

Title Insurance: One Aspect to Consider in Land Reform in Ghana

Kweku Darfoor

Abstract

This paper analyzes the land administration policies in Ghana to determine what the impact on the real estate sector has been. Additionally, this paper will briefly analyze title insurance in the United States market and assesses if this same insurance scheme could be implemented in the nation of Ghana to develop a robust real estate sector. Moreover, this paper illustrates how the current regulatory policies in Ghana provide insufficient protection for investors in the real property market, thereby increasing the transaction costs, reducing efficiency, and driving potential investors away from the market because of insecurity in the real estate sector.

Introduction

The law can be seen as a system of facilities that enable life in society to be carried on, and which in fact even expand the opportunities for the conduct of such life with assurance and understanding; the land law is part of this system.¹ As part of land law, a satisfactory system of land administration should give to ordinary people a sense of security concerning the lands they hold and freedom from fraudulent claims.² As confidence in the market is attributable to the policies and schemes that allow the market to function efficiently, a statute for the registration of title instruments which includes penalties for the failure to record an instrument is paramount.³

Facilities for registration of instruments relating to land have existed since 1883 in Ghana, followed by the Land Registry Act of 1962, and more recently the National Land Policy

¹ KWAMENA BENTSI-ENCHILL, GHANA LAND LAW 4 (1964)

² *Id.* at 310

³ *Id.* at 316

of 1999 and the Land Administration Project.⁴ However, a true land reform policy should encompass all facets of land tenure reform, and not simply serve as an ad hoc and incremental approach to land tenure issues.⁵ These inadequate reforms have led to inefficiencies during land transfer culminating in numerous litigation disputes involving land. Many of these litigation disputes could have been prevented if the country had a form of title insurance, similar to that offered in the U.S.A.

Whereas, the American title insurance system and Ghana Land Laws and Policies provide the bulk of the insight for this paper, this paper will not serve as detailed examination of real property regulations in either the United States or Ghana nor shall it serve as a detailed examination of title insurance. However, this paper will propose a solution for the country of Ghana (common in the USA), going forward, to implement title insurance as a solution.

Currently, the lack of title insurance has forced some thriving investors to lose millions of dollars in settlement fees, relocation costs, opportunity costs, etc because of defects in the title of land presumably purchased free of encumbrances.⁶

This paper begins with a brief overview of the U.S. form of title insurance. Part I then goes on to provide a synopsis of the history of Ghana Land Law, followed by a brief analysis of

⁴ Ernest Aryeetey, Joseph R.A. Ayee, Kwame Ninsin, and Dzodzi Tsikata, *The Politics of Land Tenure Reform in Ghana: From the Crown Land Bills to the Land Administration Project*, 71 INST. of STAT., SOC. and ECON. RES. (2007) [hereinafter THE POLITICS]

⁵ *Id.* at 48

⁶ Gri, Network Computer Systems versus Sam Jonah saga, MODERN GHANA, Dec. 18, 2005, <http://www.modernghana.com/news/92106/1/network-computer-systems-versus-sam-jonah-saga.html> [hereinafter NETWORK]

the current land policy systems in Ghana. Part II provides the reasoning why title insurance is needed in the marketplace by illustrating how it reduces transaction costs, and increases efficiency in the marketplace. Part III will then delve into the problems associated with implementing a form of title insurance in Ghana. Part IV concludes the paper.

A Brief Overview of Title Insurance in USA

Legal dictionary defines title insurance as a contractual arrangement entered into to indemnify loss or damage resulting from defects or problems relating to the ownership of real property, or from the enforcement of liens that exist against it.⁷ Title insurance is a system developed in the United States by abstractors and attorneys over a hundred years ago to protect the purchasers of real property in the event that title to the property purchased is different than as represented on the title insurance policy.⁸ As eminent Yale Law Professor Quintin Johnstone opined, “title insurance is a means of protecting against risks inherent in the uncertainty of land titles by delineating some defects of title and by insuring against potential losses from others.”⁹ Each parcel of land has its own unique history, filled with multiple types of transactions transferring differing rights in the land (i.e., legal/equitable interest; possessory/non-possessory interest; fee simple absolute/lesser interest).¹⁰ Any of these interests could still burden the land when a new purchaser acquires the property and there is a tremendous risk that they might not be disclosed to a purchaser. Therefore, no piece of land’s history is identical to another and thorough investigation is required into each conveyance by performing a title search of each real property transaction.

