locus point for the identification of individuals for commercial, judicial or civic purposes; or a reliable terminal for receiving public utility services, such as energy, water, sewage, telephone or TV. In the formal sector, land and buildings have a variety of additional functions to secure the interests of other parties. By fixing the economic potential of assets through property records, capital is born.

Integrating Dispersed Information into One System

Most people in developing nations cannot enter their assets into a legal property system, no matter how they try. In consequence they end up holding them extra-legally. This failure to integrate the assets of the majority into a comprehensive property information system is a fundamental constraint to economic development. Integration in the Western nations did not happen casually, but as a result of statutes, judicial decisions and administrative measures over the last 150 years or more. In Japan, the process was not completed until the late 1940s. As a result of this integration, the potential of assets has become easier to evaluate and exchange, enhancing the production of capital.

Making People Accountable

The integration of landed property under one formal legal system helps shift legitimacy from the local community to the impersonal context of the law. Releasing owners from restrictive local arrangements and incorporating them into an integrated legal system increases both their financial opportunities and their obligation to behave responsibly. People who do not pay for goods and services can be identified, charged interest on unpaid bills, fined and have their credit ratings downgraded. Authorities can suspend services and place liens against their property. A great part of the potential value of the formal property system is derived from the possibility of its forfeiture. The lack of a legal property system explains why citizens in developing countries cannot readily make profitable contracts with strangers, cannot get credit, insurance or utilities services. They have no property to lose.

Making Assets Fungible

The incorporation of assets into a formal property system transforms them from a less to a more accessible condition so that they can do more work. The representation of property assets in the form of a title makes them 'fungible' – able to be fashioned to suit practically any transaction. Assets may be split into shares, each of which can be owned by different persons, to carry out different functions. Investors can divest themselves of their shares without affecting the integrity of a physical asset.

Networking People

By making assets potentially divisible, combined or mobilised, by attaching owners to assets, assets to addresses, and ownership to enforcement, and by making information on assets and owners easily accessible, formal property systems convert citizens into a network of individually identifiable and accountable business agents. The legal property system of an economically developed nation is the centre of a complex web of connections that equips ordinary citizens to form ties both with the government and the private sector and so obtain additional goods and services.

Protecting Transactions

The keeping of public records containing all the economically useful descriptions of fixed assets (e.g. land, buildings, businesses, industries) alerts potential buyers to encumbrances, easements, leases, arrears, bankruptcies and mortgages. The records are established to protect both the security of ownership and that of transactions. Security assures the authenticity and legitimacy of transactions so that people can more easily make their assets lead a parallel life as productive capital.

Based on the work of Hernando de Soto, *The Mystery of Capital*, 2000

The TOR for the study require the consultant to address the following land market issues:

- the high demand for plots in urban and peri-urban areas, land fronting and other illegal land transactions;
- land pricing and funding mechanisms which would make land more accessible to citizens in these areas;
- controlling land acquisition by foreigners.

Between 1992 and 2001, the number of annual market transactions of state and freehold land increased by about 56%. Transactions of tribal land are also accelerating. For example, the number of property transfers recorded annually by the Mogoditshane Sub-land Board increased by 93% between 1993 and 2001.

The upsurge in the land market is due to the absolute increase in the number of properties, rapid urbanisation, and greater immersion in the monetary economy. The land market is both a consequence of national development and a contributor to it. Expansion has been made possible by the development of public and private sector services to support the property sector and by the evolution of policy and legal reforms extending the scope of permissible land and property transactions.

