
AFRIBUSINESS' SUBMISSION ON EXPROPRIATION WITHOUT COMPENSATION

Submission made by AfriBusiness to the Constitutional Review Committee

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Executive summary

AfriBusiness opposes the amendment of the Constitution to facilitate expropriation without compensation. We argue that:

1. Expropriation of property without compensation is an act of confiscation.
2. A constitutional dispensation that allows for the confiscation of property or a constitution which in its text allows for the confiscation of property ceases to be a real constitution because it reneges on the very notion of constitutionalism. This implies that both an amendment to the text of the Constitution and an amended interpretation of the current text of the Constitution to the effect of legitimising confiscation would be equally unacceptable.
3. The denial of compensation for expropriated property amounts to a denial of a remedy, which constitutes a violation of the South African constitution as well as of international law.
4. An amendment to the constitution to facilitate expropriation without compensation, read together with other interventions such as BEE, the Mining Charter and central bank nationalisation, would signal to investors that South Africa is on a Zimbabwe trajectory.
5. The motion by the EFF and ANC for expropriation without compensation rests on statistical fiction about land ownership patterns in South Africa, and neglects to acknowledge the extensive and extending spread in land ownership across race groups in South Africa.
6. AfriBusiness will provide free legal aid to the first of its members who becomes a victim of expropriation without compensation due to an amendment of the property rights clause in the Constitution. All members of AfriBusiness, both individuals and companies, will enjoy this protection.

About AfriBusiness

AfriBusiness is an independent business community with more than 12 000 members countrywide. Its mission is to promote and create – in the interest of its members and in the common interest wherever its members do business – a constitutional order, free markets, property rights, prosperity and a favourable business environment. The organisation was founded in 2011.

PART 1

Executive statement

In this submission, AfriBusiness expresses its opposition to an amendment of the Constitution to facilitate expropriation without compensation. It does so on four levels:

1. Constitutionally

- a. The right to private property is fundamental to constitutionalism itself. The corollary to this right is compensation in the event of an expropriation by the state.
- b. Any constitution purporting to allow for expropriation without compensation would cease to observe constitutionalism, and in that respect fail to be a legitimate constitution.
- c. Whether a constitutional amendment for expropriation without compensation is effected by way of a change to the text of the Constitution or by way of a reinterpretation of existing text is irrelevant.
- d. Two crucial foundations of constitutionalism – citizenship and the discharge of the check and balance function by institutions of civil society – require vigilant protection of the right to private property.
- e. Private property provides the oxygen for free, active and politically participating citizens and renders the basis for the autonomous institutions of civil society acting as a check and balance against bad government and on one another, securing (individual) freedom.
- f. A constitution that allowed for expropriation without compensation would revive as an actual constitution only once it regains core constitutional content by safeguarding private property, protecting citizenship and bolstering power dispersal and checks and balances.

2. The International Law Standard of Treatment

- a. The prevailing international law position on the expropriation of property owned by foreign nationals is that the expropriating state is under an obligation to pay compensation.

- b. Expropriation of property without compensation is an act of confiscation. It takes the form of a forfeiture or a penalty, which by nature, cannot attract compensation. Expropriation, on the other hand, is a concept that is always linked to a remedy in the form of the payment of what the property is worth at a certain point in time.
- c. The denial of compensation for expropriated property amounts to a denial of a remedy which constitutes a violation of the South African constitution as well as of international law.
- d. The current political debates in South Africa on expropriation and the payment of compensation seem to oscillate between Soviet-style confiscation and one or other still to be determined sanitized version of confiscation.
- e. Treaties have become the fundamental source of international law in the field of foreign investments.
- f. Since some guarantees contained in treaties are based on general state practice they have become part of the general principles of investment law and as such have relevance beyond the life of any individual treaty.
- g. Apart from treaties themselves, guarantees may derive from general international law on treaties and on the treatment of foreign nationals under international law.
- h. Since the enactment of the 2015 Protection of Investment Act appears to be intended as a step towards the phasing out of bilateral investment treaties in favour of a legislative mechanism, the protective regime of the Act must be scrutinized to assess its comparability with what investors can rely on in terms of an investment treaty or general international law principles. Such an assessment ought to be an integral part of the current constitutional review and public comment process on the issue of expropriation without compensation.
- i. Nowhere in the 2015 Protection of Investment Act is there any explicit reference to the payment of compensation. If this was a deliberate omission to provide government with an option to expropriate without compensation, it may constitute a violation of the international minimum standard. Since South Africa has not explicitly denounced this standard, it may face claims based on a legitimate expectation that compensation must be provided for.
- j. A reconsideration of the 2015 Protection of Investment Act is inevitable should expropriation without compensation become a reality.