⁷ The Free Dictionary by Farlex, <http://legal-dictionary.thefreedictionary.com/Title+Insurance> (last visited Apr. 22, 2010).

⁸ Barlow Burke, Law of Title Insurance, pg 1-3 [C] (3d ed. 2000) [hereinafter TITLE INSURANCE]

⁹ *Id.*

¹⁰ *Id.*

Title insurance arose specifically because the protections provided in a typical real estate transaction were not satisfactorily providing adequate safety to the parties involved.¹¹ Prior to title insurance in America, a person known as a conveyancer would conduct all the research to determine the ownership rights of the seller and any other rights, liens, encumbrances that exist with respect to the property, and based on its search, would provide a signed abstract (i.e. description) of the status of the title.¹²

As a layperson or a novice investor unfamiliar with the processes and the proper due diligence, title insurance fills the void; it protects novice, inexperienced, and all types of investors, not only from the arduous task of independently verifying the status of the title; but, also from the financial risk that the purchased property may be encumbered. Could you imagine the transaction costs involved if forced to independently research the history of real property in a transaction? The thought of even completing a real estate transaction in America without issuance of title insurance is impracticable (even when merely a private sale, buyer will typically purchase an owner's policy). This is probably the single most beneficial result that has accrued from the introduction of title insurance.

Watershed Case: *Watson v. Muirhead*

The case of *Watson v. Muirhead* is widely regarded as the case that spawned the establishment of title insurance. In that case, Muirhead, a conveyancer chose to ignore certain recorded judgments and chose to report the title as unencumbered to the buyer, Watson. Watson purchased the property, but was later presented with the liens and required to satisfy the liens on the property. Watson sued Muirhead because of the losses but the Pennsylvania Supreme Court

¹¹ Cliff Bernstein, The History of Title Insurance, Ezine Articles, Jun. 25, 2007, <http://ezinearticles.com/?The-History-of-Title-Insurance&id=620338> [hereinafter THE HISTORY]

¹² THE HISTORY, *supra* note 11

decided that Muirhead had not been negligent and Watson, the innocent bona fide purchaser had no recourse.¹³

Clearly, after this case, some overhaul of the system needed to be implemented to provide purchasers with the protections needed to regain confidence in the system. The Pennsylvania legislature felt the same way and passed an act "to provide for the incorporation and regulation of title insurance companies" with the first such company being founded in Philadelphia in 1876.¹⁴ Title insurance is now an integral part of the American real estate industry. It is hard pressed to complete a real estate transaction in America without a title insurance policy being issued on the property.

Finally, the widespread popularity of title insurance in the U.S. is probably traceable to California during the latter part of the nineteenth century.¹⁵ During the 1880's in CA, large landowners had been concerned about squatters and high unpredictable costs of title searches & litigation needed to quiet and maintain title; hence, title insurance was a method for both reducing costs and rendering those costs predictable. Title insurance companies quickly supplanted lawyers' searches and abstracts.¹⁶

Part I. Ghana Land Laws and Current Policy Initiatives

In Ghana where land is typically owned by stools, clans, lineages and other corporate bodies (accounting for 78%), with the state being the next biggest owner of land (20%), and joint ownership accounting for only 2%, land conflicts routinely arise.¹⁷ With such a tight control over ownership of land firmly entrenched in stools, clans, and lineages, it can be costly and risky to

¹³ *Id.*

¹⁴ *Id.*

¹⁵ TITLE INSURANCE, *supra* note 5, at 1-7.

¹⁶ *Id.*

¹⁷ THE POLITICS, *supra* note 4, at 27

invest in such an economic climate without a thorough recording system. A thorough recording system could then facilitate the creation of a title insurance system, thereby spurring economic vitality in this poor nation.

A. Current Land Policy System in Ghana

To say that an effective land titling system is important would be to understate the immense magnitude that formal land ownership recognition plays in the industrialized world. The Land Titling problem has taken a step forward with the introduction of a National Land Policy, issued in 1999 by the government. The first phase necessary to produce a robust real estate market to spur economic activity has been undertaken. The Government of Ghana has implemented a comprehensive system to record formal land ownership. Recognized in its National Land Policy, the Land Administration Project was developed from 2000-2003 with assistance from the World Bank and other donors.¹⁸

The long term aim of this initiative, titled the Land Administration Project, “is to stimulate economic development, reduce poverty and promote social stability by improving security of land tenure, simplifying the process for accessing land and making it fair, transparent and efficient, developing the land market and fostering prudent land management.”¹⁹ With the belief that stimulating economic development will directly lead to a reduction of poverty and improve upon social stability by making land transfers fair, transparent, and efficient, the government has undertaken a pilot program, primarily in the urban areas of Accra and Kumasi, of deed and title registration.