Overall, there is an acceptance that the development of a land market is good for Botswana, but that it has to be regulated and controlled. Aspects that must be taken into account are:

- the different types of land tenure – tribal, state, and freehold – with different laws and institutions and associated market conditions;
- the policy of allocating free customary land grants on tribal land and subsidised allocations of state land to eligible citizens, which is contributing to the growth of land fronting and illegal property transactions;
- the concentration of property transactions within Gaborone (with about three quarters of all transactions by number and value of state and freehold land in 2001) where the greater support accorded to the operation of the land market may be a factor contributing to uneven urban development in the country as a whole;
- the requirement that, with the exception of the small area under freehold, land *per se* is not owned and traded, which has had important financial implications for compulsory acquisition and for the value of property assets as fixed-period state grants approach their date of expiry;
- the concern over the need to encourage foreign investment without an excessive amount of property ending up in the hands of foreigners; and
- the concern that greater tradability of land rights will contribute to further landlessness, as members of lower-income groups engage in distress sales.

The continuing growth in transactions raises a number of important issues:

- How can the land market operate more efficiently? Do existing institutions have the capacity to support (and regulate) the increasing number of transactions? Do members of the public have adequate access to information to help them make decisions about land transactions? Are there unnecessary impediments to transacting land? What will be the impact of applying VAT to land transactions, either in addition to, or instead of, transfer duties?
- How can land markets be extended? For example, the Draft Revised National Policy for Rural Development states that: *the principal issue is whether or not holders of tribal land grants or common law leases should be allowed to sub-let freely, effectively allowing them to trade their right to use land.* People holding residential plots in terms of CORs or customary grants find it difficult or impossible to sell their rights because they cannot afford to have the land surveyed and thus cannot obtain the title deed that would allow prospective buyers to access mortgage finance.
- The introduction of the Botswana Land Information System (BLIS) has greatly benefited urban land management. In the rural areas, progress has been achieved more slowly - there are large areas of low value land with a small and scattered population where few problems are perceived. However, there are places where the pressures are higher, such as the peri-urban areas and the urbanising villages, and where land management is hampered by the overall lack of information.
- The big question is whether extending the land market will contribute to landlessness and land speculation and whether there are ways of doing so that are relatively benign.
- How is it possible to reduce illegal and extra-legal transactions? People engage in various types of illegal land transactions. Perhaps the most common illegal transaction is 'land fronting', whereby a person who applies for a plot has pre-arranged to sell it to someone else with more resources to develop it – perhaps a foreigner –who might not be eligible to apply direct. Land fronting is in breach of the “development covenant” which forbids people to whom land has been allocated to sell it undeveloped. One option would be to enforce the rules more aggressively, and close the legal loopholes which evade the prohibition. Another would be to abandon the development covenant altogether.
- In addition there are issues relating to property taxes in all declared townships, an important tool for fiscal decentralisation and for funding the provision of services. However, for a variety of reasons property rates systems have a tendency to become weak over time. Large arrears and out-of-date valuation rolls are symptomatic of this weakness. Some of the problems with the existing systems were addressed in the amendments proposed in 1995 to Part VI of the Town Council Regulations that fall

under Section 9 of the Townships Act.³ These were not adopted due to the governmental restructuring of the mid-1990s that resulted in Local Government being split from Lands. It may be time to revisit these amendments. There are concerns too that people in peri-urban areas do not pay rates even though they may receive the same types of services as their counterparts in urban areas.

Although it is premature to make specific recommendations in respect of land markets and property taxation, a few principles emerge which are likely to guide the development of more specific recommendations to follow:

- **Increase homogeneity of treatment:** While distinct tenure regimes will no doubt remain in Botswana, there should be greater homogeneity the rules that govern property transactions. Liability for paying property rates should be extended to built-up peri-urban areas and private townships, hereby removing the arbitrary distinction between such areas and declared townships.
- **Address capacity constraints in land-related departments:** This can mean increasing internal capacity, outsourcing some functions to the private sector, and/or making strategic decisions to lower demands on departments, for example, by relaxing the standards that apply to surveys.
- **Promote access to and synthesis of information:** This includes information kept at the Deeds Registry, at the Department of Surveys and Mapping, at the Department of Town and Regional Planning, at the Department of Lands, in the land boards, and by town and district councils. Some information can be made available on a cost-recovery basis.
- **Accord legal recognition to more types of transactions:** Of particular concern here is the sub-letting of tribal plots and the obstacles to transacting unsurveyed land in urban and peri-urban areas.
- **Increase the supply of unserviced or minimally serviced land for settlement:** This is critical for the poor and will reduce the need to engage in illegal transactions.