3. Economically

- a. For the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence. Other trends, such as in fixed capital formation and balance of payments data, point to similar concerns.
- b. Nationalisation would strengthen current trends of relative increases in state capital formation compared to private sector capital formation, which decreases overall capital quality, and is typically a leading indicator of low growth and stagnation.
- c. Diminishing property rights and making constitutional provisions for greater state control of land will open the door to the same “state-capture” risks of the Zuma administration but on an even grander scale. This would further diminish investment quality in South Africa, causing severe misallocation of capital to serve narrow special interests, perpetuating economic decline.
- d. Economically speaking, the purposes of private property are to incentivise wealth creation, facilitate purposeful economic action and trade, and diminish conflict over resources.
- e. An amendment to the constitution to facilitate expropriation without compensation, read together with other interventions such as BEE, the Mining Charter and central bank nationalisation, would signal to investors that South Africa is on a Zimbabwe trajectory.
- f. To amend the Constitution in such a way as to weaken property rights, give more control and discretion over land and real estate to the state, and make arbitrary state expropriation possible, is to risk sliding South Africa into an economic abyss.
- g. Without extensive free market reforms, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to ‘state-proof’ as much as reasonably possible their investments and businesses domestically.

4. Factually

- a. The motion by the EFF and ANC for expropriation without compensation rests on statistical fiction about land ownership patterns in South Africa.

- b. The motion provides three land ownership statistics to justify expropriation without compensation. However, all three statistics are erroneous, which leaves the motion without factual basis.
- c. Under paragraph 3, the motion reads: “The African majority was only confined to 13% of the land in South Africa while whites owned 87% at the end of the apartheid regime in 1994”. However, while it is true that land ownership by black, coloured and Indian people were restricted before 1994, and most notably since the 1913 Land Act, the numbers cited are in error. State-owned land, land in the former homelands, self-governing states and development trust land alone in 1994 amounted to 28% of total usable land in South Africa. Furthermore, it should always be borne in mind that the inclusion of the semi-desert, sparsely populated Northern Cape, accounting for some 30% of land area in South Africa, in nationally aggregated statistics completely distorts the picture. It cannot be reasonably said that white people owned 87% of land by 1994.
- d. Under paragraphs 4 and 5, the motion reads: “Only 8% of the land transferred to black people since 1994,” (par. 4), and “black people own less than 2% of rural land, and less than 7% of urban land,” (par. 5). However, these numbers are far off. According to the best available statistics, black, coloured and Indian people in South Africa currently own approximately 38% of useable land in South Africa, and 27% of agricultural land. Moreover, even according to the Department of Agricultural Development and Land Affairs, black, coloured and Indian people own 46% of yard surface area in towns and cities.
- e. It should be noted that the significant spread in ownership of land across races in recent decades occurred despite government’s self-admitted land reform failures. In large part, successful land reform has been the result of restitution (either of land or by compensation), goodwill between persons from different race groups in South Africa, and regular free market purchases and sales.
- f. A constitutional amendment for expropriation without compensation threatens the three sources of successful land reform in the country – restitution, goodwill and the free market. And to add insult to injury, indications are that such constitutional provisions would be used to make the state the owner of land, leading to less black, coloured and Indian land ownership than currently exist.
- g. Any undermining of the property rights of white land owners will come at the expense of the property rights of all other race groups in South Africa as well.