¹⁸ THE POLITICS, *supra* note 4, at 53.

¹⁹ World Bank, *Ghana- Land Administration Project: restructuring*, 45705, October 10, 2008. [hereinafter LAND ADMINISTRATION]

One of the key facets of the National Land Policy that will lead to efficiency in land administration services delivery is the merging of four public land sector agencies (i.e., Lands Commission, Survey Department, Land Title Registry, and Land Valuation Board) into one agency, the Lands Commission.²⁰ The proof is already evident, from the reduction in the number of days necessary to wait to complete certain transactions; the timeline for registering deeds has shrunk from 36 months to 2 months; a new directive issued in 2006 has lessened the time it took to register deeds with the Lands Commission from 135 days to 34 days.²¹ Though all of the functions of the new Lands Commission are of importance, the ones of particular importance for this paper include:

1. Minimize or eliminate, where possible, the sources of protracted land boundary disputes, conflicts and litigations in order to bring their associated economic costs and socio-political upheavals under control;
2. Promote research into all aspects of land ownership, tenure and the operations of the land market and the land development process;
3. Instill order and discipline into the land market through curbing the incidence of land encroachment, unapproved development schemes, multiple or illegal land sales, land speculation and other forms of land racketeering;
4. Establish and maintain a comprehensive land information system.²²

²⁰ LAND ADMINISTRATION, *supra* note 19, at 7.

²¹ *Id.*

²² Ghanalap.gov.gh, Lands Commission News & Events, <http://ghanalap.gov.gh/index1.php?linkid=281&archiveid=236&page=1&adate=10/01/2010> (last visited April 23, 2010)

Whereas these new initiatives are part of a plan that will lead to greater efficiency, the country will not effectively capture the full benefits of this new scheme until the introduction of title insurance to purchasers of land. With the implementation of title insurance, the goals of the Lands Commission can be facilitated by the private sector. Title insurance companies have an incentive to maintain a thorough land information system to minimize their own risks.

The gap in deed and title registration services in the marketplace has also recently been recognized by American business man Craig Deroy.²³ In 2007 Deroy, then the president of First American (a major title insurance and real estate information provider located in California), took early retirement and formed a new company called Corporate Initiative Development Group.²⁴ The pilot project aimed to utilize new geospatial technology to survey and draw plat maps of private schools in the Accra suburb of Ashaiman with the goal of issuing legal title to the private schools.²⁵

He pitched the idea to a United Nations Commission on Legal Empowerment for the poor, which aims “to make legal protection and economic opportunity not merely a privilege to the few but the right to all.”²⁶ The pilot project gives the chance to demonstrate how formal land recognition can pave the way to help alleviate the poor and provide a means to utilize the wealth trapped in the lands. "Government recognition of landownership [through land titling] gives the poor an identity, which yields numerous benefits," says DeRoy.²⁷ The land title can ultimately be used as an asset to leverage permanent change in their economic and financial futures.

²³ Peter Rabley, *Ghana Project Leverages GIS-Based Title Registration and Microfinance to Alleviate Poverty*, ESRI, Fall 2008, <http://www.esri.com/news/arcnews/fall08articles/ghana-project.html> [hereinafter GHANA PROJECT]

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ GHANA PROJECT, *supra* note 20

Moreover, the effective land titling program can be the catalyst for implementing the next phase of title services, which is title insurance.

B. Areas that Need Further Improvements

Though the new initiatives have seen progress in certain areas, others areas still need a significant improvement. Areas of particular interest to this paper that have been identified as needing significant improvement include the pilot program of systematic titling/registration and the adjudication of land cases.²⁸ The projected estimate of the pilot project was to cover the issuance of 300,000 land titles over a five year period. This number has been extremely adjusted downward to a goal of covering 50,000 land titles over the remainder of the project life with the help of the private sector.²⁹ Private sector participation hasn't fallen on deaf ears either. As previously mentioned, the American company, First American Corp, spurred by a grant from the Clinton Global Initiative has already started its pilot project to create a land titling system and GIS based land record systems using the latest geospatial technologies.³⁰ Therefore, the issue isn't whether the necessary technology is available but the issue seems to resonate with the implementation and the enforcement of private land laws, even if the development of title insurance product would solve the comparative deficiency of Ghanaian land record laws.