2.2 Promoting land market efficiency

2.2.1 Background

In a so-called 'free market', market transactions take place in relation to rules and procedures, whether statutory or customary law defines these. Numerous kinds of rules have direct implications for the land market, e.g. pertaining to land registration and to land use. Rules may strengthen the market by promoting certainty and safeguarding the

³ The amendments to the Town Council Regulations referred to are the Rating Review proposals of 1995. These were examined and approved by Dept of Lands, all Urban Councils and members of the Urban Development Committee in 1995. The advantage of these proposals is that they build on and improve the existing system and avoid any radical changes.

public interest against uncontrolled land development. They may also have the potential to hinder the market.

Where the market in land is accepted, it is in the interest of good governance and the public good that it operates efficiently. Market efficiency depends most of all on three conditions:

- costs being kept to a minimum, so as not to deter land transactions;
- decisions being informed by near-complete knowledge of the nature and specifications of the property in question and of the land market in general; and
- minimising any uncertainty relating to the rights and obligations of land owners and tenants.

Promoting efficiency in the land market is thus largely about government providing an enabling regulatory framework and performing the necessary administrative functions effectively and efficiently.

2.2.2 Related land policy issues

The efficiency of the land market in Botswana is hindered by a number of factors. While more investigation is needed better to understand the obstacles to greater efficiency, the following points describe the most important constraints.

- The public has poor access to the kind of information that would help them decide whether or not to engage in transactions. For example, access to information in the Deeds Registry is restricted (unofficially if not officially).
- For a variety of reasons, transactions costs are probably higher than they need to be. One reason is that services required for urban land transactions are centralised in Gaborone, an inconvenience to those living in distant parts of the country.⁴
- For tribal land, it takes a very long time to process applications for transfers of customary land grants and leases and thus discourages transactions.
- Too much uncertainty prevails. A prime example is the lack of clarity regarding the renewal of FPSG, not least the terms and conditions according to which decisions will be made about their renewal.
- Many people who would like to sell are hindered from doing so because they do not have a title deed, which means that prospective buyers cannot get mortgage finance. The lack of title deeds relates to the fact that many plots have not been surveyed; surveys are either expensive, if one hires a private surveyor, or take a long time, if one relies upon the land board.

⁴ The Deeds Registry has opened an office in Francistown recently.

2.2.3 Policy principles and choices

Mindful of Botswana's unique circumstances, many of the measures that should be examined so as to improve the efficiency of the land market can be ascertained by referring to international best practice. These measures might include:

- Ensuring better access to information needs to be balanced against legitimate concerns about privacy. If necessary, facilities may need to be created to allow the public better access to information without inconveniencing Deeds Registry officials or undermining the integrity of the rights.
- Identifying ways of abbreviating the time it takes to effect transfers, especially, but not only, those that must pass through the land boards.
- Identifying other types of transactions costs that can be reduced.
- Providing more clarity as to the conditions according to which fixed period state grants are to be renewed.
- Devising low-cost methods to resolve land disputes in urban areas as an alternative to using the courts.
- Providing efficient, low-cost ways of surveying plots and issuing title deeds.

2.3 Extending land markets

2.3.1 Background

Land can be allocated and acquired either administratively or through the market. In theory, market allocation of land (or of particular rights in land) results in efficient land use, meaning that the land ends up in its 'best use', and thus promotes development generally. It also allows for greater mobility and flexibility, for example by enabling households to trade land rights for cash that can then be invested in other productive activities or land elsewhere.