PART 2

The implications of expropriation without compensation for constitutionalism

by Prof. Koos Malan
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1. Summary

Expropriation without compensation, more correctly, the confiscation of property, is a patent invasion into the basic right to private property. More importantly, it is also an offence against the very foundation of constitutionalism. Even though Parliament may amend the written text of the South African Constitution to allow for expropriation without compensation, such amendment would be constitutionally illegitimate for its offending the very foundation of constitutionalism as such. The same applies for a pro-confiscation interpretation of the present text of the Constitution. Should the present text be interpreted to permit expropriation without compensation, such interpretation, though in conformity with the Constitution, would be an affront to the idea of constitutionalism.

2. The foundation of constitutionalism

Constitutionalism presupposes the pursuit of justice on a grand scale, that is, for the whole of the polity, and more specifically for all individuals and communities within the polity. In this way, constitutionalism is inextricably associated with the pursuit of justice, but this normative commitment – the commitment to justice – is only one side of the constitutional idea. The second element of constitutionalism relates to power: power that has to serve as a rampart that supports the normative – the justice element. Hence the normative element has to be complemented by a real element, which consists in the structures for the suitable allocation and checks on political power, thus to ensure that power is not abused; to ensure that it is exercised for the benefit of the whole instead of degenerating into privateering for the sake of only a segment – either a minority or a majority. The structural element is essential to constitutionalism. Precisely for that reason questions around governmental power – its allocation, exercise, limitation and control – are and have always been essential for constitutionalism.

In the present context the following two prerequisites, both relating to the real element of constitutionalism, are crucial. The first is *citizenship* and the second is the notion of *the dispersal of power and (mutual) checks and balances*.

- Citizenship in the real sense of the word is not viable without the protection of personal property rights, that is, the property rights of individuals and juristic persons; and
- Constitutionalism is founded on the basis of the dispersal of power among the largest possible number of centres of power, more specifically not only the three centres of state power, but the widest range of loci of private, civil and economic power (here in after referred to as institutions of civil society). These loci of power must be strong enough to counter-balance governmental power and strong enough to counter-balance each other, thus to ensure that no locus of power grows so strong that it gains absolute power that would allow it to abuse its power to the detriment of any segment of the populace. Once any locus of power, and specifically the state, is so strong that it can act in an unconstrained fashion, it becomes absolutist. That rings the death knell of constitutionalism. Institutions of civil society constitute loci of power capable of discharging their check and balance function only when they have their own property, which allows to them act autonomously.

Both these crucial foundations of constitutionalism – citizenship and the discharge of the check and balance function by institutions of civil society – require vigilant protection of the right to property.

3. Citizenship

It is important to clarify the meaning of *citizenship*. That requires, amongst other things, that citizenship be distinguished from the concepts of *subject* and *consumer*. The latter two should not be confused with that of citizenship; in reality they stand in opposition to the idea of citizenship.

From the point of view of constitutionalism, it would be most inappropriate to view the populace – also the South African populace – as a collection of subjects. *Subjects* denote a relationship of subordination, inequality and dependence of the populace vis-à-vis government. It is an inappropriate, essentially monarchical concept, which is incompatible with the very notion of republicanism which is the idea on which the South African constitution claims to be premised.

Viewed through the prism of constitutionalism it would be equally inapt to conceive of the South African populace as collection of *consumers*. A consumer is by definition in a commercial relationship in which the identity of buyer, tenant, borrower, or whatever other commercial identity stands at the centre.

In contrast to the above, in pursuance of the very notion of constitutionalism, the appropriate public identity of members of the populace should be that of citizens. Citizenship, unlike the identities of consumer and subject, primarily denotes the ability to participate *independently and on an equal footing* with all other citizens in the joint endeavour to govern the polity in the public good and to the benefit of the citizenship body as a whole, through a process of even-handed rational public discourse and compromising decision-making.

