

Progress Report of the Panel of Experts on the Development of Policy on the Regulation of Ownership of Land in South Africa by Foreigners [Non-Citizens]

(VOLUME 1)

Panel Members:

Professor Shadrack Gutto (Chairperson)

Dr Joe Matthews (Deputy Chairperson)

Dr Dirk Kotze

Mr. Mandla Mabuza

Dr Danisa Baloyi

Prof Fred Hendricks

Adv Leah Gcabashe

Mr Cecil Morden

Mr. Bonile Jack

Ms Christine Qunta

Technical support team:

1. Mr Jeff Sebape

2. Ms Tumi Seboka

3. Mr Sunday Ogunronbi

4. Mr Sam Lefafa

**Presented to the Minister for Agriculture and Land Affairs, Ms A T Didiza
on 17 February 2006, Pretoria**

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Acknowledgements

The Panel of Experts on Foreign Ownership of Land (hereinafter PEFOL) wishes to acknowledge all those who have participated in and assisted with the inquiry. In particular, the following deserve special mention:

South African

1. *People who made written and oral presentations*
2. *Department of Land Affairs*
3. *Department of Provincial and Local Government*
4. *Institute of Estate Agents, South Africa*
5. *Parliamentary Committees on Agriculture and Land Reform*
6. *Total Geo-spatial Information Solutions*
7. *National Land Summit of July 2005*

Foreign

8. *Singapore: Singapore Land Agency*
9. *Indonesia: National Land Agency*
10. *Canada: Highlands Regulatory Appeals Commission
Ministry of Natural Resources and Environment
Foreign Ownership of Land Administration*
11. *Chile: Ministry of National Properties
Ministry of Agriculture
National Agricultural Society
Chilean South and African Chamber of Commerce*
12. *Scotland: Dept of Environmental and Rural Affairs
Scrofting Law Group
Scottish Land Court*
13. *England: Dept of Constitutional Affairs:
Royal Institute of Chartered Surveyors
Chartered Institute of Taxation*
14. *Brazil: Ministry of Agrarian Development*
15. *U.S A: Pretoria Embassy*

Background: appointment of the Panel and the terms of reference

The land question in South Africa is central to the actualisation of the core constitutional values of human dignity, the achievement of equality, the advancement of human rights and fundamental freedoms, non-racism and non-sexism. Equitable access to land is a yard stick for measuring the worth of citizenship and how rights, freedoms and responsibilities are distributed in the New South Africa. In essence, progress in resolving the land question is an important barometer for measuring the manner in which South Africa is consolidating its democratic gains. In other words, reasonable and equitable resolution of the land question is an essential component in the building and the sustainability of constitutional democracy in South Africa.

The Panel of Experts on Foreign Ownership of Land (PEFOL) was constituted and commissioned by the Minister of Agriculture and Land Affairs on 24 August 2004, long before the July 2005 National Summit that urged the government to impose a moratorium on acquisition of land in South Africa by foreigners. Despite government's concerted effort to address the land question through restitution, tenure security, and facilitating access to land through redistribution and the provision of housing as mandated by sections 25 and 26 of the Constitution, there remains a strong and growing public opinion and impression that more needs to be done, and be so done at a faster pace. There is also very strong public opinion and perception, as manifest in the public hearings convened by the PEFOL, that an unregulated ownership of land and landed property, such as housing, by foreigners contributes significantly to the lack of readily available and affordable land for land reform. Given the history of racially based exclusion of the majority of citizens from land ownership, development and use under the colonial and apartheid regimes, unregulated acquisition and disposal of land and landed property without some priority of access being given to those who were arbitrarily excluded can only lead to perpetuating the *status quo*.

It is within this background and context that Government considered it imperative to start a process of developing a comprehensive policy on foreign ownership of land. The PEFOL was appointed to assist Government in understanding the extent of ownership of land in the country by citizens and foreigners, the legal and policy landscape, the policies and legislative framework in selected representative foreign countries on the matter; and to point to possible policy, regulatory and legal reforms for consideration by the Government.

The Terms of Reference (TOR) of PEFOL are, amongst others, to *investigate*, consider and make recommendations regarding:

- ◆ The nature, extent, trends and impact of the *acquisition* and *use* of, and *investment in* land in South Africa by non-South African citizens;
- ◆ The extent to which the current lack of a comprehensive policy and legislative framework contributes to the acquisition, use and investment in land by non-South African citizens;
- ◆ Whether the Government should (and how) monitor and intervene by policy, legislative and other means, in preventing any possible negative consequence of land acquisition/use by non-South African citizens;
- ◆ The impact on the property markets on land acquisition and use by non-South African citizens, distinguishing between land use for residential, commercial, agriculture, eco-tourism/tourism/game lodge and golf course purposes; and
- ◆ Comparative international practices (laws, policies, impact, etc) on the issue of land ownership by non-citizens.

In executing its mandate and tasks, PEFOL considered the relevance of size and percentages as well as economic value of land to the question in study. Within the African context, however, other considerations of historical, spiritual, emotional and strategic nature are equally important. The need to

promote social stability may necessitate restrictions on foreign ownership. Governments the world over are often unable to resist popular pressures around land ownership since assuaging national emotions becomes a legitimate consideration.

The PEFOL regrets that it was not able to present the written progress report earlier as it had to grapple with the difficulties of obtaining, analysing and mapping concrete data from the Deeds Registry, practitioners in the property sector and the plethora of legislation regulating land development and use at all the 3 spheres of Government. There was also need to undertake study tours to the selected foreign countries in order to gather and verify information that may be useful for benchmarking the development and management of a new South African regulatory framework. The Report has established the approximate proportion and categories of foreign owned land, the constitutionality of regulating foreign land ownership and provided a landscape of the disparate legislation applicable to regulation of land development and use. The report has also exposed the widely held myth that there is abundant unoccupied state owned land suitable for land redistribution.

The Report is divided into eight parts. The first 7 narrative parts are in **Volume 1**. Part 8 consisting of 12 appendices appears separately in **volumes 2-7**.

The seven (7) parts in **Volume 1** consists of the following:

- (1) The executive summary
- (2) Analysis of public written submissions, oral presentation and parliamentary committee's recommendations and the national land summit resolutions
- (3) Quantification and spatial mapping of patterns of land ownership and property prices
- (4) Forms of regulation of ownership and use of land and property by non-citizens in selected foreign countries and report of study visits by the Panel
- (5) Revision, harmonisation and rationalisation of development planning and land use legislation
- (6) Initial recommendations for immediate policy consideration; and
- (7) On-going tasks for the preparation of the final report.

Part 1.

Executive Summary

Introduction

This is the first written progress report submitted to the Minister by the Panel. It is envisaged that the second progress report shall be submitted to the Minister by January 2006 and the comprehensive final report by April 2006. The progress report records the work of the panel between August 2004 and 31 October, 2005.

Methodology

The methodology used by PEFOL included, amongst others, desktop studies, textual interpretation of legislation and policy on access, ownership and use of land, scientific research, solicitation and analysis of public submissions (oral and written), interpretation of Deeds Registry data, analysis of sourced information provided by foreign embassies and high commissions in South Africa and evaluation of information gathered first hand from study tours in selected foreign countries.

It is important to provide international comparisons for the development of South African policy in respect of ownership of land by non-South African citizens. This is vital not only from the perspective of the TOR but also to determine whether there are any appropriate lessons to be learnt from attempts to regulate foreign land ownership. To this end, the Panel has investigated comparative foreign trends at some length as well as the position under international law.

Constitutional imperatives on land reform and the case for special regulation of foreign ownership and use of land in South Africa

It was considered imperative to base PEFOL approach on sound constitutional framework in the interest of promotion and protection of the constitutionalism and the rule of law. The Constitution of the Republic of South Africa 1996 (hereinafter “the Constitution”) makes an important and material distinction in the conferring of rights and freedoms to citizens on the one hand and non-citizens or foreigners on the other. As a general rule, the Bill of Rights (Chapter 2 of the Constitution) confers rights on “everyone” or “a person”. In such cases, the rights and freedoms are presumed to be bestowed on all persons, citizens and non-citizens. However, where the Constitution specifically confers rights and freedoms on “citizens”, it is clear that such rights and freedoms cannot generally apply to non-citizens or foreigners. Examples of the former include the right to life, human dignity, equality before the law, the pursuit of substantive equality, and freedom of association (sections 11, 10, 9 and 18 respectively). Examples of the latter include political rights, the right to a passport and the right to choose their trade, occupation or profession freely (sections 19, 21(4) and 22, respectively).

For the present purposes, the relevant provisions in the Constitution that bestow rights on citizens only are section 21(3) – right to enter, to remain in and to reside anywhere in the republic – and section 25(5) – state duty to make resources available and to create conditions which enable citizens to gain access to land on an equitable basis.

The constitutional imperative on land reform in general is captured in the TOR and the elaborate interpretation that the Panel of Experts has given them (see the advertisements for written submissions and the public hearings).

It is clear from the above that policy and legislative measures may be taken to give meaning to the specific rights and freedoms of citizens with regards to residence and access to land that may positively discriminate against non-citizens, provided that such measures do not amount to arbitrary deprivation

of property as contemplated in section 25(1) of the Constitution and are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (section 36(1)). The only debatable issue is the rights of those holding permanent residence status, as explained in the “Definitions and Glossary of Terms” in this Progress Report.

Should any contemplated measures require expropriation of existing property rights of non-citizens, applicable constitutional and legislative guarantees, principles and procedures must be followed (see section 25(2)-(5)).

International law contemplates the same guarantees, principles and procedures with regards to protection against arbitrary deprivation of property¹ and right to adequate compensation in the event of expropriation for legitimate reasons² such as those provided for in our Constitution.

Terms, concepts and definitions

Key terms and concepts posed major challenges to the inquiry and analyses. In particular, terms and concepts of land, property, ownership, citizenship (and non-citizenship), nationality, juristic and natural persons were investigated and interrogated in detail. It is clear from constitutional jurisprudence (case law) surveyed that ownership rights must be balanced against constitutional injunctions and societal needs. It is established that although they fall under the category of “foreigners”, permanent residents in South Africa enjoy special rights in the Republic. The question of what is foreign is also complicated with regard to corporations and trusts. The detailed study conducted on terms, concepts and definitions accompanies this Progress Report as **Appendix 1**. Analysis of foreign interests in juristic persons that own land in South Africa is ongoing.

¹ Universal Declaration of Human Rights (1948), Article 17.

² Declaration on Permanent Sovereignty over Natural Resources, G.A. Res 1803 (1962), Article 4.

The extent of foreign ownership of land as reflected in the Deeds Registry data

Despite the unhelpful status of the current deeds registration information system in determining the extent and nature of foreign ownership and use of land in South Africa, a technical information interpretation commissioned by the Panel³ produced results which point to the general status of land owned by South Africans, foreign individuals, corporations and trusts, and inconsistent data and gaps in the data. These have been plotted on maps and presented in tables.

The preliminary findings are that foreign individuals own approximately 1% of *erwen*, 0.6% of farmland, nearly 2% of agricultural holdings and 3% of sectional titles in terms of count or units. These represent approximately 0.74%, 0.15%, 1.75% and 2.46% in value, respectively. In terms of area, the figures represent 0.07%, 0.07%, 1.98% and 0.52%, respectively. These percentages however only refer to ownership by individual foreigners and do not include the extent of foreign interests in corporations (public companies, CCs and Ptys), trusts and section 21 companies that own and use land. In addition to corporate owners, there is a category of “*defective records*”. Some registered deeds have no ID or passport numbers and some have conflicting entries that may very well include significant numbers of foreign owners or substantial foreign interests. These knowable “*defective records*”⁴ account for:

- 8.27% in area and 17.66 in value for *erwen*;
- 11.97% in area and 15.70% in value for *farms*;

³ TGIS, Lynwood Ridge, Tshwane (Pretoria), **Interim Report on Foreign Land Owners in South Africa**, July 2005 (**Appendix 10**)

⁴ The Chief Registrar of Deeds explained to the Panel that the “*defective records*” are due to error in recording entries over the years and presented the Panel with progress in correcting the records.

- 18.48% in area and 4.10% in value for *agricultural holdings*; and
- 1.17% in area and 11.40% in value for *sectional titles*.

It is therefore very likely that the total figures of foreign ownership inclusive of the corporate share will increase dramatically in terms of value and area. The Panel is continuing with the analysis of corporate ownership and will re-examine the progress being made in correcting the “*defective records*” category. Overall, the PEFOL is of the opinion that extent and nature of foreign ownership of land in South Africa is significant enough to require policy and legislative regulation along the initial measures recommended and those under consideration for the final report.

Initial recommendations for immediate policy consideration

This report proposes initial recommendations for immediate policy consideration dealing with the issue of ownership and use of land by foreigners in South Africa within the context of the overall land reform policy, constitutional and other relevant legislative imperatives. The immediate initial measures are projected at preventing unintended consequences such as land grabbing, and putting in place mechanisms to start generating reliable data on records of transactions on land and landed property, including ownership and changes in land use.