Part II: Why the need for title insurance policies?

²⁸ LAND ADMINISTRATION, *supra* note 19, at 8.

²⁹ *Id.*

³⁰ GHANA PROJECT, *supra* note 20.

“Title insurance cannot work in Ghana”, at least in the mind of the head of Ghana Real Estate Developers Association (GREDA).³¹ This is not what you expect to hear from one of the leaders of the housing sector and someone that should be championing efforts to improve the sector. However, this is what Ghanaian real estate entrepreneur Peter Atsu Tsikata described as the categorical response he received from the head of GREDA when he approached the business executive about the issue. But title insurance needs to be the next initiative if the real estate industry is to be used as the engine for economic expansion. Simply stated, title insurance reduces the transaction costs of purchasing real property while increasing the efficiency in the real estate market and also providing more liquidity to the market through investor confidence.

Using the Coase theorem as background, I will analyze how this unfolds with case of NCS v. UTC Estates as an example. Transaction costs refer to any cost not associated with the money price of trading goods or services.³² It would be an unrealistic assumption that there are no costs in carrying out transactions.³³ In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up a contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, as so on.³⁴ The landmark tenancy dispute case of NCS v. UTC Estates helps to illustrate how a title insurance policy would not only have prevented this unfortunate case, but similar cases that frequently arise in Ghana. To summarize, the issue stemmed on who had ownership rights to the land where NCS was operating. NCS had a rental agreement with UTC estates, who had leased

³¹ E-mail from Peter Atsu Tsikata, Principal, Millenium Properties Ghana Ltd, to Kweku Darfoor, Student, Florida State University College of Law (Feb. 6, 2010, 03:36:00 EST) (on file with author)

³² Paul Johnson, *A Glossary of Political Economy Terms: Transaction Costs*, (2005), http://www.auburn.edu/~johnspm/gloss/transaction_costs

³³ R.H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1, 15 (1960) [hereinafter SOCIAL COST]

³⁴ SOCIAL COST, *supra* note 33.

the property from the Government of Ghana.³⁵ Ultimately, four parties laid claim to interest in the property, including UTC Estates, Osu Stool, and two private individuals.³⁶ It is unclear from the records but eventually NCS ended up negotiating with one of the private individuals, with strength of a letter presented by the individual through his attorneys, who were also counsel to the named defendant.³⁷ The high court decided to award damages to UTC Estates, thereby assigning liability to NCS and property rights to UTC Estates.³⁸

The Coase theorem suggests that, in many instances, the assignment of rights by courts or legal authorities may have little to do with who eventually possesses those rights.³⁹ This idea lies in the premise that the party that values the property right will eventually end up with that right regardless of whom the courts initially allocates that right to, absent high transaction costs. The NCS case is a perfect example of exactly what the Coase theorem suggests, because the high transaction costs (recognizing the appropriate party to negotiate with on the front end of the transaction & negotiations of accrued rent payments) ultimately stifled the parties from reaching an agreement.

However, a problem that the Coase theory readily recognizes is that virtually all exchanges contain transaction costs. As previously mentioned, transaction costs contain many components (search costs, information costs, the costs of meeting, negotiations, and any other costs incurred to make the primary exchange occur).⁴⁰ So how can title insurance be seen as an arrangement for reducing transaction costs? As pointed out by Benito Arrunada, title insurance is seen as an arrangement of reducing transaction costs, by motivating the production of

³⁵ NETWORK, *supra* note 6.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Jeffrey L. Harrison, Law and Economics in a Nutshell 72 (4th ed. 2007) [hereinafter LAW AND ECONOMICS]

⁴⁰ LAW AND ECONOMICS, *supra* note 39, at 78.

information and the enforcement of liability.⁴¹ In this regard, government intervention is not necessary because private actors, on both sides of the transaction, will act out of self interest. Arrunada points out that even though title insurance suffers little danger from moral hazard (opportunism in the form of events subsequent to issuance of the policy); it is susceptible to a high degree of adverse selection (the worst risks are most likely to take out such insurance).⁴² However, this problem is mitigated because title insurers have every incentive to devise means to discover, in advance and correct any defects in title before they provide coverage.⁴³