In some countries, governments forbid certain kinds of transactions, for example, because they contradict other policy objectives such as protecting vulnerable groups from becoming landless. In Botswana, there has been a gradual evolution towards greater tradability of land in tribal areas. This is evident for example when in 1968 the Tribal Land Act provided for the common law lease on tribal land and in 1993 when the amendments to the Act first permitted the transaction of customary land grants.

Despite this trend, some kinds of transactions in tribal land are still not permitted. Others are very difficult and/or costly to effect. And still others are subject to conditions that might need to be reviewed.

2.3.2 Related land policy issues

The issue of extending land markets in tribal areas can be disaggregated into three distinct sub-issues.

- Although both customary land grants and common law leases are already tradable, the application procedures can discourage transactions to such an extent that a formal market barely exists in some areas. (This is largely addressed in section 2.2 above. It should also be recognised however that an absence of a market could be due to an absence of demand or supply.)
- Second, it should be recognised that opening up the land market need not mean an increase in *sales*, but rather *rentals*. Evidence from East Africa shows that land sales can sometimes lead to increased inequality, while land rentals tend to promote equality. Presently, there is no procedure in Botswana for legal recognition of leasing land held under a customary land grant or sub-leasing land held in terms of a common law lease. The introduction of the former might promote efficiency without the twin evils of landlessness and land hoarding.
- Third, the most important requirement that transactions of tribal land must meet is that, prior to transfer, the land must have been developed according to the use for which it was allocated. While the intentions of this condition are understandable, it must be asked whether the disadvantages exceed the advantages, e.g. by restricting the supply of land and encouraging informal transactions.

2.3.3 Policy principles and choices

The Draft Revised National Policy for Rural Development identifies ‘the need to introduce market forces on tribal land’ ... ‘the principal issue is whether or not holders of tribal land grants or common law leases should be allowed to sub-let freely, effectively allowing them to trade their right to use land.’

It is necessary to consider the effects of further extending land markets to tribal land. One possibility is that there will be a rise in speculative activity and an even greater rush for applications for unallocated land. Moreover, at a fundamental level, the right to sell or lease land at its market value calls into question the principle that only improvements and not the land itself may be sold. This distinction, which is increasingly difficult to grasp in today's environment, may have to be reformulated or simply abandoned.

Particular areas for attention might include the following:

- The possibility of permitting leases/sub-leases of customary land grants and common law grants should be explored.
- The prohibition on the transfer of undeveloped plots should be re-examined, in conjunction with a re-examination of the principle of allocating plots for free.
- If the transfer/sale/lease of tribal land is to be allowed, it must also be procedurally possible. Procedures would have to be reviewed to ensure that they are not prohibitively time-consuming or costly.

2.4 Illegal and extra-legal land transactions

2.4.1 Background

Illegal land transactions are those transactions that are conducted in violation of the law, while extra-legal transactions are those that are conducted without the benefit of legal recognition but which may not be explicitly forbidden. Both types of transactions present problems for land policy. Illegal transactions thwart land policy and force government to reinforce measures to prevent such transactions from taking place. Extra-legal transactions leave one or both parties insecure because neither has recourse to the law in the event of a dispute.

Illegal land transactions are increasingly common in Botswana, especially in urban and peri-urban areas, where market pressures tend to be strongest. Land fronting is one manifestation of this, whereby a person who applies for a plot allocation has pre-arranged to sell it to someone else with more resources to develop it, but who might not have been eligible to apply on his own behalf. Another form of illegal transfer is when a person owning *masimo* land in a peri-urban area subdivides and sells it off for residential purposes without the consent of the land board. The large numbers of rental transactions which take place on urban and rural land, but which have no legal status, provide examples of extra-legal land transactions.

2.4.2 Related land policy issues

Non-legal transactions may be an indication that the institutional and regulatory framework is unsuited to the prevailing economic conditions. The fact that valuable land is allocated to Botswana citizens for free creates a situation whereby some apply mainly for speculative purposes. Others find themselves tempted to sell even if that was not their original intention.