The central concern in the report is the lack of clarity around the question of who actually owns South Africa. While we have data on general trends of ownership by natural persons, there are substantial deficits in the detail of nationality based information on land-ownership by corporate entities and in the category of “*defective records*”. The fact of the matter is that the Deeds Registries is currently not in a position to provide reliable information on the actual extent of foreign ownership of land in the country. Figures that are normally quoted in public debates in the media have been proven to be based on mere conjectures with no sound scientific basis.

The report proposes that government should consider immediate policy measures to assist it in regulating the de facto situation in respect of foreign ownership of land. The immediate initial measures are designed to facilitate ongoing investigations into the impact of foreign land ownership on land use and prices and consequently on the prospects for meaningful land reform in South Africa within a regime of the rule of law and the Constitution. The immediate initial measures, if accepted and implemented, will start introducing new and reliable information system that can easily produce data on foreign ownership and use of land and conditions attached thereto, and ownership and use of land by gender and race.

The Panel recommends to the Minister the following four (4) initial measures:

(i) Introduction of reporting requirements for certain transactions on land and landed property

Natural and juristic persons to make declarations on, for example, transfer duty and deeds registration forms with regards to gender, citizenship, nationality, race, identification number, passport number, company registration number, income tax registration number, VAT registration number, trust registration number, category of shareholders and beneficiaries, as may be appropriate to the category of the legal personality. The race disclosure might apply only to South African citizens for purposes of measuring transformation in the country's land holding patterns.

(ii) Introduction of ministerial approval for certain transactions on land and landed property

- Agricultural land in excess of certain prescribed value and/or size depending on the agrological zones;

- land earmarked for restitution or redistribution;
- protected areas such as coastal land, water catchments military installations and land along the international territorial boundaries of the Republic of South Africa; and
- land used for golf estates, golf courses and game farming

(iii) Establishment of an intergovernmental review and oversight committee

It is recommended that a permanent inter-departmental and intergovernmental review and oversight committee to oversee the implementation of the regulations with regards to ownership and use of land by foreigners and non-residents be established.

(iv) Rationalisation and harmonisation of zoning and change of land use approval procedures

It is recommended that the government undertakes a review of current procedures and practices in the zoning and re-zoning of land for land use purposes and to institute capacity building in this regard, especially at the local government level. The draft Land Use Management Bill addresses some aspects of the lack of uniform legislative approach.

Part 2.

Analysis of public written submissions, oral presentation and parliamentary committee's recommendations and the national land summit resolutions

The Panel received about 60 oral submissions and about 10 written submissions from different organisations and individuals. They represented a wide range of opinions including organised agriculture, organised estate agents, NGOs, organised business, local communities, municipal councillors, traditional healers, trade unions and political parties.

For the purpose of this report this wide range of views will be summarised in two broad categories. The first category approaches the issues from the perspective of the impact on investor confidence, foreign direct investments (FDI), the free market, and economic growth's "trickle-down" effect on employment opportunities. The second category approaches it from the perspective of land reform and community development. They are not in all respects mutually exclusive.

The first issue addressed in both categories is the relevance of foreign landownership for the general concerns about landownership articulated by proponents of both perspectives. The first category does not perceive foreign landownership to be a major concern, except by the organised agricultural sector. The second category includes a combination of views. Some are convinced that foreign landownership is an obstacle to land reform and that they are more insensitive towards the interests of community development than South African owners. Others - notably community organisations in the Western Cape - do not attribute their land problems to foreigners but to

insensitive local authorities, South African developers and absentee landowners.

A second issue presented by the submissions, is that foreign landownership is not necessarily an issue throughout South Africa, but that it is regionally concentrated. The number of submissions presented to the Panel is not a scientific method to locate these regions but it is noteworthy that the highest number originated from the Western Cape and Northern Cape. They represented concerns in respect of the second category, articulated mainly by community organisations. The Cape Peninsula is certainly another concentration point, mainly from the perspective of the first category. Therefore the main presentations made there came from the estate agents and the Democratic Alliance.

A third issue addressed in both categories, is the extent of foreign ownership in the country, and its impact on property prices and land reform. The Panel's dilemma is that almost no empirical evidence or data has been presented to it to substantiate the various arguments. A number of submissions used the same data made available by estate agents that 0.5% of the total value of property transactions between 1997 and 2002 were foreign in nature. Pam Golding claimed that 5-8% of all the company's sales were foreign in nature. Apart from these vague data, nothing has been forthcoming.

Most of the submissions arguing for and against the impact of foreign ownership rely on public *perceptions*. Perceptions cannot be discarded as irrelevant for policy-making when the policy environment is a democratic one. But it has to be complemented by empirical data, which appear not to be available at present.

Moreover, the Panel did not receive any submissions or other information about the economic impact of foreign ownership. No economic analysis is yet available on the impact of foreign ownership on the property market (prices and changes in land usage) and FDI or investor confidence. Equally vague, is

the impact of commercial agricultural land converted into game farms/lodges on job opportunities, food production, income generation, etc.

Within the context of the above considerations, the arguments for the two categories as presented in the submissions are now summarised:

1) Free market, investor confidence, job creation and no government intervention:

The main argument is that the South African government since 1994 has embarked on macro-economic policies which opened and liberalised the economy and encourages FDI. It therefore depends on unrestricted competition and investor confidence. It also assumes that FDI will encourage economic growth, which will “trickle down” and create more job opportunities. Price increases in the property market since 1994 are attributed to relatively low interest rates, good and attractive economic policies and rising construction costs.

Government intervention will harm investor confidence and therefore the “trickle down” results. Moreover, it is argued that the extent of foreign ownership in the overall market is relatively small and therefore does not require policy interventions. The Panel still requires a clarification of this argument in view of the fact that the proportion of foreign ownership is arguably relatively small or even insignificant but that their FDI contribution is used as an important justification against any policy intervention. Organised estate agents and the Democratic Alliance are the main proponents of this view. AgriSA uses it also in a qualified manner.

2) Land reform and community development:

The main argument is that a new government policy is urgently required to regulate landownership, because the principle of “willing buyer, willing seller” promotes a free market but not necessarily land reform. Unregulated property developments also have detrimental effects on established communities. In

this category there is no consensus about the blame foreign ownership should carry for the problems experienced in land ownership.

Development is supported by almost all the proponents of this category, but its preferred nature is contested. Local communities in particular, view development often as a threat to their established livelihoods. In the Western Cape, for example, new developments (foreign and local) appropriate land used by these communities, who sustain their living conditions partly by using sources from the sea. Developers pay the house owners a substantial amount of money to relocate them to a house in a town, where they cannot continue with their established lifestyle. New developments also require other types of skills from their workers, and therefore farm-workers cannot be re-employed by the new development. Even if communities can remain on their land, new developments (like golf estates) are fenced-in and therefore they are denied access to beaches and the sea for collecting food and fire-wood.

Organised agriculture like NAFU and AgriSA, and individual farmers are also in their way in support of this category. They argue that the Rand currency cannot compete with foreign currencies in an open market on the basis of willing buyer, willing seller. Therefore prime agricultural land is purchased by foreigners. Even in the absence of foreign competition the same principle is counter-productive for emerging NAFU farmers. AgriSA added another dimension to it by insisting on policy intervention to protect prime agricultural land against conversion into other uses, and to protect specified strategic areas.

Farmers and local communities also argue for national government intervention in response to the local authorities' inadequate vision and support, as well as the inadequate cooperation between the three spheres of government. They are of the opinion that local authorities work in cahoots with developers, without being sensitive to established communities. Some proponents of this view believe that local authorities are overwhelmed by applications for developments, that they do not apply their minds to the applications but are more concerned about the rates and taxes income the

developments can generate than about their social and environmental impact. Application procedures are so diverse (some are lodged at local authorities; others at tribunals, etc) that coordinated spatial development is almost impossible.

Special areas of attention.

Several of the submissions in both categories highlighted three contentious areas of landownership: golf estates, game farms/lodges and high potential agricultural land.

Golf estates are developed mainly on South Africa's eastern and southern coastal areas and in Gauteng. Submissions from the Southern Cape refer to them in particular. It appeared from those submissions that the 34-odd estates are developed by South Africans but marketed abroad. Houses are therefore owned by foreigners but not the rest of the estate. The public debate on golf estates focuses on their environmental impact like water consumption, but not equally much on their social impact on local communities dislocated by these developments.

Game farms/lodges are also contested. The free market argument is that they attract FDI which creates employment opportunities and economic growth. It also argues that unproductive or under-utilised agricultural land becomes productive as well as promote tourism/eco-tourism. The contested point is whether game farming is more labour intensive than commercial farming. The intervention argument is that conversion of commercial to game farming/lodges negatively affects South Africa's food security, that it encourages speculation with land, that it does not necessarily create so many new job opportunities and that it leads to unemployment for farm workers. The latter point is that workers on commercial farmers are often uneducated and skilled in commercial farming tasks, while game farming requires higher educated workers with other skills.

The extent of foreign ownership of game farms/lodges, and of conversions from commercial to game farming, is not known to the Panel, and no submission could provide any more clarity on this matter.

Both organised agriculture and local communities maintained that high potential agricultural land should be protected by government. The balance of views is in favour of the argument that it should be excluded from foreign ownership.

In view of the arguments raised in the submissions, they suggested the following recommendations.

Suggestions from the public

The suggested recommendations extracted from the submissions are also summarised in accordance with the two main categories:

- 1) Free market, investor confidence, job creation and no government intervention:

The proponents of this category did not suggest many recommendations, except to encourage a free market in the property environment. Government intervention would discourage investor confidence and might also violate bilateral investment agreements between South Africa and her trade and investment partners. The current tax regime is considered to be appropriate and should not be altered. The proponents also endorsed the “willing buyer, willing seller” principle. One of the provincial, organised agricultural societies (but not the national body) argued that the opportunity costs of land used for agricultural purposes might dictate an application other than agricultural. This cost can only be effectively determined if the scarcity value of land is determined by market forces.

2) Land reform and community development:

The following are recommendations listed in no particular order of importance and also not designed as an internally-coherent package:

i) Leasehold

Title-deed ownership by foreigners should be converted into leasehold rights. Alternatively, new land acquisitions by foreigners should only be in the form of leasehold rights. This does not necessarily improve access to land for South African citizens but it will prevent land from being alienated. The recommendation is linked to the suggestion that foreign investors should establish partnerships with South Africans - a model used in several countries.

ii) Land quantity restrictions

A maximum size/value of land for ownership by foreigners and South Africans should be considered. Such an intervention will have to take into consideration the nature of farming and property utilisation in the different regions of the country.

iii) Impact studies

Environmental impact studies are already a statutory requirement and an established practice. The same principle should be extended to include also a social impact study, which includes the impact of a proposed development on communities affected by it: their residential and settlement patterns, their economic and sustainability patterns, and the possible impact on sites of historical, cultural and heritage importance.

iv) Indaba of interested groups

Several submissions emphasised that communities feel isolated from decision-making in the big centres and insisted on more communication with

them, and also amongst them. Therefore they proposed a land indaba first at local level, which can evolve into provincial or a national indaba.

v) Review of investment agreements

A special committee should be established to review investment agreements based on criteria such as land reform needs, land usage, sensitive heritage sites, and the benefits for the poor and landless.

vi) First-option purchaser

Whenever agricultural land becomes available on the market (the relevance of nationality is not specified here), the South African government should have the right to exercise the first option for purchasing it.

vi) BEE framework

BEE should be incorporated into the land issue and it should apply to both local and foreign investors.

vii) Local authorities and development

Local authorities have to adhere to national spatial development and planning frameworks. Through their Integrated Development Plans they have to implement policies to promote integration and redistribution of land.

ix) Government regulation of land usage and ownership

Special approval procedures should be applicable when land exceeding a certain value or size changes in ownership. This should apply to all buyers and sellers, irrespective of their nationality. The farming community is also in favour of regulations to protect South African ownership of certain strategic areas while other areas are regulated by lesser restrictions.

x) Limitations on foreign ownership

Some submissions suggested an immediate moratorium on foreign ownership and others suggested an arbitrary cut-off date for foreign transactions. The majority of submissions did not support such drastic intervention.

xi) Permanent residents

The Panel distinguishes mainly between South Africans and foreigners on the basis of citizenship. A submission also suggested that “permanent residents” should be treated as another, intermediary category, and should be distinguished from seasonal foreign visitors.

xii) Taxation/land-fee

Taxation as an alternative for restrictions on foreign landownership emerged as a popular proposal in a number of submissions. The one set of proposals suggested:

- foreigners should pay a separate scale of duties and transfer fees when purchasing property
- different rates should be paid to local authorities in respect of undeveloped stands; properties owned by foreign, permanent residents; and by foreign, seasonal visitors.