Independent participation of all citizens in the continuous enterprise of government for the public good, is impossible, however, if the people are economically reliant, especially solely reliant on another person or entity, more specifically if people are reliant on the state. When the populace is dependent on the state for their livelihood they are not citizens anymore. Then they are but subordinate subjects and state-dependent consumers. This is precisely what is occurring when the state (or any other entity) becomes the sole or primary property holder. Precisely that is the effect of schemes such as the confiscation of property. It nullifies the status of citizenship and the ability of active participation in the governance of the polity that goes along with it. Once private property rights are invaded and property is taken away from private property holders people are relegated to dependent consumers of state hand-outs and the status of subordinate subjects, forced to look up to someone or something else – the state – for their livelihoods.

The right to private property is therefore not limited to the realm of private law. It is as significant if not more for constitutional law. It serves as the guarantee for the autonomy of people. A(n) (individual) man of straw without property – without the ability of affording a living – and who has to look someone else in the eye to survive, also does not have the freedom of his / her own views, or, at least, does not have the freedom to openly express their own views. Such person is for all practical purposes devoid of her / his citizenship and degraded to the status of a reliant subject and dependent consumer of state hand-outs. Such powerless, reliant subject and needy consumer can only hope that the state would be willing and able to meet his / her basic needs through the allocation of state sponsored charities in the form of social grants.

True citizenship can be achieved only when the reliant subject status is relieved and if people are in a position to earn the means to become the proprietor of assets. In this way the crucially important *independence*, which is a prerequisite for genuine citizenship and accompanying citizen participation in the enterprise of government, can be achieved.

4. Dispersal of power and checks and balances

The notion of the dispersal of power and attendant checks and balances lies at the very core of the constitutional idea. This is particularly also true for South Africa priding itself of a constitutional dispensation that purports to subscribe to the idea of constitutionalism. It is important to emphasise that the dispersal of power is not limited to the traditional idea of the *trias politica* – the threefold separation of power between the legislature, executive and the judiciary. Trias politica, though important, provide but the basic rudiments for a full-fledged system of power dispersal. Dispersal of power goes much broader than trias politica.

It includes a rich plethora of power centres of civil society, commercial enterprises and other economic endeavours, cultural and religious endeavours, educational institutions, religious institutions, charity organisations and many more non-governmental organisations and many more institutions of civil society. The need for the dispersal of power among all these centres is a generally accepted prerequisite of sound modern-day constitutional law. In their absence the spectre of absolutism, more specifically of unrestrained governmental power which is by definition an outrage against the very foundation of constitutionalism, looms dangerously large.

The mentioned plethora of institutions of civil society fulfils two important roles.

In the first place they provide the best rampart against absolutism. They act as a counter-balance against absolutism of an excessively powerful, centralised government. Bills of Rights, that seek to protect the rights of individuals against actual and threatened governmental violations of rights, is more often than not of no practical value. Individuals lack the required muscle to take on a powerful rights-infringing government. Moreover, even if an individual does have the power to sue for the remedying of rights, the courts may rule in favour of government because they share the same ideological convictions. Even if a court does rule in favour of (an) individual/s, orders are not complied with and turn out to be judicial wishes rather than true binding orders. The South African experience of the past decades are swamped of such cases, where the executive and the state administration have proven to be unwilling and / or able to heed to words of the judiciary. Institutions of civil society are the only instruments with sufficient muscle to provide the required check on an infringing state and that can, at the same time, enlist the resources to fill the void left by a faltering state. Institutions of civil society in this way is the only genuine guarantee for the rights and interests of people and for sustaining constitutionalism.

Secondly, institutions of civil society also act as a mutual power balance and check on each other, thus avoiding and / or countering the abuses accompanied by economic monopoly practices in a way similar to how they keep a rights-infringing centralised government in check and/ or fill the gap left by a faltering state.