As stated by David Friedman in his book *Law's Order*, "Legal rules are to be judged by the structure of incentives they establish and the consequences of people altering their behavior in response to those incentives."⁴⁴ When this principle is applied in the context of title insurance law in America, which requires mortgagee's to obtain a lender's policy (even though not law, it is hard pressed to find a mortgage that does not require title insurance), it seems to offer incentives to lender's to finance purchases of real property. From the standpoint of the lender, the risks are tremendously reduced because the lender's hefty investment is secured by the knowledge that the insurance will either pay for legal expenses in defending a lawsuit brought by someone claiming to have superior title (except for exclusions noted in the title policy) or refund up to the face value of the policy if there is a defect in the title.

Even more important is the fact that the majority of mortgage loans made in the USA are made with other people money (savings & loan banks, commercial banks, & life insurance companies on behalf of depositors).⁴⁵ Therefore, these institutions must put a high premium on

⁴¹ Benito Arrunada, A Transaction Cost View of Title Insurance and Its Role in Different Legal Systems, 27 Geneva Papers on Risk & Ins. 582 (2002) [hereinafter TRANSACTION COST VIEW]

⁴² *Id.*

⁴³ *Id.* at 5

⁴⁴ David Friedman, *Law's Order: What Economics Has To Do with Law and Why It Matters* 11 (2000).

⁴⁵ THE HISTORY, *supra* note 11.

the safety of these investments as fiduciaries to their clients. From the standpoint of the purchaser, the protection of serious financial loss from defects in title to the property is insurmountable. One truly beneficial aspect is that the insurance covers not only claims that could have been discovered in public records, but also so called “non-record” defects that could not have been discovered.

As summarized by Kasim Kasanga and Nii Ashie Kotey, Land Title Registration Law (Law 152) was enacted in 1986 to introduce a scheme to register all interests in land.⁴⁶ Subsequently, in 2005, Deeds and Title Registries were established in four regions to service the whole country, with plans to establish one in each region in the long term.⁴⁷ Thus, the impediments to the development of a robust realty sector are gradually being extinguished.

In Ghana, the root of all interests in land is the allodial title, usually held by a stool, skin, quarter or family.⁴⁸ For clarification purposes, the stool (Southern Ghana) and skin (Northern Ghana) are traditional symbol of divine chieftaincy authority. When land is vested in the chief, it is referred to as stool or skin land. In the context of the Ghanaian system, some design defects exist in reference to stool/skin land that lends itself to a problematic registration system. Law 152 provides that interests held by stools, skins, quarters, and families are to be registered in the name of the corporate group.⁴⁹ However, the law doesn’t require the registration of the members that are entitled to deal with this land on behalf of the group.

Therefore, a public record search would only produce the name of the group. It is quite possible then for a transaction to occur by a chief or head of family without approval from the members of the group. The creation of a title insurance scheme could effectively limit this

⁴⁶ International Institute for Environment and Development, *Land Management In Ghana: Building On Tradition and Modernity* (Feb 2001) (prepared by Kasim Kasanga and Nii Ashie Kotey) [hereinafter LAND MANAGEMENT]

⁴⁷ THE POLITICS, *supra* note 4, at 61.

⁴⁸ LAND MANAGEMENT, *supra* note 45, at 6.

⁴⁹ *Id.* at 5.

problem. Title insurance did not arise in the US to make up for the absence of laws or the shortcomings of courts but, to complement the errors and omissions insurance of conveyancers.⁵⁰

As Kasanga and Kotey stated, “the absence in the register of the composition and membership of “management committees” increases the possibility of fraud and hence uncertainty and insecurity.”⁵¹ This is exactly what the American title system addresses when it covers “non record” defects that could not have been discovered in a public record search.