Another proposal is the following:

A distinction is made between “raw land” (the value of the property which arises independently of the owner’s efforts, such as by nature, good governance, public infrastructure, amenities, etc) and “improvements”. The value of raw land lasts “in perpetuity” while improvements have a shorter economic life due to depreciation and obsolescence. Alienation of raw land to foreigners means that its rental income leaves South Africa for as long as the foreigner retains ownership. Improvements - even by foreigners, on the other

hand, are good for the economy and can create job opportunities. Therefore the proposal is a policy to prohibit alienation of land but which encourages investment in improvements by foreigners. This can be achieved by introducing a land-user charge or land-fee, which is similar to the “differential” rating available as an option in the new Rates Act. Depending on the rate used to calculate the land-fee, it can deter absentee ownership (foreign and local), and it can ensure that both urban and rural land are developed and not left vacant. It can also ensure that more improvements are made and that land prices across South Africa are reduced, because it discourages speculation with land.

Consultation with and special submissions by the Institute of Estate Agents of South Africa

The Panel held consultative meetings in Pretoria, Tshwane, and Cape Town and with the representatives of the Institute of Estate Agents of South Africa (hereinafter the “Estate Agents”). The written submission by the Estate Agents confirmed some information in the possession of the Panel but also introduced some new information and opinions. The following were particularly relevant to work of the Panel:

- Confirmation of administrative bottlenecks and sometimes inadequate capacity at local government level;
- Confirmation of rapid escalation in house prices leading to lack of affordability for new-comers
- Confirmation that between 1999 and 2004 the sale of housing units to foreigners in Cape Town averaged between 6% and 7% of the total
- Confirmation that foreign buyers have significant investments in wine farms
- Contention that sales to foreigners (not cumulative ownership by foreigners) does not exceed 1% of residential property sales, except for some prime seaboard areas in Western Cape and KwaZulu-Natal where foreign buyers constitute a significant percentage.

The Estate Agents recommended, amongst others, that:

- A common definition of a foreign buyer is needed; and
- The Deeds Office should be mandated to record disclosures of foreign ownership in relation to transfer of residential property.

**SUBMISSION TO THE DEPARTMENT OF LAND AFFAIRS FROM THE INSTITUTE OF ESTATE AGENTS OF SOUTH AFRICA
REGARDING THE MAGNITUDE AND IMPACT ON THE RESIDENTIAL PROPERTY MARKET OF ACQUISITIONS BY NON-SOUTH AFRICAN CITIZENS**

ADDENDUM A

**SOURCE: Residential Property Price Ranger (RPPR) by month for the Western Cape
& South African Property Transfer Guide (SAPTG) totals for the Western Cape**

Period: December 1999 - November 2004

RPPR - TOTAL SALES IN TERMS OF UNITS

**SAPTG - TOTAL SALES
IN TERMS OF UNITS**

UNITS	Dec-Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	TOTAL	TOTAL
1999	1133	179	1333	923	923	913	873	1023	987	1133	1133	13845	37259
2000	1633	1413	1383	303	1163	1804	693	1133	1383	1283	1133	13134	37724
2001	1793	1217	1241	1311	1153	1193	891	1193	1074	1283	1283	13242	38383
2002	2545	1521	1583	1284	1863	1197	1194	1547	1293	1387	1303	15719	47033
2003	2548	1493	1323	1283	1261	1372	1458	1338	1573	1313	1573	19819	50103
2004	2538	1637	1631	1423	1443	1303	1833	1573	1483	1483	1453	17117	45703

RPPR - TOTAL SALES TO FOREIGNERS IN TERMS OF UNITS

UNITS	Dec-Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	TOTAL
1999	97	57	56	55	25	31	23	24	27	46	81	523
2000	69	32	38	42	36	37	23	42	38	30	40	343
2001	112	68	78	53	48	43	43	54	34	44	38	313
2002	228	148	148	142	118	71	69	97	88	38	130	1304
2003	273	158	148	145	134	79	143	100	88	118	32	1442
2004	213	142	141	124	38	83	69	68	61	37	54	1128

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RPPR - PERCENTAGE UNITS BOUGHT BY FOREIGNERS

**SAPTG - PERCENTAGE OF
UNITS BOUGHT BY FOREIGNERS**

PERCENTAGE	Dec-Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	TOTAL	TOTAL
1999	3.5%	7.5%	5.7%	5.9%	4.34%	3.41%	2.69%	2.39%	2.74%	4.31%	5.40%	4.67%	1.42%
2000	5.54%	5.8%	4.98%	4.35%	4.81%	3.80%	2.70%	3.69%	3.39%	2.20%	3.51%	4.19%	1.48%
2001	6.59%	5.59%	3.12%	5.21%	4.35%	4.36%	4.04%	2.52%	3.39%	2.38%	5.12%	4.67%	1.88%
2002	13.07%	9.99%	10.77%	11.82%	7.14%	6.36%	5.20%	8.19%	8.89%	5.38%	8.38%	6.30%	2.77%
2003	11.94%	13.88%	11.25%	11.45%	8.32%	6.76%	9.46%	7.69%	5.49%	4.88%	5.38%	6.55%	2.89%
2004	8.63%	8.69%	8.69%	8.71%	8.28%	6.51%	4.9%	4.85%	4.11%	5.38%	3.78%	6.55%	2.49%

RPPR - TOTAL VALUE OF SALES FOR THE YEAR

**SAPTG - TOTAL VALUE
OF SALES FOR THE YEAR**

TOTAL SALES	Dec-Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	TOTAL	TOTAL
1999	R 458 522,643	R 828 115,617	R 1 038 523,241	R 587 725,530	R 585 221,284	R 344 136,267	R 355 517,654	R 308 330,692	R 438 722,536	R 498 463,789	R 215 880,070	R 4 349 542,852	R 10 036 319,602
2000	R 718 444,614	R 698 142,734	R 624 343,691	R 432 813,981	R 475 245,212	R 388 658,468	R 383 122,313	R 514 186,890	R 418 387,541	R 538 113,048	R 311 808,389	R 6 411 574,165	R 16 036 319,336
2001	R 821 287,321	R 801 185,138	R 634 363,616	R 482 303,999	R 576 862,883	R 328 725,481	R 487 251,191	R 541 128,884	R 438 384,238	R 632 567,533	R 615 152,688	R 8 275 636,724	R 15 136 383,242
2002	R 1 213 634,875	R 869 784,635	R 877 414,638	R 652 385,236	R 870 859,282	R 736 264,453	R 385 624,514	R 781 687,878	R 708 980,180	R 638 485,437	R 614 464,611	R 8 384 234,389	R 17 338 473,482
2003	R 1 384 478,813	R 1 267 987,452	R 650 483,242	R 628 829,184	R 647 768,676	R 1 088 417,983	R 1 322 736,463	R 851 687,328	R 1 203 671,238	R 1 292 487,414	R 1 137 988,638	R 12 177 816,978	R 23 431 949,636
2004	R 2 223 634,273	R 1 443 137,853	R 1 417 127,411	R 1 272 145,614	R 1 231 265,677	R 1 238 128,244	R 1 181 818,309	R 1 282 236,242	R 1 454 732,897	R 1 518 365,447	R 1 516 303,738	R 15 384 148,928	R 30 238 719,634

AVERAGE PRICE	Dec/Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	AVERAGE
1999	R 425,299	R 424,116	R 374,181	R 506,035	R 587,068	R 579,251	R 384,527	R 371,783	R 412,818	R 403,249	R 403,299	R 399,205
2000	R 425,189	R 415,115	R 449,927	R 466,764	R 477,955	R 387,585	R 404,483	R 448,273	R 415,536	R 432,441	R 436,197	R 429,921
2001	R 465,530	R 495,990	R 487,156	R 475,225	R 528,554	R 479,759	R 492,029	R 484,498	R 432,253	R 484,229	R 479,949	R 473,641
2002	R 549,489	R 635,378	R 647,061	R 656,409	R 587,921	R 634,683	R 578,152	R 580,318	R 624,490	R 638,773	R 603,290	R 618,088
2003	R 376,372	R 720,898	R 742,195	R 732,100	R 733,755	R 735,142	R 891,054	R 719,528	R 784,239	R 712,133	R 720,908	R 740,452
2004	R 374,374	R 911,829	R 666,070	R 680,988	R 693,547	R 693,484	R 887,223	R 912,090	R 968,150	R 1,016,289	R 1,058,537	R 839,657

RPPR - TOTAL VALUE OF SALES BY FOREIGNERS FOR THE YEAR

TOTAL SALES	Dec/Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	TOTAL
1999	R 65,866,000	R 45,742,750	R 49,265,000	R 49,257,442	R 26,875,000	R 17,378,000	R 18,307,500	R 25,825,500	R 20,750,000	R 54,241,000	R 45,156,500	R 411,359,693
2000	R 61,906,800	R 93,580,100	R 95,648,000	R 43,328,000	R 40,143,500	R 26,498,500	R 25,731,500	R 40,045,100	R 42,122,500	R 24,054,000	R 31,120,000	R 450,399,233
2001	R 122,886,425	R 107,759,000	R 89,948,000	R 55,455,000	R 96,493,000	R 40,234,180	R 41,786,000	R 21,207,000	R 25,725,000	R 27,888,975	R 50,416,880	R 642,810,440
2002	R 242,512,800	R 149,829,800	R 211,840,500	R 198,622,000	R 180,152,820	R 84,397,280	R 68,349,850	R 65,238,000	R 65,804,900	R 103,544,704	R 152,172,588	R 1,569,045,939
2003	R 332,018,158	R 210,179,000	R 239,423,561	R 151,871,708	R 112,225,280	R 117,845,400	R 198,247,900	R 123,025,700	R 65,842,000	R 158,257,400	R 61,687,000	R 1,829,393,378
2004	R 515,616,918	R 259,182,512	R 259,487,687	R 182,791,022	R 103,915,899	R 109,547,386	R 102,731,596	R 111,405,000	R 65,842,000	R 158,257,400	R 61,687,000	R 1,778,407,183

AVERAGE PRICE	Dec/Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	AVERAGE
1999	R 652,588	R 632,522	R 799,559	R 841,044	R 706,897	R 178,000	R 734,700	R 968,813	R 788,518	R 1,105,965	R 739,982	R 680,348
2000	R 685,864	R 739,543	R 851,583	R 1,031,571	R 716,848	R 715,743	R 989,875	R 672,173	R 1,170,869	R 601,800	R 528,116	R 698,938
2001	R 1,087,218	R 1,487,044	R 1,170,542	R 1,348,321	R 658,399	R 894,899	R 1,044,650	R 625,758	R 758,559	R 633,795	R 783,857	R 886,154
2002	R 1,073,085	R 1,324,171	R 1,450,882	R 1,391,283	R 1,057,226	R 1,164,489	R 1,487,456	R 658,682	R 1,111,684	R 1,175,644	R 1,179,658	R 1,214,300
2003	R 1,218,178	R 1,390,289	R 1,590,138	R 1,347,391	R 1,078,070	R 1,488,182	R 1,416,858	R 1,230,257	R 1,571,180	R 1,016,075	R 1,587,807	R 1,538,065
2004	R 874,874	R 911,829	R 1,818,521	R 1,474,121	R 1,180,960	R 1,318,948	R 1,688,803	R 1,858,308	R 1,571,180	R 1,618,821	R 1,587,807	R 1,451,379

RPPR - PERCENTAGE OF SALES VALUES SPENT BY FOREIGNERS

PERCENTAGE	Dec/Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	AVERAGE
1999	14,34%	13,90%	12,00%	12,68%	7,90%	5,22%	5,47%	8,25%	5,10%	11,35%	20,91%	10,16%
2000	7,11%	12,30%	12,54%	13,24%	6,45%	5,62%	5,61%	7,78%	10,12%	4,33%	10,01%	8,52%
2001	14,98%	18,93%	14,71%	11,47%	11,52%	7,61%	8,15%	3,92%	5,87%	4,83%	8,14%	10,34%
2002	16,68%	15,12%	24,14%	23,28%	18,51%	11,12%	13,48%	10,90%	12,10%	12,18%	16,82%	16,29%
2003	16,92%	18,87%	24,24%	18,56%	11,84%	11,57%	19,38%	13,28%	7,68%	12,24%	8,88%	15,02%
2004	14,21%	17,33%	18,10%	14,37%	7,81%	8,06%	8,62%	8,92%	8,88%	10,44%	8,54%	11,15%

SOUTH AFRICAN TRANSFER GUIDE (SAPTG)

SAPTG excludes sales to Companies, Trusts and Close Corporations.

Information obtained from the Deeds Office.

SAPTG data in report reflect date of sale and not date of transfer.

RESIDENTIAL PROPERTY PRICE RANGER (RPPR)

RPPR report criteria: Sales confirmed during the month are recorded as per sales date, to be transferred later.

The RPPR report is inclusive of sales to Companies, Close Corporations and Trusts.

The areas reported on are listed in an addendum.

Note: The interpretation by individual estate agents is subjective based on accent, appearance, source of capital etc.

Parliamentary Committee recommendations and National Land Summit Resolutions

The Panel took note of three of the recommendations of the Portfolio Committee on Agriculture and Land Affairs of the 7th of June 2005 that had relevance to the TOR. The three recommendations read as follows:

- Government must consider placing moratorium on the selling of agricultural land to foreigners until the Ministerial Committee on Land Ownership by Foreigners reported to the Minister;
- The office of the Registrar of Deeds should register land in terms of race so that land reform progress or the transfer of land to blacks could be adequately monitored; and
- Government should develop mechanisms especially within the current land policy to dissuade the inflation of land prices unnecessarily.