The situation is made more acute by the fact that the amount of land available for settlement in urban and peri-urban areas is restricted, not least because of the administrative burden of making more land available in a manner consistent with existing government policies.

On the other hand, only releasing land according to its market value would be likely to lead to a socially undesirable pattern of ownership. Private developers, for example, rarely cater for the needs of low-income households. Low-income households would seldom be able to live in well-located areas if 'ability to pay' were the sole criterion for land allocation.

A key problem that runs through the land policy is the distinction between ownership of improvements and ownership of the land itself. Increasingly the distinction is proving too abstract and too at odds with economic reality. The *masimo* holders are a case in point. Their land might be valuable by virtue of its advantageous location for future settlement, but according to the law the land is not theirs, and thus they cannot benefit from the value attributed to it by the market.

2.4.3 Policy principles and choices

The persistence of illegal and extra-legal land transactions calls for three types of measures:

- addressing the conditions that make non-legal transactions so likely and tempting;
- careful reconsideration of which type of transaction should continue to be restricted or banned; and
- more vigorous enforcement of rules that still apply and the introduction of new rules where necessary.

Subsumed within these points could be the following measures:

- Accelerate the pace at which land of different categories is made available, especially unserviced land on which self-help housing can be erected.
- When engaging in compulsory acquisition, improve compensation to *masimo* holders according to the market value of their land.
- Revise the functions of the land boards, especially in relation to operations in peri-urban areas, so that they acknowledge and monitor the many land transactions that are taking place, including land rentals.
- Close loopholes that are presently being exploited to transfer ownership to non-citizens without the oversight of the Deeds Registry (e.g. through sub-division into lease areas and via property companies). Similarly, resolve the various uncertainties relating to the Tribal Land Act and the Town and Country Planning Act.
- Ensure that the capital gains tax is properly applied in cases of land sales, especially where there has been a change of use.
- Provide for standard types of lease and develop pre-printed proforma documentation to enable people to enter into these classes of lease agreement.

2.5 Strengthening the property tax system

2.5.1 Background

It is generally agreed internationally that local government is more responsive to the people it represents when it relies on local sources of revenue. This is the principle of “fiscal decentralisation”.

In Botswana, town councils collect rates on property, but district councils do not, and these therefore rely almost entirely upon transfers from central government for their budgets.

However, even within town councils the property rates system is generally not performing as well as it should: re-valuations are not occurring as frequently as they should according to law; an unnecessary level of rigour is required for the rating of residential properties; the valuation basis (capital value) is not as convenient as it could be (rental value); and valuations are rarely contested, in large measure because of a lack of easy access to the valuation rolls, but also because of general apathy; and finally, collection is very poor and arrears are very high.

Some of these problems were addressed cogently in the amendments proposed in 1995 to Part VI of the Town Council Regulations that fall under Section 9 of the Townships Act. The non-adoption of these proposed amendments appears to have been due to the governmental restructuring of the mid-1990s that resulted in Local Government being split from Lands. Revisiting these proposed amendments would be a major step in the right direction to addressing the ills of the property tax system.

2.5.2 Related land policy issues

There are two main issues to be explored with regard to the strengthening of the property tax system.

What measures would be needed to strengthen the system as it already exists within town councils? In the first instance, a review of the proposed amendments from 1995 to Town Council Regulations is necessary.

The second issue that must be explored is whether owners of properties in peri-urban areas should also be liable for property rates, thus providing a stream of revenue to district councils.⁵ The main issues here are:

- whether the extension of liability would be politically acceptable;
- how to enable the district councils to cope with assessment and collection of property rates; and
- on what basis new property rating areas would be included.