The private property rights of individuals and of institutions of civil society are an absolute *conditio sine qua non* for fulfilling these check and balance and rights-guaranteeing functions. Institutions of civil society can perform these functions only if they have the material means – the independent proprietary basis – to that end. The institutions of civil society as well as their individual members that constitute their support base must therefore be in a position to accumulate material assets in the form of protected property. The privately owned property of institutions of civil society and their members enable these institutions (and their members) to act autonomously and in that way place them in the position to discharge their responsibility to act as a check and balance against a rights-infringing absolutist government and also to stand in for a faltering state.

Citizenship and autonomous institutions of civil society also mutually imply one another:

- Citizenship – the capacity to participate in the governance of the polity – is reinforced and strengthened when people assemble and act through institutions of civil society, instead of acting individually on their own with much greater difficulty; and
- Institutions of civil society on the other hand cannot be viable without citizens joining these institutions and without them materially contributing towards such institutions, thus enabling these institutions to discharge their check and balance function.

5. Conclusion

Constitutionalism is to a considerable extent premised on the protection of private property rights. Private property provides the oxygen for free, active and politically participating citizens and renders the basis for the autonomous institutions of civil society acting as a check and balance against bad government and on one another, securing (individual) freedom.

Thus viewed preference should be given to promote and expand property rights in order to enable the largest number of people – inhabitants of South Africa in the present case – to become property holders, thus affording them the opportunity to cultivate meaningful citizenship. The plea for property rights does not amount to arguing for the rigid maintenance of existing patterns of asset ownership in South Africa; on the contrary, it is a plea for the exact opposite, namely to make it possible that the existing patterns can be changed, and more specifically that it can be expanded so that many more people can become property owners. This calls for the exact opposite of expropriation without compensation. It calls for policies that could enable more people to become property owners, and in doing so to become true citizens and active participants in governance and in fending off absolutism through meaningful participation in strong institutions of civil society.

On close analysis the undoing of private property through schemes of confiscation masquerading as expropriation without compensation or other schemes with a similar effect is therefore undermining the very idea of constitutionalism itself. A constitutional dispensation that allows for the confiscation of property or a constitution which in its text allows for the confiscation of property (for expropriation without compensation) ceases to be a real constitution because it reneges on the very notion of constitutionalism. Such constitution continues to be a constitution only in name, but in substance it is a constitution no more. In substance it descends into an instrument of state absolutism and violation of the idea of citizenship and violation of the notion of dispersal of power and checks and balances. It descends into a wicked instrument of rights violation that cannot command respect and which warrants rejection instead of compliance. Being devoid of the genuine core content of constitutionalism and having ceased to be a true constitution, such false constitution forfeits legitimacy and loses the legal (constitutional) basis for the voluntary obedience by the citizenry. It revives as an actual constitution only once it regains core constitutional content by safeguarding private property, protecting citizenship and bolstering power dispersal and checks and balances.

PART 3

Expropriation without compensation and the international law standard of treatment

by Prof. Hennie Strydom

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1. Introduction

The views and comments expressed in this part are based on the premise that the prevailing international law position on the expropriation of property owned by foreign nationals is that the expropriating state is under an obligation to pay compensation. This has been confirmed in various arbitral awards and commentaries on the principles of international investment law (see for instance Salacuse *The Law of Investment Treaties* (2010); ditto *The Three Laws of International Investment* (2013). What is also not in dispute is that states may differ as to the method and standard of compensation and different formulations are used in treaties, arbitral awards and national laws. For instance in the *De Sabla* case it was found that the claimant was entitled to the “full value” of the property (1934, 28 *American Journal of International Law* 602, 611 – 602) and in the *Norwegian Claims* case the Permanent Court of Arbitration held that the claimants were entitled to “just compensation ... under the municipal law of the United States, as well as under international law” (*The Hague Reports*, 1932, vol 2, at 69). In several bilateral investment treaties the phrase “prompt, adequate and effective compensation is used (see example below).