The Panel also noted that the pre-National Land Summit provincial land marches and summits in all the nine provinces strongly recommended a moratorium on acquisition of land by foreign individuals and corporations as well as the need for government regulation of land prices to ensure affordability so that land restitution and redistribution could be accelerated.

Special attention was given to the recommendations of the National Land Summit that “the state should actively intervene in the land market including through regulating foreign ownership”; that foreigners should only be allowed to purchase land if there is clear indication of productive investment and sustainable job creation; and that a land tax should be introduced.

In her closing address at the Summit the Minister of Agriculture and Land Affairs noted the following:

“Simultaneously, the issue of foreign land ownership was raised sharply, with almost unanimity that a policy on this matter must be developed. I am happy that that this summit had three members on the Ministerial panel that is attending to this matter.”

Part 3

Quantification and spatial mapping of patterns of land ownership and land prices

Section 1: The General overview

The national division of land ownership in South Africa reveals that 76,2% of the total land surface of the country is privately held, and that the rest is held by the state (20,4%) or in trust on behalf of the state (3,4%).

TABLE 1
DIVISION OF LAND OWNERSHIP

	Hectare	Hectare	%
State Land:		24,919,290	20.4%
DPW	6,845,916		
Land Affairs	13,759,968		
Provincial	<u>4,313,406</u>		
Trust:		4,103,096	3.4%
Ingonyama	2,893,232		
Coloured Rural	277,926		
Traditional	<u>931,938</u>		
Private		92,885,406	76.2%
TOTAL		121,907,792	100.0%

In terms of land use, most of South Africa is under natural pasture (73,2%), approximately 12% is arable productive agricultural land, and about the same proportion is allocated to nature conservation while only about 1% of the land is urban and residential.

TABLE 2**LAND USE PATTERNS**

Land Use	Hectare	%
Arable / Agriculture	14,753,249	12.1%
Nature Conservation	14,549,797	11.9%
Forestry	1,790,270	1.5%
Natural Pasture	89,240,143	73.2%
Industrial / Commercial	274,549	0.2%
Urban Residential	1,299,784	1.1%
TOTAL	121,907,792	100.0%

One of the critical issues concerning the ownership of land by foreigners is the question of property prices. In this regard there are three main categories of land viz. residential property, commercial/industrial and agricultural.

Residential

Residential properties can be divided into three distinctive market categories, viz. low (below 80m²), middle (between 80 and 440 m² with a value below R2 million) and high/luxury (value more than R2 million). Since 1998 property prices in the low segment of the market have increased at a rate below the average inflation rate and prices at the high end of the market increased more or less in line with inflation. Residential property prices of the middle-income market have recorded substantial increases in real terms. Some of the factors that have contributed to the significant increases in property prices of middle-income houses are: relatively low interest rates, higher disposable income of middle income earners partly due to tax relief, increased demand by an expanding black middle class, and increased demand by foreign buyers partly due the weakening of the weak rand in 2000 and 2001.

Commercial and industrial properties

Price increases in commercial and industrial properties have been around 10 per cent per annum.

Agriculture

Price increases in agriculture properties have been between 10 and 25 per cent per in 2002 and 2003.

The following table is a summary of price movements in the middle-income residential market.

TABLE 3
PRICE PATTERNS

Newly Built Homes: 160m ²	Land Rand	Building Rand	Total Rand	Land % of Total	Building % of Total
June 1998	65,776	208,138	273,914	24.0%	76.0%
June 1999	80,562	238,775	319,337	25.2%	74.8%
June 2000	92,335	258,335	350,670	26.3%	73.7%
June 2001	101,825	288,314	390,140	26.1%	73.9%
June 2002	120,695	337,243	457,938	26.4%	73.6%
June 2003	154,575	414,872	569,447	27.1%	72.9%
June 2004	178,639	445,460	624,099	28.6%	71.4%
Finance Week - 27 Sep 2004: Absa					
p.a. % change	18.1%	13.5%	14.7%	3.0%	-1.0%

Although substantial more work is required to quantify the impact of foreign buyers on the prices of properties in all sectors of the property market, residential, agriculture, commercial and industrial there are clear indications that the increased demand by foreigners have put upward pressure on property prices, especially residential property in Cape Town and some spots such as Umhlanga in the Durban

area (see **Appendix 9**). Further examination of the available data is required before any definitive opinion can be made by the Panel on the exact impact of foreign ownership of land on the escalation of land prices in general.

Table 3 indicates that the land portion of residential property prices have increased from 24.0 per cent in 1998 to 28.6 per cent in 2004. This is an indication of the scarcity of land.

Section 2: Analysis, interpretation and spatial mapping of Deeds Registry's data.

The data supplied by the Deeds Registry was generally:

- (I) not designed to differentiate between citizens and non-citizens or foreigners in general
- (II) poorly structured
- (III) contained significant error in data entry, and
- (IV) contained significant duplication.

The prices of land reflect the price at the time of registration and do not necessarily reflect the current value. According to the Chief Registrar of Deeds, data capturing and recording takes place only when a transaction is presented for registration. Given the fact that overall foreign purchases have increased since 1994, and especially during the weakening of the Rand, it is reasonable to conclude that the value of the bulk of the land owned by foreigners reflect values that are close to the 2005 prices.

Categories of Foreigners

Foreign ownership is made up of:

- i. External Public : Overseas Public companies
- ii. Foreign - Permanent Residence
- iii. Foreign Refugee

In addition to the above, there are certainly foreigners among the following categories:

- i. Conflicting/Unidentified/Blank
- ii. Different number/text : Which doesn't conform to a known
- iii. pattern
- iv. PTY Ltd : Private Companies
- v. Public Company : Public Companies
- vi. CC : Close Corporations
- vii. Section 21 : Section 21, non profit companies
- viii. Trust : Registered

Consolidated statistics on land ownership in South Africa

The tables below represent a consolidated view of the various percentages of ownership for each of the 5 major groupings.

Count

South Africa - Combined Data				Count
Type of Owner	Erf	Farm	AH	Section
Defective records	11.15%	16.40%	10.52%	5.28%
South African	71.06%	49.80%	69.95%	74.33%
State	12.19%	5.80%	6.17%	1.11%
Foreign	0.93%	0.55%	1.79%	3.02%
Corporate	4.67%	27.45%	11.57%	16.26%
Total	100.00%	100.00%	100.00%	100.00%

Types of owners and value of the land

South Africa - Combined Data				Value
Type of Owner	Erf	Farm	AH	Section
Defective records	17.66%	15.70%	4.10%	11.40%
South African	17.73%	5.69%	43.19%	48.03%
State	0.26%	0.37%	0.14%	0.14%
Foreign	0.74%	0.15%	1.75%	2.46%
Corporate	63.61%	78.09%	50.82%	37.97%
Total	100.00%	100.00%	100.00%	100.00%

Types of owners by area/size of the land

South Africa - Combined Data				Area
Type of Owner	Erf	Farm	AH	Section
Defective records	8.27%	11.97%	18.48%	1.17%
South African	6.53%	48.60%	49.34%	22.27%
State	81.00%	5.73%	21.97%	0.11%
Foreign	0.07%	0.07%	1.98%	0.52%
Corporate	4.13%	33.63%	8.23%	75.93%
Total	100.00%	100.00%	100.00%	100.00%

Overall foreign ownership (only individuals)

South Africa - Combined Data			Foreigners	
Measurement	Erf	Farm	AH	Section
Count	0.93%	0.55%	1.79%	3.02%
Value	0.74%	0.15%	1.75%	2.46%
Area	0.07%	0.07%	1.98%	0.52%

The only conclusion drawn from these data is that foreigners appear to be more interested in urban land, and specifically they make up a large segment of the sectional scheme owners. This however does not indicate that this is the largest segment of their involvement as this merely represents the percentage they make up within each particular segment.

Individual foreigner owners by value

South Africa - Foreigners						
Type of Land	Count		Price (Rands)		Area (Sq Km)	
Erven	52786	65.66%	R 13,992,479,496	61.99%	945.487685	31.99%
Farm	2540	3.16%	R 1,009,916,956	4.47%	1724.142697	58.33%
Agricultural Holding	1049	1.30%	R 258,657,755	1.15%	283.8575572	9.60%
Sectional Title	24013	29.87%	R 7,312,556,270	32.39%	2.316280029	0.08%
Total	80388	100.00%	R 22,573,610,477	100.00%	2955.804219	100.00%

The table above clearly indicates that foreigners are primarily interested in urban land, with erven and sectional title making up more than 90% of the count and value of their acquisitions. Area for sectional titles can be ignored as an indicator, because of the small size of units compared to erven, farms and holdings.

5. Corporate Ownership

The corporate ownership as recorded in the deeds registries does not give any immediate indication of whether the ownership is South African or Foreign. Further investigation into the shareholding of corporations that own land, specially the CCs and Prys, with a view to determining what percentage is South African and what is foreign is continuing. Similarly, the citizenship of beneficiaries of trusts is being investigated.

So far the panel has established that there are instances where foreign corporations establish wholly owned subsidiaries that are registered as South African companies. An example is Utrechtse Beheer Maatschappij “Catherine” B.V. that owns the Marakele Park (Pty) Ltd, CCG088 Investments (Pty) Ltd and CCG 108 Investments (Pty) Ltd. These corporations have substantial holdings in and around Marakele National Park in Limpopo.

Foreign corporations have also invested in the wine farms in a significant number. Recent noticeable foreign investments include:

- **French owner Anne Cointreau-Huchon of the liqueur and Cognac family has made huge investments in the Morgenhof Estate.**
- **Italian Count Ricardo Agusta invested R17 million in revamping Agusta Wines’ cellar in Franschoek.**
- **A Bahaman-American-SA wine partnership established BoweJoubert Vineyards & Winery in 2001.**
- **Dornier Wines represents a R100 million investment by its Swiss owner.**
- **Chateau Pichon-Longueville-Lalande has recently bought a 310 acre estate Glen Elly in Simonsberg.**

The categories of owner affected are, those tabulated below:

South Africa - Erf Data		Corporate Ownership				
Type of Owner	Count		Price (Rands)		Area (Sq Km)	
CC	76251	1%	R 28,219,865,685	1%	9931.507	1%
PTY Ltd	137952	2%	R 1,133,540,734,537	60%	44055.59	3%
Public Company	1822	0%	R 8,836,419,783	0%	651.8952	0%
Section 21	1141	0%	R 72,472,356	0%	54.1649	0%
Trust	48022	1%	R 33,769,774,449	2%	1550.913	0%
Total	265188	4%	R 1,204,439,266,810	63%	56244.07	4%

6. Overall findings and conclusions regarding foreign individual ownership

Erven

Individual foreigners own 0.93% of the erven in South Africa, in terms of number. The value and area percentages are 0.74% and 0.07% respectively.

According to the table in section 2.4, 65% of foreigners buy Erven.

The 0.93% is owned in the majority by foreigners with permanent residence (52529 parcels), with foreign refugees (153 parcels) making up the next larger group and Foreign Public Companies (104 parcels) making up the smallest group.

No information was detectable which identified foreigners who are not residents, and who may well lie in the Unknown category of owners.

This number of 0.93% may change significantly once the Unknown category of owners is resolved.

Farms

The farms ownership by foreigners represents some 0.55 %, which is significantly lower than the value for Erven, and is owned almost entirely by foreigners with permanent residence.

Section 2.4 indicates that approximately 1% of foreigners are interested in this land segment.

Interestingly the value and area reduce to 0.15% and 0.07% respectively, which indicates involvement in the lower end of this land segment market.

Agricultural Holdings

According to the table in section 2.4, 1% of foreigners buy Holdings,

Their impact here represents nearly 2% of this land segment, which is very high considering the low percentage involvement.

Sectional Title

According to the table in section 2.4, 30% of foreigners buy Sectional Title units.

Their impact in this segment is approximately 3% of the market by number of units and value.

As a percentage of foreigners involved, combined with their percentage of the market, this is probably the area of largest impact by foreigners.