2.5.3 Policy principles and choices

The land policy should provide regulatory arrangements for the efficient, sustainable and equitable occupation and use of land. This requires that users pay for the services they receive. Rates and property elsewhere are subsidised by central government. It is therefore necessary to:

- Review the proposed amendments to Part VI of the Town Council Regulations, and determine if Local Government and/or Lands can now champion them;
- Make valuation rolls easily available to the public, inform the public as to their publication, and allow ample time for objections to be lodged;
- Examine the possibility of extending liability of rates to all ‘built-up’ areas, including those that fall outside township boundaries;
- Devise a system for the collection of rates in non-township areas, either by capacitating District Councils or through co-operative arrangements with town councils;

⁵ Extension of rating to peri urban areas was a recommendation of the Second Presidential Commission on Local Government Structure in Botswana.

- Determine criteria for when a private township should fall within the taxing jurisdiction of the adjacent town council, and what rates would apply;
- Establish a valuation tribunal to hear all disputes/grievances/appeals arising from valuation (e.g. compensation, rental and rating valuations).

2.6 Land information

2.6.1 Background

In Botswana freehold land and urban state land plots are held in terms of registered title deeds supported by survey diagrams. Rural land held on customary tenure may have no formal documentation, or may be leased from the land board, in which case the land parcel is normally described by a sketch plan. A relatively small amount of such land is now surveyed prior to allocation.

Much rural land was allocated through grants made prior to the formation of land boards or on customary grant at a time when the need for comprehensive land records was not anticipated. Neither did the technology exist that would allow land administration and management bodies to easily access such information. Technology and communications have improved dramatically in recent years – it is now possible to keep information in a way that can be accessed and checked by computers through the telephone system.

The need for better land records in rural areas has long been recognised, and several pilot land inventory projects have been undertaken. None of these has been followed up. However, they have generally served to raise awareness of the potential benefits of better land information and the technical options that are becoming available to achieve this. The latest of these, the Tribal Land Information Management System (TLIMS) is ongoing.

2.6.2 Related land policy issues

Occupation of most tribal land in rural areas is either unrecorded, or inadequately recorded for present day needs. Without reliable information, it is not possible for land boards to make numerous decisions without costly and laborious site visits. Without reliable records, land boards are faced with numerous speculative applications and are unable to control land hoarding. The efficient administration of state land by the Department of Lands is dependent on ready access to land board records. Without such access, applications for state land cannot be evaluated fairly, as rural land holdings cannot be taken into account.

Records should to be in such a form as to facilitate the use of land and property as security for credit, and to support the development of an open market through enabling registration of title.

2.6.3 Policy principles and choices

The land allocation process should be equitable, unbiased and transparent – based on government policies regarding the amount and type of tribal and state land that should be

allocated. It should have regard to the need for control of hoarding and speculation through accumulation to the disadvantage of others. It should ensure that land allocated is developed and brought into beneficial use, and is thereafter well managed. Registered title to rural land should be an attractive option. It should be cost effective and take into account people's rural land values and respect for traditional ways of land occupation and use.

- An early objective should be to extend TLIMS and quickly build up the critical mass of information to achieve a return on investment, focusing on concentration of use, high market value and problem areas. Information should be shared between land boards, and between land boards and urban authorities. The capture of land information and maintenance of the data base should be an integral part of the work processes.
- Digital maps should be developed at appropriate scales for 'urban' villages, other locations such as areas targeted for commercial arable development, DTRP planning areas, etc.
- Introduce a "land object" based registration system in rural areas; examples of legal objects include parcels of land in individual occupation, subject to access rights, administrative units and natural features.

2.7 Access to land by non-citizens

2.7.1 Background

Many countries restrict the opportunities for non-citizens to own land. There are either outright restrictions – no non-citizen may own land – or limitations on ownership. Ministerial permission must be obtained; or a limitation is imposed on the amount, the whereabouts or the use of the land; or a limitation is imposed on the nature of the right which may be obtained; for instance only leasehold of a specified duration may be permitted. Any restrictions that do exist usually apply also to corporate bodies, partnerships and cooperatives etc., the majority of whose members or shareholders are non-citizens.