As far as the protection of national and foreign investments are concerned, South Africa has confirmed the relevance of international law standards (see The Protection of Investment Act below) and has committed itself in bilateral treaties to the payment of compensation in the case of expropriation (see treaty with Finland below as an example). Since these commitments may now be under threat in view of the current plans to provide in law for expropriation without compensation (i.e. confiscation), three counter-movements of the 20th century on expropriation and compensation may be helpful, firstly for investors (national and foreign) to consider the nature and scope of the investment risks they may face in future, and secondly, for government to realize the importance of bringing legal certainty to an area of governance that has become increasingly chaotic and divisive with potentially serious economic and political consequences.

The first, and most notorious, were the large-scale confiscations of property without compensation practiced by the Soviet government after the October Revolution of 1917

under the delusion of the Dictatorship of the Proletariat. In the 1920's with an economy in ruins and desperately seeking international recognition and economic assistance a so-called New Economic Policy was launched which included concessions by the Soviet government to entertain foreign claims arising out of the confiscation policy following the 1917 revolution (see Salacuse *The Law of Investment Treaties* (2010) at 62, 63). What followed was an intricate web of horse trading between Western countries and the Soviet Union in settling claims and counter-claims for damages caused by either the reckless and ruthless experimenting with communism or the opportunistic intervention by some Western powers in the socio-political crisis following the October revolution.

A second development originated in the Latin American countries through efforts to implement the so-called Calvo doctrine which purported to subject all property-related claims to domestic law only and to exclude the use of diplomatic protection by foreign nationals whose property rights were affected by action taken by the territorial state. This 'national treatment' rule had the effect that foreign nationals who entered into contracts under the Calvo clause with the territorial state could not claim treatment under an international law standard and had to accept treatment equal to the treatment nationals of the territorial state could lawfully claim, no matter how low that level of treatment was. In several arbitral awards handed down between the 1920's and the 1950's the rule was applied that a Calvo-clause contract precluded a foreign national from presenting a claim to his/her government for interpretation or fulfilment of the contract concluded with the territorial state (Salacuse *op cit* 65 -67). In 2002, the International Law Commission, in its Third Report on Diplomatic Protection made it clear that the Calvo clause only applied to contracts between a foreign national and the territorial state containing the clause and not to breaches of international law, especially breaches that constitute a denial of justice (own emphasis). Since compensation is a recognized remedy that must follow an expropriation, the denial of compensation may constitute a denial of justice and even an arbitrary taking of property.

The third, and perhaps most relevant development for current purposes is the post-colonial challenge to customary international law principles on the protection of investments. This took the form of UN General Assembly resolutions in the 1960's and 1970's when developing states sought to use their numerical strength in the Assembly to shape international law of state responsibility to foreign investors in accordance with their own interests. The underlying political agenda was informed by the concept of permanent sovereignty over natural resources by means of which developing states sought recognition of their right to nationalize and re-establish sovereignty over natural resources in their territories without the necessity or adequacy of compensation. Developed states, on the other hand were prepared to accept such a right provided that developing countries remain in compliance with established rules of international law on the payment of compensation. From the 1960's to the mid 1970's 62 developing countries engaged in 875 nationalizations or takeovers of foreign enterprises which led to a dramatic increase in disputes about the existence and nature of compensation for expropriated property under international law. Soon, the economic and political consequences of the expropriation frenzy had a sobering influence on the aspirations of developing countries under what became known as the New International Economic Order (NIEO). In 1962, the General Assembly adopted resolution 1803 on the issue of permanent sovereignty over natural resources. In para 3 the resolution states in clear terms that foreign

capital investments and the earnings on that “shall be governed by the terms thereof, by the national legislation in force and by international law” (own emphasis). In para 4, the resolution states that in the case of nationalization, expropriation or requisitioning “the owner shall be paid appropriate compensation, in accordance with the rules in force in the State... and in accordance with international law” (own emphasis). Of further significance is para 8, which determines that “[f]oreign investment agreements freely entered into by or between sovereign states shall be observed in good faith” (own emphasis).