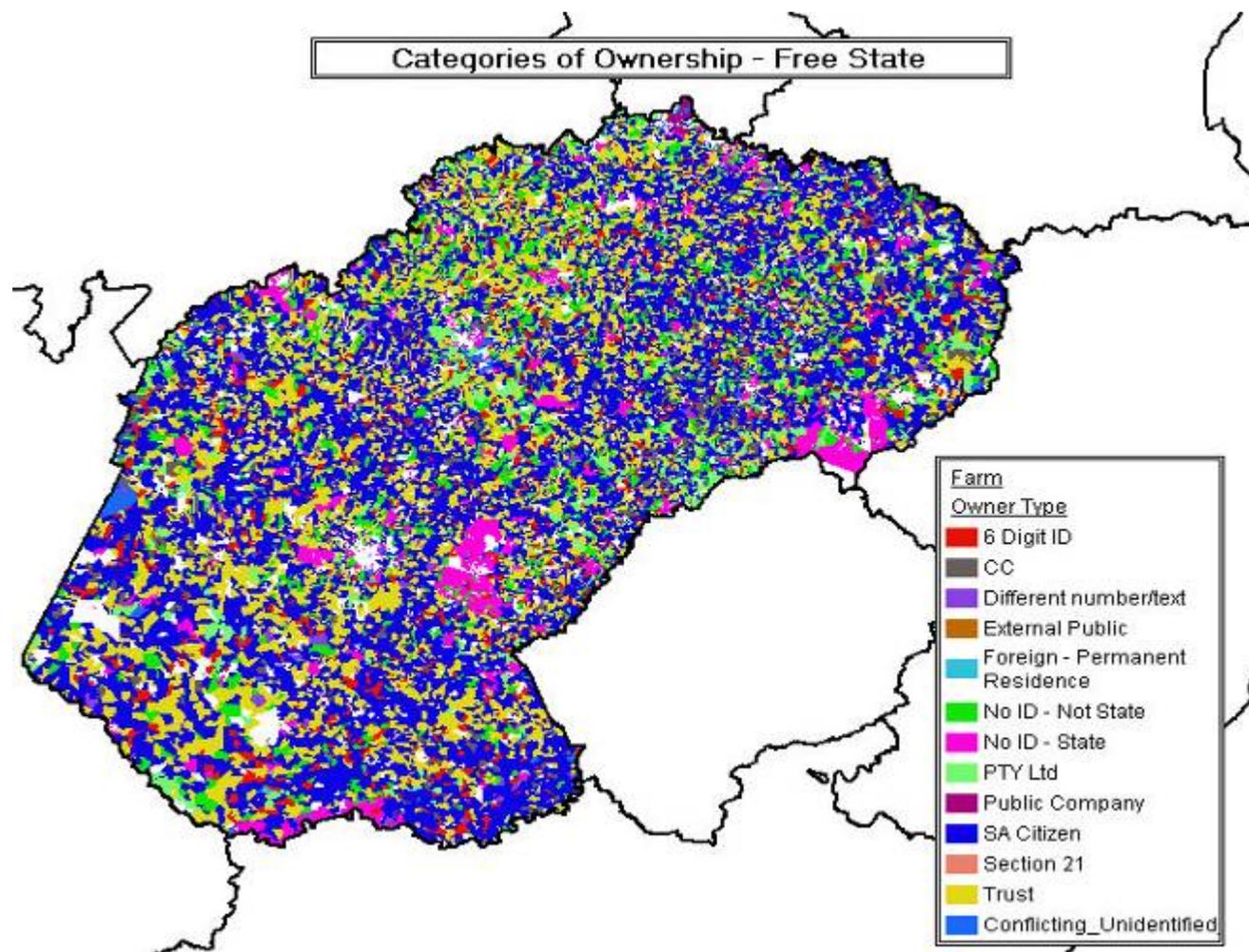
Conclusion

Foreign individuals with permanent residence have acquired a significant percentage of urban land in South Africa being approximately 1%.

Foreigners with permanent residence have acquired a probably insignificant percentage of rural land in South Africa being approximately 0.5%.

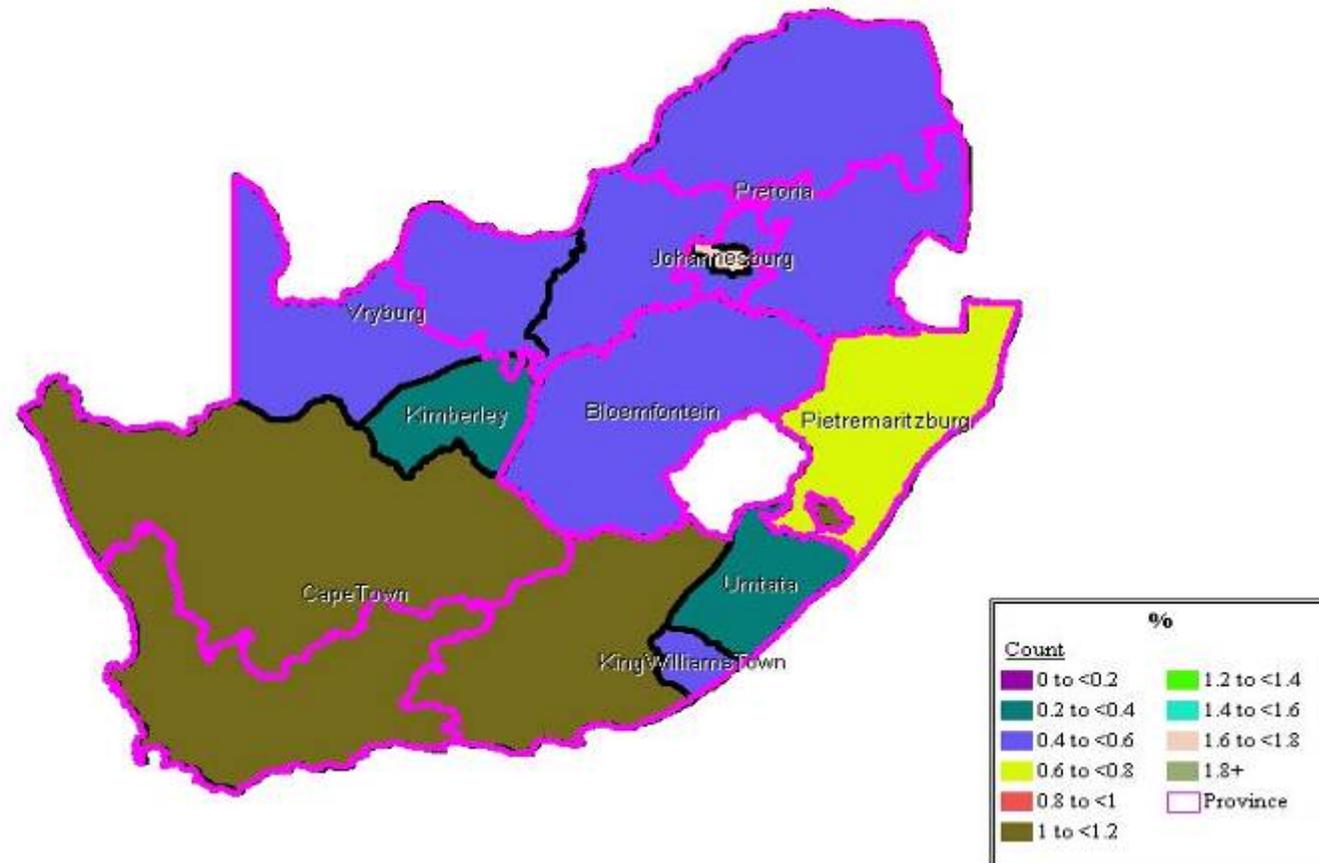
No conclusions can be reached regarding foreigners who are not residents as no data was identified.

Map 1



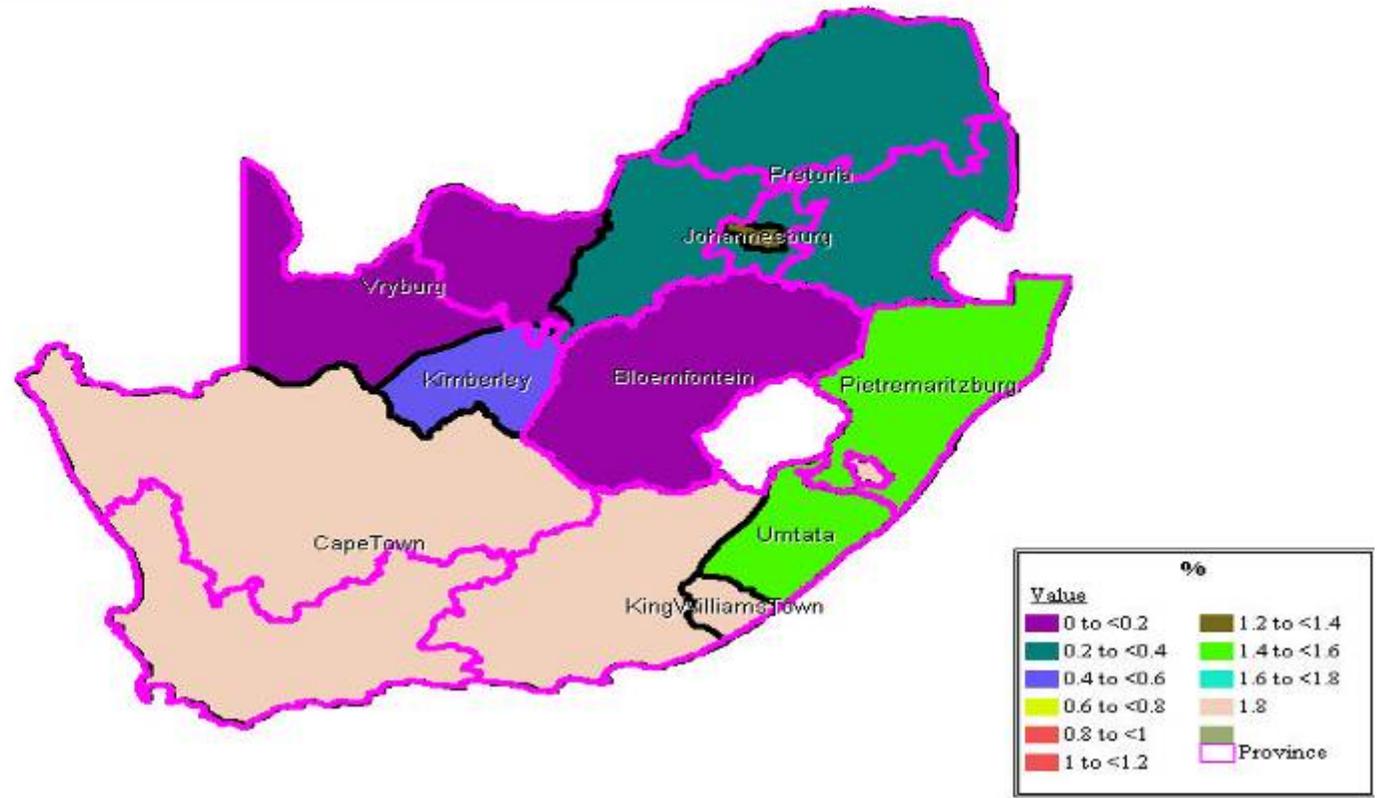
Map 2

Count of Foreign Ownership as a percentage of total properties



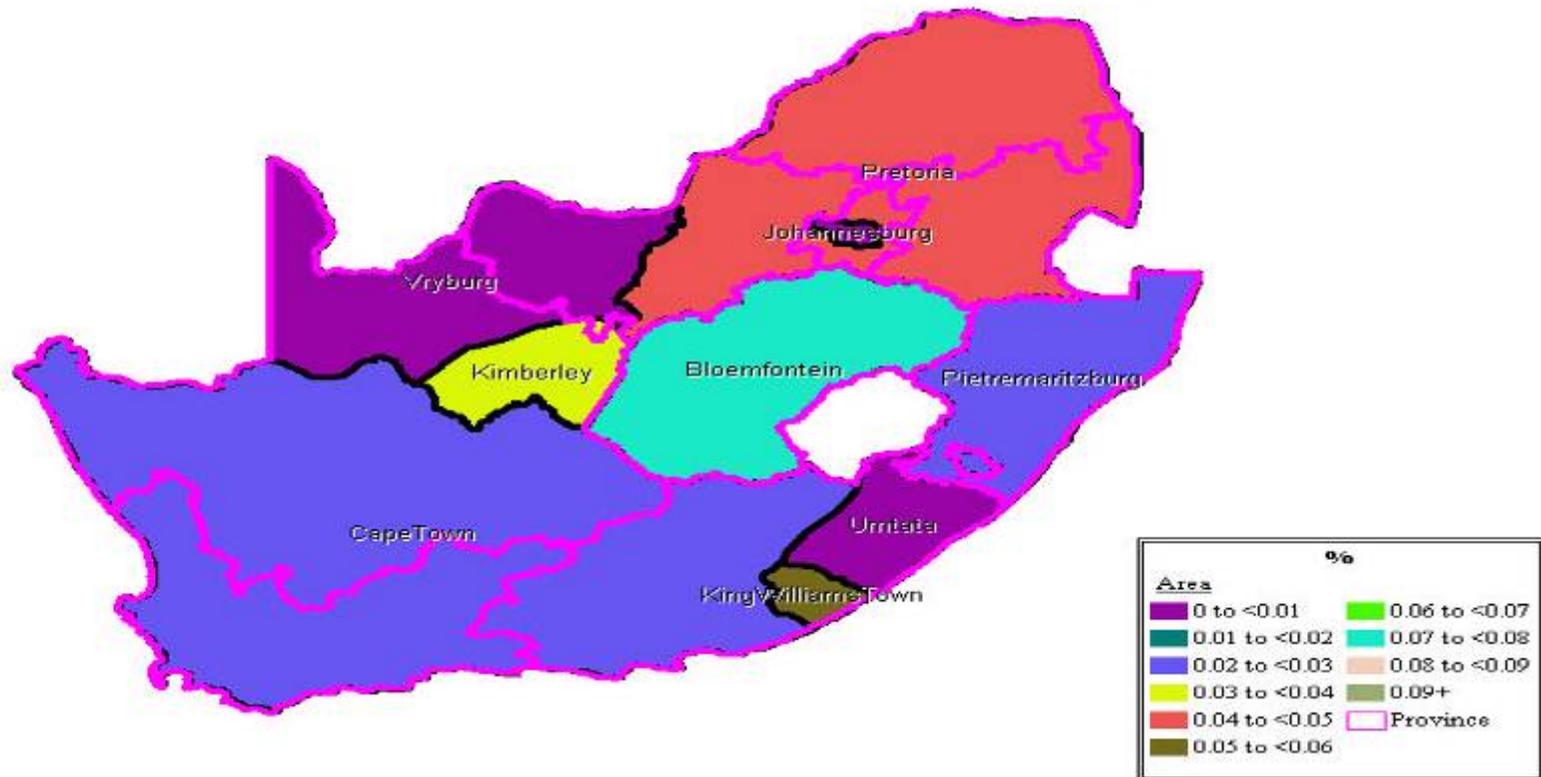
MAP 3

Value of Foreign Ownership as a percentage of total value



MAP 4

Area of Foreign Ownership as a percentage of total area



Section 3: The Myth that the state owns large tracks of vacant land suitable for land redistribution

Given the link between the availability of land for meaningful land reform and the Panels' TOR, the Panel considers it important to dispel the legend that the state owns large tracts of land suitable for land reform. The figures and the breakdown given below speak volumes on the issue. Even if it were to true that such land existed, the assignment given to the Panel by the Government would still be relevant.