In the USA, where title to most lands is recorded in a registry system, it limits the possibility of error. Though it doesn’t eliminate error, it drastically reduces the risks associated with defective title. In Ghana, however, most title during land transaction isn’t recorded in a registry system. “In comparison with the rapid urban sprawl and residential developments, the number of title deeds registered is quite low. The numerous constraints to registration notwithstanding, this suggest that almost all transactions remain unregistered.”⁵² Though this statement was used after data was collected from the Regional Lands Commission in the Ashanti Region, it is highly likely that the other densely populated area such as Accra, Tamale, and Obuasi share similar fates. Therefore, a prospective purchaser looking for safety and security would have to laboriously spend time and money performing due diligence about allocation of property rights in regards to a prospective investment. Another alternative is to not invest time and money in finding out whom the property rights belong to, but to take on the immense risk of purchasing a property without the safety and confidence that title insurance would provide. With title insurance as an option, the buyer has an incentive to pay a company experienced in this area for such a service. The insurer has an incentive for screening pre-existing risks and correctly

⁵⁰ TRANSACTION COST VIEW, *supra* note 41, at 14.

⁵¹ LAND MANAGEMENT, *supra* note 45, at 6.

⁵² *Id.* at 21.

performing closing services, thereby avoiding potential new risks.⁵³ Title insurance is therefore seen as an arrangement of reducing transaction costs, by motivating the production of information and the enforcement of liability.⁵⁴

Clearly the benefits of title insurance in the American system are evident to both parties in a real property transaction. This is why the implementation of titling and registration reforms should be accompanied with the introduction of a title insurance program. This same idea has been expressed by Peter Atsu Tsikata, a prominent Ghanaian real estate professional, in an article he authored after the shutdown of Ghana's premier internet service provider.⁵⁵

Part III. Problems in Implementing Title Insurance

1. Political Issues

Land conflicts in Ghana have increasingly become more problematic because of the increase of interested parties acquiring stakes in the land tenure systems which has created an intricate web of powerful interests.⁵⁶ The problems reverberate in the political, social, and economic aspects. From the political context, chiefs are clamoring for restoration of their power so they can regain control as manager of their lands.⁵⁷ Their argument is that their people are not benefiting from the enhanced economic value of their lands.⁵⁸ In regard to this argument, one of their main points is that the state has acquired large tracts of land allegedly for uses in public interest, but compensation for such acquisitions, if paid, is deemed inadequate, or is not paid at

⁵³ TRANSACTION COST VIEW, *supra* note 41, at 5.

⁵⁴ *Id.*

⁵⁵ Peter Tsikata, *NCS SHUTDOWN: The Need For Title Insurance*, MODERN GHANA, (Dec. 10, 2003), <http://www.modernghana.com/news/113183/1/ncs-shutdown-the-need-for-land-title-insurance-in-.html>

⁵⁶ THE POLITICS, *supra* note 4, at 34.

⁵⁷ *Id.*

⁵⁸ *Id.*

all.⁵⁹ With strong tribal and ethnic ties being maintained by many Ghanaian people, seemingly, the problem of government appropriated lands must be settled with chiefs and tribal heads prior to land tenure reforms effectively succeeding in Ghana. Furthermore, conflicting claims to land are often the underlying cause of chieftaincy disputes and ethnic violence.⁶⁰ Therefore, not only do chiefs and the state have tension, but there are underlying disputes of land boundaries between rival chiefs causing tension.

The apparent inability of the courts to effectively resolve disputes poses another threat to implementing title insurance.⁶¹ The protracted nature of land litigation and court procedures has left thousands of land cases pending in the law courts, with high cost in time and money eroding confidence of those who wait on the courts for justice.⁶² In turn, this has led to parties taking matters in their own hands because of the loss of confidence in the courts, often resulting to bloody conflicts when parties settle disputes regardless of the law.⁶³ As was mentioned earlier, title insurance did not arise in the US to make up for the absence of laws or the shortcomings of courts, but to complement the errors and omissions insurance of conveyancers.⁶⁴ Therefore, in order for title insurance to function correctly, clear laws and a competent judicial system are required.⁶⁵ Evidently, this kind of system is not yet prevalent in Ghana.

2. Economic Issues

If Ghana is to remain one of the most rapidly growing economies in Sub-Saharan Africa, intending to attract investors worldwide, the economic issues that are prevalent must be

⁵⁹ *Id.*

⁶⁰ *Id.* at 35.

⁶¹ *Id.* at 36.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ TRANSACTION COST VIEW, *supra* note 41, at 14.