The Land Control Act (LCA) provides for the regulation of foreign ownership of land via the Ministerial permission approach: no dealing in agricultural land (land other than tribal land or land within a township) where the person acquiring the interest in the land is a non-citizen is valid without a Ministerial consent.⁶ Companies where the majority of the shares are owned by non-citizens are similarly constrained. The proposed sale and the agreed price for the land must be advertised. The Minister must have regard to criteria set out in s.7 of the Act in determining whether to grant a consent: these relate to economic development and productivity of the land; standards of good husbandry; any objections

⁶ The Land Control Act covers outright transfers recorded at the Deeds Registry. Transfers of shares in property owning companies to non-citizens are not recorded at Deeds. This is what causes a "blur" in property ownership and transfer information, and should be addressed by legislation.

made by any person and in particular whether a citizen might wish to enter into the transaction; and whether the person in question already has sufficient agricultural land. The Minister's decision is final and shall not be questioned in any court.

2.7.2 Related land policy issues

The deleterious social and economic effects of past foreign owned land on many countries in Africa provide ample justification for countries to regulate foreign ownership and occupation of land, especially agricultural land. On the other hand, a regulatory system which operates in an inefficient and discriminatory way – some non-citizens seem to get a better deal than others – will likely deter the foreign investment which many countries are seeking to develop their economies and which is one of the key elements of NEPAD. A further factor that needs to be taken into account is the US African Growth and Opportunity Act (AGOA) that extends trade benefits to African states that fulfil certain criteria with respect to providing a level playing field for foreign investors. It may be argued that to have in place a legal regime governing access to land that applies only to non-citizens infringes the principles of AGOA. Against this, it may be argued that the LCA is just one of a number of regulatory barriers to land transfers in Botswana; non-citizens are not being specially picked out.

Aside from agricultural land, access by non-citizens to land is relatively free of regulation. FPSGs may be acquired from citizens on the free market: this is giving rise to concern where it is argued that non-citizen activity in the market is driving up the price of land. With respect to tribal land, the transfer of an interest in tribal land is subject to the consent of the relevant land board and, with some limited exceptions, this applies to all transfers.

Where arguably less favourable rules apply to non-citizens is in relation to refusals of consent under the LCA. Refusals of consent to transfer interests under the TLA may be appealed to the Land Tribunal while no appeal lies from a Ministerial refusal under the LCA.

2.7.3 Policy principles and choices

Two fundamental principles of equity and efficiency in land markets may be seen to be in conflict here.

Equity stresses the perfectly proper social goal of developing a land policy that gives priority to the land needs of all citizens in rural and urban areas. Efficiency stresses the importance of a land market which facilitates the movement of land via market processes to those who can put the land to its highest and best use: if that means non-citizens acquiring land, so be it: it will be for the greater economic good of the whole country.

Insofar as policies and practices do discriminate, they appear to discriminate in favour of citizen purchasers of agricultural land (who can object to non-citizen would-be purchasers) and against citizen purchasers of urban land who cannot stop non-citizen purchasers of FPSGs. This infringes the principle of equity yet there is no evidence that it is advancing the principle of efficiency.

Similar principles and policies should apply to urban and agricultural land. The LCA should apply to urban land. Criteria for the grant or refusal of consent to transfer FPSGs appropriate to urban land should be developed taking as the starting point s.7 of the LCA. It might be appropriate to require a prior residency qualification in Botswana or even in the local authority area where one wishes to obtain an FPSG as being one criterion: this would help prevent absentee landlordism and fronting for non-citizens. The LCA should be amended to provide for appeals from the Minister's decision on an application for consent to a Land Tribunal. Land boards should apply s.7 LCA criteria to consent for transfers of land to non-citizens under s.38 TLA.