The bulk of state owned land is already under occupation and use by Africans and coloureds who were previously merely "tenants" of the state and will now acquire title to the land they occupy under CLARA (approx 19 million ha) and other legislation. State land will therefore shrink dramatically. The other "state land" are divided between the defence forces, public works, state owned enterprises and conservation. Besides, large areas of state land are in poor ecological regions not suitable for immediate low cost sustainable productive development.

The Panel is of the view that the government needs to communicate coherently and effectively to the public about the correct situation regarding state land. **In terms of the TOR of the Panel, the need for monitoring and regulating foreign ownership and use of land is enhanced by the fact that the land in the market and not state land is critical to land reform and transformation. The answer to equitable access to land for citizens can not be met by distribution of state land.**

THE EXTENT OF STATE LAND IN THE REPUBLIC OF SOUTH AFRICA (ha) *													
NATIONAL STATE LAND PER PROVINCE												PROVINCIAL STATE LAND	
Department of Public Works								Department of Land Affairs				(the nine provincial governments)	
PROVINCE	SANDF	SAPS	DCS	DWAF	AGRI-CULTURE (EALA-land) (1)	SOUTH AFRICAN NATIONAL PARKS	OTHER (2)	Ex-TBVC-STATES & SGT's	Ex- SADT (3) & other land obtained for land reform	NATURE RESERVES & PROTECTED AREAS	OTHER (4)	RSA - TOTAL	%
	18 215	3 870	13 678	246 855	17 060	136 856	201 355	4 696 243	78 505	461 984	133	6 007	24,7%

Eastern Cape											300	921	
Limpopo	16 318	2 245	7 890	58 234	8 574	1 025 940	239 385	3 203 840	326 234	335 602	130 050	5 354 312	22,1%
North West	32 110	1 605	2 422	8 742	6 890	0	169 680	3 451 200	77 077	240 119	156 300	4 146 145	17,1%
Mpumalanga	9 890	2 190	3 275	89 478	5 636	955 675	167 600	545 434	161 102	208 900	165 120	2 314 300	9,5%
Western Cape	42 824	3 982	16 588	396 840	18 315	202 983	226 010	0	0	836 135	146 560	1 890 237	7,8%
Northern Cape	246 850	1 298	908	11 950	25 483	1 258 842	130 135	0	21 432	62 176	116 250	1 875 324	7,7%
KwaZulu-Natal	7 860	3 225	17 220	116 678	7 319	0	211 770	30 902	508 106	770 354	161 250	1 834 684	7,6%
Free State	31 080	875	3 730	7 675	5 508	11 633	87 210	140 557	38 388	202 738	58 860	588 254	2,4%
Gauteng	9 766	2 216	10 212	3 815	9	4	70 350	0	35 210	42 191	68 690	242 463	1,0%
GRAND TOTAL	414 913	21 506	75 923	940 267	94 794	3 591 933	1 503 495	12 068 176	1 246 054	3 160 199	1 136 380	24 253 640	

Notes:-

* *Excluding* the following:-

- some unsurveyed, unregistered state land (e.g. coastal areas)
- foreign properties (e.g. SA embassies)
- offshore islands (e.g. Seal Island) (Robben Island is included under Western Cape “other”: 476 ha)
- parastatal land (e.g. Transnet)
- former KwaZulu land (now Ingonyama Trust land - 2 883 884 ha)
- former Coloured Rural Areas (e.g. Rural Area of Enon) - administrated and held in trust in terms of Act 9 of 1987 - 1 277 926 ha
- land held in trust by the Minister of Land Affairs for various African traditional communities (e.g. tribes) - 931 938 ha

- (1) FALA-land refers to Financial Assistance Land (land bought in from insolvent farmers and PWD agricultural land) administrated by the National Department of Agriculture.
- (2) Includes unreserved PWD-land, land held in shares, and other smaller holder departments (e.g. Home Affairs, Justice, Mineral & Energy Affairs, etc.).
- (3) Ex-SADT - refers to South-African Development Trust land *outside* the geographical boundaries of the former homelands and Self Governing Territories.
- (4) Includes provincial agricultural land, as well as school sites, hospital land and provincial road reserves.

Source: Department of Land Affairs, Directorate Public Land Support Services, 30 June 20

Part 4

Regulation of ownership and use of land and property by non-citizens in foreign countries and reports of study visits by the Panel⁵

The Panel is charged with a mandate, which amongst others, include considering policies and legislation in foreign countries on the issue of land ownership and use by foreigners and recommending the options most suitable to South Africa. **Appendix 6** to this Progress Report contains the detailed survey of what obtains in many other parts of the world. A summary of the survey is presented in this section of the Progress Report.

The following are the countries surveyed:

Africa: Malawi, Nigeria, Zambia, Zimbabwe

Middle East: Jordan, Iran, Israel

Western Europe and Nordic Countries: Austria, France, Norway, Switzerland, Turkey, Spain, Sweden, Denmark, Finland, Greece, Ireland, Portugal.

East and Central Europe: Lithuania, Slovakia, Poland, Czech Republic, Hungary⁶

North America: Canada, United States of America

Asia and the Pacific: India, Japan, South Korea, Thailand, Singapore, Indonesia, Australia and New Zealand.

⁵ *In July and August 2005 the Panel Members and members of the technical support team conducted study tours to the following countries; Canada, Chile, Brazil, Indonesia, Singapore, England and Scotland. The information gathered has been analysed and appear in summary at the end of this part and in **Appendix 12** in full.*

Latin America: Colombia, Brazil, Mexico, Chile

The report below represents position in foreign jurisdictions along broad thematic issues that have relevance to the Panel's TOR.

Strategic factors and national interest

National security interest, perhaps more than any other factor, is advanced as the main reason for the imposition of restriction on foreign ownership of land or other land-based resources. What amounts to national security interest is influenced by many factors including the time of the decision and other geopolitical considerations. As such, what becomes a question of national security importance may fall away with time or by sudden changes in the geopolitical climate.

A couple of other motivations justifying foreign ownership restrictions are also defensible on grounds analogous to national interest or security. National interest therefore encompasses concerns around food security, protection of coastal and sensitive land and water protection, communal lands, national monuments, security or military installations, and other areas of national strategic importance. The Government of Australia (Summary of Australia's Foreign Investment Policy issued by the Treasury - May 2000) reports that: "The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase additional properties. In this way the Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia. By far the largest number of foreign investment proposals involves the purchase of real estate.

⁶ Some of these countries are new members of the EU.

The Government seeks to ensure that foreign investment in residential real estate increases the supply of residences and is not speculative in nature. The Government's foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (i.e., new developments - house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers."

Economic factors

Economic-related control measures seem quite prevalent in many countries since the very nature of foreign acquisitions and use of immovable property in a country is said to be influenced mainly by the relative financial superiority of the non-nationals against citizens. Measures are thus instituted to restrict or direct the flow of investment according to national interest consideration. The economic control justification includes the need to restrict land speculation, a potential source for distortion of agricultural and housing land market prices.

It is vital that we search for answers to the hovering question of what are the determinants of FDI. Or rather more directly, will the regulation of land ownership by non-citizens deter FDI? Studies have revealed that while a liberal policy on investment is necessary to attract FDIs, it is not sufficient. Other determinants for increased FDI flows: market size, growth, production costs, skills levels, adequate infrastructure, economic stability, and the clarity and stability of rules which can effectively rule out corruption and other forms of rent-seeking. This explains why countries with varying nationality restrictions on investment equity like Thailand, Malaysia, Singapore and especially China are among the top 20 recipients of FDIs worldwide. China, with the most stringent nationality requirement, is number one in the list of twenty.

The leading grouping of industrialized countries of the world, the Organisation for Economic Co-Operation and Development (OECD) *Checklist For Foreign Direct Investment Incentive Policies* (OECD 2003) stated as Guiding Principles for Policies Toward Attracting Foreign Direct Investment that:

“The aim of policies for attracting FDI must necessarily be to provide investors with an environment in which they can conduct their business profitably and without incurring unnecessary risk. Experience shows that some of the most important factors considered by investors as they decide on investment location are:

- ◆ A predictable and non-discriminatory regulatory environment and an absence of undue administrative impediments to business more generally.
- ◆ A stable macroeconomic environment, including access to engaging in international trade.
- ◆ Sufficient and accessible resources, including the presence of relevant infrastructure and human capital.

The most effective action by host country authorities to meet investors’ expectations is:

- ◆ Safeguarding public sector transparency, including an impartial system of courts and law enforcement.
- ◆ Ensuring that rules and their implementation rest on the principle of non-discrimination between foreign and domestic enterprises and are in accordance with international law.
- ◆ Providing the right of free transfers related to an investment and protection against arbitrary expropriation.
- ◆ Putting in place adequate frameworks for a healthy competitive environment in the domestic business sector.
- ◆ Removing obstacles to international trade.
- ◆ Redress of those aspects of the tax system that constitute barriers to FDI.
- ◆ Ensuring that public spending is adequate and relevant.”

The view has been canvassed that the existence of an effective property tax regime draws the distinction in the land market between speculation and investment. Several countries including Namibia, France United States, and New Zealand, indeed utilise this, either solely or in conjunction with other measures as a balancing act. The US *Foreign Investment Real Property Tax Act* (FIRPTA) governs dispositions of United States real property interests by

a foreign person or entity. A person who meets the substantial presence test (183 day rule) or is considered a resident alien for income tax purposes is however not considered to be a foreign person. The amount of tax required to be withheld and paid to the IRS by the buyer is 10% of the amount realized on the transfer, or, 35% of the gain recognized by a domestic corporation, domestic partnership, domestic trust or domestic estate. A foreign corporation that holds a U.S. real property interest, and under any treaty obligation is entitled to non-discriminatory treatment with such interest, can elect to be treated as a domestic corporation for purposes of this section. If the real property interest is used by the foreign person or entity for the production of income during the taxable year, and it is located in the U.S. the law imposes a 30 percent tax rate (or tax treaty rate if lower). However, the foreign person or entity can make an election to treat the real property income as income effectively connected with a U.S. trade or business, thus making it subject to graduated tax rates

Outright Ban

Debates on land ownership by foreigners are partly informed by exponents of outright total prohibition of ownership by non-citizens. According to Stephen Hodgson, Comac Cullinan, Karen Campbell *Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners* (FAO, December 1999, p31), "Relatively few countries surveyed have an outright ban on foreign ownership or use of land. Some countries such as China, Vietnam, Ethiopia and a number of others form a distinct category in that nationals are not permitted to own land outright either. China grants "equal treatment" to foreigners in that they too may be granted land use rights. In Zambia, the Land (Conversion of Titles) Act provides that all land vests absolutely in the President, "and shall be held by him in perpetuity for and on behalf of the people of Zambia", and that no person shall be granted land except for a specified term of up to 100 years. Such a provision, not unusual in the African context, does not in itself preclude foreigners from acquiring land rights as strong as any national might acquire. Such land rights may in practice be tantamount to ownership, though subject to a superior *de jure* right held by the state or the President. There will be

knotty domestic and international legal issues to contend with in the case of an outright prohibition of ownership by non-South Africans. This option is not recommended except in case where further political, legal, and economic effects are sufficiently examined and weighed.

Avoidance Mechanisms

It is apparent that the success of any regulatory option the State adopts depends largely on the institutional capacity to defeat efforts aimed at undermining those measures. Just as what obtains around the Financial Intelligence Centre Act which seeks to ensure that fraudulent transactions are tracked at sources and non-compliance effectively sanctioned, we propose that the State must ensure that the regulatory options adopted must be accompanied by punitive sanctions to meet possible non-compliance.