⁶⁵ *Id.*

drastically reduced. Due to the confusion in land administration, investors – both public and private – have found it difficult to acquire secure title to land for agricultural, industrial or real estate development.⁶⁶ If a public entity such as the Social Security and National Insurance Trust (SSNIT) can not accurately identify the legal interests of prior parties pertaining to land, what hope do private investors have? In 1997, SSNIT acquired 508 acres of land at Dunkonah on the Weija/Kasoa Road for a housing project but could not develop it because of the activities of unauthorized developers and land guards.⁶⁷

Persistent land conflicts have forced successive governments to set up commissions of enquiry, at great expense to the nation.⁶⁸ The government coffers could be better utilized in other areas of the economy if the system were finally fixed. Government has gone as far as spending huge sums of money maintaining security agencies in some areas where land conflict is recurrent, even to the extent of establishing permanent security barracks, which comes with heavy financial implications.⁶⁹

3. Social Issues

The dual system of customary and state land system serves as another impediment to a successful overhaul of the land tenure system. Advocates of the customary land system point to the poor record of the state in land administration, characterized by appalling levels of corruption, inequities, inefficiencies and lack of sustainability as reasons to strengthen the customary system.⁷⁰

⁶⁶ THE POLITICS, *supra* note 4, at 36.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ THE POLITICS, *supra* note 4, at 44.

Ghana, like many developing nations, is a country where much of the country's wealth is held in the hands of few. Though these same proponents of the customary system admit that the trusteeship ethos of customary law has been abused and its credibility eroded by wanton alienation of communal lands by chiefs and other traditional leaders, there is still a belief that the system could be reformed to remove these weaknesses instead of placing more powers in the hands of the state.⁷¹ Evidence of state mistrust can be seen in the conflict between Ga-Dangme and government over the retention by the state of unused communal lands that had been acquired for public purposes, accompanied by demands for the repeal of what the aggrieved communities or traditional states regard as "inimical laws" such as the Land Development Act.⁷² This does not speak for the entire populace but only for proponents of the customary system, mainly those that are not civil servants or that favor traditional forms of rule.

Moreover, on the opposite side of the spectrum are those that advocate a radical overhaul of the land tenure system by arguing that a rosy view of customary land tenure systems prevails because a) the stewardship of chiefs and custodians of land under customary land tenure systems has not been subjected to enough intellectual scrutiny; and b) the current dominance of neo-liberal arguments supports reduced state involvement in the economy.⁷³ I will not delve into these issues as the first one has already discussed and the second one is outside the scope of this paper. No matter which side of the debate one falls on, there are still enough proponents of the customary system to preclude it from being consumed by the state system. Regardless, the negative effects of land conflicts are clearly evident and without a comprehensive overhaul of the system, the land administration policies will not move the country forward.

⁷¹ *Id.* at 45

⁷² *Id.* at 37

⁷³ *Id.* at 42

VI. Conclusion

As illustrated by this paper, the land tenure crisis in Ghana is the result of haphazard land policies over the years coupled with an inefficient system of implementation and a legal system incapable of enforcing these rights. The legal system has not forced sellers to internalize the effects of their decisions, whether they are private actors or state actors. Title insurance has proven effective in the US at reducing inefficient property transfers. All parties to the transaction, including the seller, purchaser, title insurer, and bank (if party to the transaction) internalize the externalities.

The market for title insurance is ripe for development in Ghana, but it must be addressed by regulators. Once the system is able to clearly allocate and enforce property rights, with a competent judicial system, title insurance will be able to allow the economy to flourish with very little interference from the state. With the traditional approach of land transfer proving inadequate in Ghana, the solution lies in implementing a new innovative product and then letting the market work out the particulars. Having a form of title insurance in Ghana would prove a tremendous benefit to the real property market. For instance, the NCS case discussed earlier in this paper could have yielded an efficient result had title insurance been an option. Insurers have a self interest to implement a system to identify risks and resolve them or choose to factor that risk into the cost of the product. The consumer (NCS) could then evaluate whether the risk of not buying the insurance (litigation expenses, information gathering, ex post negotiation) is worth the cost of the premium. With the relevant information in hand, a risk averse firm (much like NCS) would always purchase the insurance (defending the lawsuit, insurer paying litigation expenses, gathering information) and transfer the risks to the insurer.

Like the title insurance surge that occurred in California in the late 1800's due to landowners concerns about squatters and high unpredictable costs of title searches & litigation needed to quiet and maintain title, Ghana has entered a similar stage of development as the U.S. when it introduced title insurance and would benefit from a similar structure.