Particularly problematic in regulatory measures designed to address foreigners' ownership of land is that of non-natural entities like companies, close corporations, and other business entities. Whilst it is easy to determine the national status of a natural person, unique problems are encountered where legal entities are used to acquire land. Ownership of shares and interests in such entities are usually distorted. The ability to obtain information on beneficial ownership and control is at the heart of a regulatory measure on foreign land ownership. Simulated transactions by natural and non-natural persons to defeat regulatory measures that are designed to capture and enforce regulations based on nationality will persist in the absence of adherence to two fundamental principles:

- ◆ Beneficial ownership and control information must be obtained or be obtainable by the authorities; and
- ◆ There must be proper oversight and high integrity of any system for maintaining or obtaining beneficial ownership and control information.

Reporting and Restrictions

A good majority of the countries in all the regions of the world have either or both of restrictions on the ownership/acquisition of land or reporting requirements of the ownership/acquisition of land by non-citizens. Various forms of restrictions exist including (a) Leases or term restriction; (b) Coastal Zone, sensitive, forbidden areas restrictions; (c) land quantity restrictions; (d) reciprocity or preferential national treatment; (d) Pre-emption and right of first refusal; and (e) Permit or authorisation requirement. We suggest that the country should seek to adopt a mix of these forms of restrictions together with a reporting or monitoring mechanism which allows the state to know what portions of land are held by non-citizens. Reporting or disclosure measures enable countries to secure an accurate base of data on non-citizens, non-resident land ownership in a timeous manner as a basis for policy intervention. These reporting or disclosure measures are used for a range of planning and governance purposes including taxation and security issues by countries including Mexico, Canada, Australia, New Zealand, Thailand, and the United States of America.

Land Information Reporting, Monitoring or Disclosure Legislation

Tracking Land Ownership (see *Non-Resident Land Ownership in Nova Scotia* - Final Report of the Voluntary Planning's Task Force on Non-Resident Land Ownership, December 2001) provides a mechanism to gather and update information as properties change hands in a timely fashion. This ensures that an accurate and comprehensive database on non-citizenship and non-residency status is available upon which to base future decisions. Reliable data collected over time offers the information needed to address issues of societal concern when they arise.

Summary reports on study tours by the Panel members to Canada, Chile Brazil, Indonesia, Singapore, England and Scotland

Chile

The overwhelming lesson learnt from the tour of Chile is the very open climate that the country portrays in respect of foreign investment. Land is no exception. There are virtually no regulations pertaining to the purchase of land by non-citizens, except in respect of border and coastal areas. Nationals of Peru, Argentina, Bolivia cannot acquire land in a 10 km buffer zone between the boundaries of these countries. Furthermore, the very long western coast is not transferable but only granted under concession.

About 35% of the land surface of Chile is the property of the state, 15% falls under the jurisdiction of the Ministry of National Property, and 20% is protected land and falls under the Forestry Department. About 65% is under private ownership. The Ministry of National Property is charged with the responsibility of managing all of land under the various branches of government in respect of a coherent strategy of territorial development and regulating the different uses of state property. It takes care of the procurement of land by the state for the purposes of good governance through purchases, transfers, donations or expropriation. The sale of public property is only allowed in the event that the Ministry declares a piece of land as non-essential to the proper functioning the state. The transfer of state property is done by open and public tender.

The Ministry of National Property has two main lines of activity. It seeks to promote productive investments in government land and it attempts to ensure a model of sustainable protection of state assets.

Chile does not discriminate against foreigners in respect of investment in the country. There are two mechanisms for foreign investment. Firstly, Chapter 14 of the Compendium of Foreign Exchange Regulations of the Chilean Central Bank and secondly, the Foreign Investment Statute, Decree Law 600. While Chapter 14 establishes a general mechanisms for the registration of

foreign investment, it has no powers to screen or reject any foreign investment project. Instead, it is supposed to facilitate the free entry, use and exit of investment flows. Decree 600 on the other hand is an optional mechanism through which a foreign investor enters into an investment contract with the Chilean state. The decree provides special conditions for investors such as the right to transfer capital, to repatriate profits, guarantee of non-discrimination against foreigners, the right to participate in any form of investment and to hold assets indefinitely and tax stability. These voluntary applications for such contracts can be rejected only if they contradict public order, national security or general economic policy. The Foreign Investment Committee is charged with the responsibility of administering Decree law 600. While the general climate tends to encourage foreign investment, there are some restrictions. Non Chileans may not invest in Chilean fishing companies or in the media, unless their home country has a reciprocal arrangement with Chile. The European Union signed such an agreement in 2002 to cover commercial fishing companies. While there are no restriction on foreign investment in telecommunications, investors are required to acquire a licence and these are strictly limited. Chile entered a Free Trade Agreement with the USA which came into force on 1 January 2004.

This open investment climate has allowed one individual Douglas Tompkins to acquire vast tracts of land in Chile (estimates range between 400 000 and 500 000 ha). Ostensibly purchased to create national parks to protect the country's temperate forests, Tompkins's vast ownership of Chilean land, effectively splitting the country in two, has stimulated intense debate over whether a foreigner should have been allowed to acquire so much land. Chilean nationalists (from the left and right of the political spectrum) have publicly questioned his motives and have drafted a bill to curb this kind of foreign ownership on the basis of the territorial integrity of the country.

Indonesia

All regulations in respect of ownership, occupation, use and utilisation of land apply to all Indonesian citizens and foreigners. Currently Indonesia belongs only to Indonesians and the right of land ownership is limited to Indonesian citizens.

Generally, there is no differentiation between Indonesian citizens and foreigners who are resident in Indonesia except that foreigners cannot have freehold title. Foreigners domiciled in Indonesia can derive benefit from the land in the same way as citizens. However access to land can only be gained by foreigners who meet certain criteria as prescribed by law. Failure to do so disqualifies foreigners to have any form of land right. The National Agrarian Law of 1960 allows foreigners the rights of use, which affords holders ownership of residential house or tenancy in Indonesia on the basis of a specific Government regulation, regulation 41/1996. The regulation requires that foreigners should be domiciled in Indonesia and that their presence should benefit national development. Individuals owning this right can only own one house or one unit of mansions (Condominium) not qualified as small. The regulation is only to allow them to take care of their investments in the country. Foreign legal entities founded according to Indonesian law and domiciled in Indonesia can acquire the right to cultivate land owned by the state. Indonesia restricts the size upon which this right can be exercised to five (5) hectares in densely populated areas and seven (7) hectares in less densely populated areas. In the event of a foreigner owning the right of use to land and released to the state at a price based on its productive value.

Leasehold is another type of land holding available to foreigners living in Indonesia. Lease agreements should be written and authenticated by a competent Indonesian authority. Long lease rights for large estates and housing could be valid for not longer than 20 years and can be renewed for a further 25 to 30 years. A long lease can be renewed to a maximum cumulative period of 65 years.

Restrictions in Indonesia do not deter foreign investment since holders of the right of use can engage in legal activities towards the land, the house or unit of apartment. Foreigners holding any form of right of use can sell, buy, mortgage, possess, rent, donate and use the right on land, house or apartment.

Process of acquisition of land rights by foreigners

Application to buy a right of use is lodged with the land officials and in the case of privately owned land the owner releases ownership to the state. Once satisfied that the applicant meets the criteria for foreigners the state authorises that the right can be registered. Registration of the right acquired then is effected at the relevant registration office. In the case of a lease, a written lease agreement between the foreigner and owners should be drawn by a competent authority. For such lease to be valid it should be registered in the regional land office. Land use change should be authorised by the land office. No direct transfer of right can take place between two private persons and change of ownership of rights on land should be reported within two (2) weeks to the land office

Singapore

90 percent of the land in Singapore is state controlled and 8 percent of housing stock is privately owned. For both citizens and foreigners land is held either in freehold or in leasehold. Land can be leased for up to 30 years renewable for industrial purposes whilst state land can be leased for 99 years. Ownership of land and property is regulated by the Residential Property Act of 1973. The Act restricts foreign ownership of landed residential property such as detached houses, semidetached or terrace houses. (Restricted residential properties) and foreign ownership of commercial or industrial property is not restricted. Therefore foreign persons can freely buy non-residential properties and non-restricted residential properties.

In order to buy restricted residential properties foreigners require prior approval. Foreigners who wish to buy residential land for development must apply for a qualifying certificate under the PRA. The Qualifying certificate imposes on the developer conditions such as completion and disposal of the developed properties within a specified period. The qualifying certificate further requires the developer to provide a bank guarantee as security for compliance with the conditions. Developers may apply for variation of the conditions and approval is granted on the merits of each case.

The Residential Property Act set criteria for qualification to purchase restricted residential properties. Foreign individuals who wish to buy such properties must be permanent residents. This criterion signifies the individual's intention to live and work in Singapore thereby making adequate economic contribution to Singapore. This criterion can also be met by possession of professional or other qualifications or experience, which is of value to Singapore

Foreign companies must meet the economic contribution requirement. Singaporeans impose limitation to foreign ownership in terms of size of land. The property purchased by foreigners may not exceed a land area of 1393 square metres.

Foreigners can also gain access to land through 99-year lease or 30-year lease for industrial purposes.

Process of land acquisition by foreigners.

The following are steps followed when purchasing land or residential properties:

Information on the purchaser's identity including citizenship and the details of the property is disclosed by the conveyancer (solicitor) with the registrar of deeds (known as controller of residential property in Singapore) on lodgement. All conditions and limitations relating to foreign owners are checked at this stage.

In the case of a foreigner purchasing restricted residential property, **approval by the Minister of Law is required**. The request for approval is first lodged with the SLA, which considers it in consultation with other relevant department such as Trade and Industry and Home Affairs. The SLA then submits the application with their recommendations to interdepartmental committee comprising of ministries of Trade and Industry, Home Affairs and the ministry of law. The committee is chaired by the permanent secretary from the Ministry of law under which land affairs falls. The committee's decision making process should at all times be transparent. Once considered by this committee an application for approval is open for objections for a specified

period after which a recommendation for approval or otherwise will be made to the Minister of Law. Approval is granted at the Minister's discretion.

England and Scotland

At this stage ownership of land by foreigners in both countries is unrestricted and is, in fact, encouraged in order to attract direct foreign investment. Therefore lessons learnt these countries were largely on their land registration systems.

Land Registration in England and Wales

Land registration in these countries takes place in terms of the Land Registration Act of 2002, which came into operation on 13 October 2003. It replaced all legislation on land registration. It introduced a new system of conveyancing. In time the paper-based system will be replaced by an electronic one.

The Act envisages changing the whole philosophy of registration. It creates a system whereby registration confers title rather than merely capturing what has already been created. It is the outcome of a joint project between His Majesty's Land Registry and the Law Commission which started in 1995. The two bodies produced a report, which was in three parts.

The aim of the project was to introduce for the first time a conclusive register that would facilitate conveyancing by reducing a number of enquiries that would have to be made before registration could finally take place.

It also created a platform for the introduction of e-conveyancing in England and Wales. The turn-around times for registration can take up to two months depending on the circumstances present in each transaction. It is envisaged that registration and titling will take place simultaneously once e-conveyancing is implemented. The target date is end 2006.

Land Registration – Scotland

Scotland is known for its successful deeds registration system until quite recently when the Scottish embraced titling. The Scottish and South African systems were similar until titling was introduced in Scotland. Registration of land in Scotland takes place in terms of the Land Registration (Scotland) 1979. Deeds registration system is still used in Scotland in respect of titles that remain unregistered.

Title registration consists of a tabular and not a genealogical record of ownership, where the title can be seen without further investigation. It is not an index of traditional documents, but it creates a new form of record in the sense that anyone interested in a piece of land need not look behind the new record in order to check whether there are existing rights which attach to the title.

This system encapsulates three principles, the mirror, the curtain and the insurance principles. The mirror reflects the state of the title, the curtain covers up other interests in land and the prospective buyer need not concern himself or herself with underlying interests in that land. Lastly, the insurance principle guarantees payment of damages in the event that an error occurred when registration of title took place.

It is recommended that while the study of both systems was quite refreshing, South Africa must not follow the title registration route but retain the deeds registration system with its positive elements and improve its negative elements. Through our thorough system of examination, which has three levels, we shall continue to maintain high levels of accuracy and thus ensure unassailable security of tenure.

In conclusion, the e-cadastre has to be fast tracked as it will reduce turn-around times and place deeds registration on the information highway. The Deeds Registration System database will also be enhanced to improve its usage.

Part 5

Revision, harmonisation and rationalisation of development planning and land use legislation

The analysis of legislation applicable to development planning and land use (see **Appendix 7**) clearly demonstrates that there is a need for new comprehensive and overarching national legislation that can provide a standard framework for the regulation of development planning and land use at all the three spheres of government. The multiplicity of legislation at national and provincial levels, in addition to local government by-laws and ordinances, lead to very different, and sometimes contradictory and confusing, practices when it comes to development planning for residential, industrial, agricultural and recreational purposes. The situation lends itself to abuse and manipulation. It explains why land use can be changed without any centralised official notification or approval.

Section 1: National legislation directly or indirectly applicable to land use and planning

Apart from Schedules 4 and 5 of the Constitution, the following statutes are important to development planning and land use

- **Physical Planning Act 88 of 1967**
- **Urban Transport Act 78 of 1977**
- **Physical Planning Act 125 of 1991**
- **Local Government Transition Act 209 of 1993**
- **Development Facilitation Act 67 of 1995**
- **Housing Act 107 of 1997**
- **Local Government: Municipal Demarcation Act 27 of 1998**
- **Local Government: Municipal Structures Act 117 of 1998**
- **Local Government: Municipal Systems Act 32 of 2000**

Section 2: The tables below summarise the applicable legislation province by province.

WESTERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- PN 733 of 1989 Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations
- Western Cape Planning and Development Act, 1999(Act no. 7 of 1999)

EASTERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Ciskei Land Use Regulations Act 15/1987
- Proc R 293 of 1962 Regulations for the Administration and Control of Townships in Black Areas
- Proc R 188 of 1969 Black Areas Land Regulations
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- PN 733 of 1989 Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations

NORTHERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- PN 733 of 1989 Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations
- Northern Cape Planning and Development Act I 1998

NORTH WEST PROVINCE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Proc R 293 of 1962 Regulations for the Administration and Control of Townships in Black Areas
- Proc R 188 of 1969 Black Areas Land Regulations
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- PN 733 of 1989 Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations

MPUMALANGA PROVINCE

- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Venda Land Affairs Proc 45 of 1990
- KwaNdebele Town Planning Act 10 of 1992
- Proc R 293 of 1962 Regulations for the Administration and Control of Townships in Black Areas
- Proc R 188 of 1969 Black Areas Land Regulations
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- PN 733 of 1989 Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations

MPUMULANGA

- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- KwaNdebele Town Planning Act 11 of 1991
- KwaNdebele Town Planning Act 10 of 1992
- Proc R 293 of 1962 Regulations for the Administration and Control of Townships in Black Areas
- Proc R 188 of 1969 Black Areas Land Regulations
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations

GAUTENG

- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- GN 1888 of 1990 Land Use and Planning Regulations

FREE STATE

- Townships Ordinance 9 of 1969 (O)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981

KWAZULU-NATAL

- Town Planning Ordinance 27 of 1949 (N)
- KwaZulu Land Affairs Act 11 of 1992
- Proc R 188 of 1969 Black Areas Land Regulations
- Proc R 1897 of 1986 Regulations Relating to Township Establishment and Land Use
- GN 1886 of 1990 Township Development Regulations for Towns
- GN 1888 of 1990 Land Use and Planning Regulations
- Kwazulu-Natal Planning and Development Act, 1998

The lack of minimum basic national standards has contributed to the disparate practices by the provinces and local authorities (municipalities). The latter, according to the **Green Paper on Development and Planning** constitute the cutting edge of the spatial planning system.

The Panel recommends urgent rationalisation and harmonisation of development planning laws by enacting a national framework law and requiring the provinces and local authorities to revise, rationalise and harmonise their laws to bring them in line with the national framework legislation. The constitutional basis for this approach lies in schedule 4, parts A and B (functional areas of concurrent national and provincial legislative competence) and Schedule 5 parts A and B (functional areas of exclusive provincial legislative competence).

The Panel further recommends that during the process of rationalisation and harmonisation the President may invoke the presidential proclamation powers under section 97 of the Constitution to assign the administration of the multiple pieces of legislation that currently reside with different ministries to the Minister. The Minister would be required to work through an inter-ministerial cluster consisting of the affected ministries.

Part 6

Recommendations for Initial Immediate Measures

6.1 Foreigners, non citizens and foreign interest

Noting that:

There is widespread local concern about ownership and purchase of South African assets by foreigners. Hence, the panel considered it imperative to define very clearly who will be viewed as a foreigner. Also, in respect of juristic persons, the panel considered how foreign interests should be defined. There are two essential features to consider in this regard. Firstly, the manner in which a South African citizen is defined in the Constitution and national legislation and secondly, in relation more specifically to the various categories of residents and non-residents in South Africa as defined by immigration legislation. The definition of who is a foreigner or what is foreign interest furthermore has to draw a distinction between natural persons, corporations and trusts.

The panel recommends:

- In the case of corporations (businesses that are incorporated in terms of the Close Corporations statute and other statutes) that consideration be given to lowering the 51 per cent shareholding by a non-resident as constituting a foreign-owned entity or a foreign interest and should be treated as such in the regulatory framework developed.
- In the case of trusts, information on the citizenship and residence of both the trustees and the beneficiaries of such trusts needs to be obtained. The same goes for partnerships and joint ownership by individuals some who are non-citizens and/or non resident.

- Given some of the long-term objectives of SADC, the panel recommends that citizens from SADC countries or SADC corporations should either be exempted from the regulations or be given preferential treatment.
- Permanent residents should also enjoy preferential treatment.

6.2 Compulsory Disclosure/Declaration Requirements

Under the current policy and practice, including the system of registration of deeds, it is virtually impossible to ascertain the precise extent of foreign and/or non-resident ownership and use of land in South Africa. *The endeavour by the Panel to provide a provisional analysis of the available information and provide a spatial mapping of land ownership by citizens and non-citizens in this report still leaves a lot of gaps.* The panel is therefore strongly convinced that a system of compulsory disclosure/declaration should be introduced.

Purpose of disclosure

Such disclosure shall serve the following purposes:

- Enable Government to establish at any given moment the extent of ownership of South Africa's land and landed property by South African citizens and non-citizens, women and men, different racial groups, state and private persons, and natural and juristic persons;
- Enable Government to have basic reliable and accurate data and information for informed development planning;
- Enable Government to have basic reliable and accurate data and information for monitoring progress in transformation and development related to land-based activities and the impact on critical sectors of society, especially women and all those who were excluded by colonial and apartheid policies, laws and practices;
- Contribute to transparent governance; and

- Contribute to improving the system of land and property registration in the country.

Recommendations:

Affected persons

The disclosure requirements shall apply to every natural and juristic person who already owns or has a registerable interest in land and landed property and the registration of all future acquisition or disposal of land or landed property. In order to measure progress on the transformation of the South African land holding patterns, disclosure on the basis of race will apply only to South African citizens and permanent residents.

What shall be disclosed/declared?

In the case of natural persons

- Gender
- Citizenship
- Nationality
- Race
- Identification number
- Passport number

In the case of corporations

- Company registration number
- Income tax registration number
- VAT registration number
- Percentage shareholding by foreigners (non-citizens) as defined in 1 above.
- The race and gender breakdown of shareholders

In the case of trusts

- Citizenship of trustees

- Citizenship of beneficiaries
- The race and gender breakdown of shareholders

Phases and timeframes for disclosure and penalties for failure to disclose:

First phase

The Panel recommends that with immediate effect any new transfer of fixed property or any first-time registration of newly-developed fixed property shall include all the requirements of the disclosure

Second phase

Disclosure/declaration by existing owners or interest-holders shall be in the second phase starting from January 2006. Two options are suggested to implement it:

(a) a once-off process, like FICA, based on a period of declaration of 18/24 months; or

(b) a staged process (such as the one for the driver's licence) by dividing the process in alphabetical blocs according to surname or name of the juristic person. Such a process will take longer but can be managed better. For example: A-B: January – March 2006; C-D: April – June 2006, etc. In respect of both options, two administrative considerations shall be borne in mind (1) decentralisation of the disclosure/declaration process to appointed agencies of the Deed's Office, such as the local government offices, Post Office branches, Magistrate's Courts, police stations, etc., and (2) declaration done electronically (*e-government*) similar to the UIF registration of domestic workers and the IEC's use of it for its voters roll.

Penalty for failure to disclose

Three elements are suggested:

- (i) no transfer of property may take place in the absence of such information;
- (ii) adaptation of some of the FICA penalties⁷; and
- (iii) a compulsory fine of up to 20% of the value of the property in question.

6.3 Ministerial Approval

Noting that there is a need to ensure public oversight in land transactions, especially in so far as the transactions impact on the constitutional provision for land reform the panel recommends that Ministerial approval, in consultation with **Intergovernmental monitoring and oversight committee** (see paragraph 6.5 below), should be obtained for the purchase and/or establishment of the following with immediate effect:

i. Agricultural land

The acquisition of agricultural (rural) land (as defined) in excess of a certain value and /or a certain size by foreign individuals/interest (as defined in 1 above) and/or non-residents will require Ministerial approval.

ii. Land Earmarked for Restitution and/or Redistribution

Purchase of land (by foreigners or citizens) over which there is an ongoing claim for the purposes of either restitution or redistribution will require Ministerial approval.

iii. Protected areas

Certain areas will be classified as protected areas and will require Ministerial approval before a transaction could proceed. Examples of such properties would be coastal areas where access to the coast/beach will be unduly restricted, conservation areas, areas that are currently classified as communal areas and trust land, land close to military installations and water catchments. The Panel recommends that the criteria and procedures for implementing this approval be done in an efficient manner that does not hamper productive investment.

iv. Zoning and change of use approval procedures

The investigations of the Panel have led to the conclusion that zoning of land may undermine the constitutional objective of ensuring an equitable access to land by all South Africans. The Panel recommends a review of the current practices in the zoning of land and the procedures to rezone land, in order to bring it under the purview of the Minister.

v. Development of Golf Estates and Polo Estates

Bearing in mind the social, spatial and environmental consequences of these, the panel recommends that establishing golf courses and polo fields should require the approval of the minister in consultation with relevant provincial and/or local authorities.

6.4 Operationalisation of initial measures

6.4.1 Any foreign national (individual or juristic) owning land or landed property within the Republic of South Africa prior to the date of publication of the regulations shall be required to submit the required information to the Deeds Office within twelve (12) months from the date of the promulgation. Failure to comply within the stipulated time shall render the owner liable to a penalty as prescribed.

⁷ To be developed further.

- 6.4.2 Any foreign national (individual or juristic) acquiring or divesting of ownership of land or landed property within the Republic of South Africa after the date of publication of the regulations shall be required to submit the required information to the Deeds Office with the application for registration of deeds of transfer. Failure to comply shall render the owner liable to a penalty as prescribed.
- 6.4.3 Individual owners of property are individually responsible for complying with the regulations. The legal right of ceding power of attorney is applicable. Corporate or juristic persons must assign a person who is legally responsible to act on behalf of the juristic person in all respects of this regulation.
- 6.4.4 Within three months after a change in any of the declared details, the individual or entity responsible for such a declaration or declarations must file amendments to the prescribed documentation in the Registrar of Deeds Office. Failure to comply shall render the owner liable to a penalty as prescribed.

6.5 Intergovernmental monitoring and oversight committee

Noting that there are many interested parties involved in the question of ownership and use of land by foreigners and bearing in mind further that foreign investment is a crucial component of the development agenda for South Africa:

The panel recommends effective inter-governmental coordination and co-operation for implementation and oversight through the establishment of a permanent committee comprising the following Ministries/Departments: Agriculture and Land Affairs, Provincial and Local Government, Housing, Trade and Industry, Water and Forestry, Environment and Tourism, Energy and Minerals, Home Affairs and Finance to oversee the implementation of the regulations and to monitor the rate of increase or decrease in foreign/non-resident ownership of land in South Africa.

6.5.1 Procedures for the Committee

It is suggested that the procedure be modelled along the Mozambican procedural requirements. These involve the following:

- Ministerial consent – The requirement would be that all residential coastal land registrations must obtain authorization from the Minister. However, the Ministerial authorization must be subject to certain objective criteria such as:
 1. general economic growth
 2. Whether the person requesting the authorization already owns property
 3. Whether the property could be sold to another South African at a reasonable price– this would be based on criteria shown by estate agents in the applicants supporting documentation
 4. Whether there is any objection to the buying of the land – to ascertain this there must be a period of publication in the government gazette

Note: if the procedural mechanism is going to be for other sectors of land other than residential land, then one would need to look at other factors like:

- Percentage general contribution of investment to FDI
- Percentage increase in aspects such as job creation
- Percentage contribution to overall economic growth

However, to mitigate the possibility of constitutional challenge, unlike Botswana, the decision of the Minister must not be final and unchallengeable. There should be a mechanism where there is the possibility of an appeal procedure to another government department, the most obvious one being the DTI.

- Also, to facilitate balance and transparency in procedure there should be a possible ultimate limit on the number and size of transactions that can be authorized within a given period of time.

6.6. Moratorium on Sale of Land to Foreigners

The panel recommends that a moratorium on the purchase and sale of South African land to non citizens be imposed with immediate effect, as an interim measure until appropriate legislation has been promulgated.

Part 7

Outstanding issues to be addressed by the Panel

- Updating data on corrections to “defective records” and determination of foreign interests in corporate entities owning or with interest in land;
- Further consultation;
- Refining recommendations for changes to the Deeds Registries records and systems;
- Further comparative analysis of the policies, regulatory legislation and implementation mechanism on foreign ownership and use of land one European and two African countries; and
- Development of some recommendations for strengthening rationalisation of relevant legislation and implementation procedures in planning as partly envisaged by the Draft Land Use Management Bill.

End