Even in the more radical General Assembly resolution 3171 of 1973, developing states did not get rid of the compensation principle, but merely made the amount of compensation and the mode of payment, matters to be determined under national law. The payment of compensation in the case of expropriation became further entrenched in General Assembly resolution 3281 of 1974, known as the Charter of Economic Rights and Duties of States adopted by a vote of 120 in favour, 6 against and 10 abstentions. In article 2(2)(c) the Charter included the payment of “appropriate compensation” in the case of nationalization, expropriation or transfer of ownership of foreign property, albeit prefaced with the precatory ‘should’.

The Charter never developed into a binding instrument because its terms, like leaving the payment of compensation entirely to the subjective discretion of the expropriating state coupled with its failure to include other terms and conditions firmly established under customary international law created insurmountable obstacles in finding common ground between developing and developed states. Whatever sentiments have remained, in reality the political and economic counter-movements of the 20th century on these issues have lost steam and are unhelpful in the 21st century given the far greater and increasing economic inter-dependence of states.

The current political debates in South Africa on expropriation and the payment of compensation seem to oscillate between Soviet-style confiscation and one or other still to be determined sanitized version of confiscation. The term ‘confiscation’ is deliberately used here in view of the fact that expropriation of property without compensation is an act of confiscation, pure and simple. It takes the form of a forfeiture or a penalty, which by nature, cannot attract compensation. Expropriation, on the other hand, is a concept that is always linked to a remedy in the form of the payment of what the property is worth at a certain point in time. Hence, the denial of compensation for expropriated property amounts to a denial of a remedy which constitutes a violation of the South African constitution as well as of international law. In the latter instance, it is worth taking note of the following: “The right to a remedy when rights are violated is itself a right expressly guaranteed by global and regional human rights instruments. Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy” (Shelton *Remedies in International Human Rights Law* 2nd ed (2005) at 114. This explains why the European Court of Human Rights has held that the payment of compensation is a necessary condition for the taking of property by a contracting state (*James v United Kingdom* 98 Eur. Ct. H.R. Series A, 1986).

Since a range of other legal considerations are applicable it is in the interest of legal certainty, which is a corollary of the rule of law, entrenched in section 1 of the South Africa constitution,

that any government decision on the legal dispensation that will in future govern expropriation without compensation (sic) is capable of rationally explaining and justifying where government stands with regard to the developments and principles above. Moreover, of specific relevance will be to get clarity on whether the protective principles in the examples below will still apply in the new expropriation dispensation, and if so, to what extent.

2. The Protection of Investment Act 22 of 2015

This Act, which applies to South African as well as foreign nationals, was passed by Parliament and assented to by the President but its promulgation in the Government Gazette is yet to take place, which event will bring it into operation in accordance with section 16 of the Act. The Act also provides that existing investments that were made under bilateral investment treaties will continue to be protected for the period and terms stipulated in the treaties. Moreover, an investment made after the termination of a bilateral investment treaty but before promulgation of the Act, will be governed by general South African law (section 15).

The nature and scope of the protection of investments envisaged by the Act appear from the following:

In the preamble to the Act, which is a tool of legislative interpretation in South African law, Parliament has endorsed the following principles, rights, obligations and objectives:

- The obligation to protect and promote the rights enshrined in the Constitution;
- The importance that investment plays in job creation and economic development;
- That the state is committed to maintaining an open and transparent environment for investment;
- The responsibility of government to provide a sound legislative framework for the protection of all investments, including foreign investments, pursuant to constitutional obligations;
- Securing the balance of rights and obligations of investors to increase investment in the Republic;
- Rights related to access to just administrative action, access to justice, access to information and all other rights set out in the Bill of Rights;
- The obligation to take measures to protect or advance persons, or categories of persons, historically disadvantaged due to discrimination;
- The protection of investments in accordance with the law, administrative justice and access to information;
- The government's right to regulate investments in the public interest in accordance with the law; and

- To ensure, in accordance with international law, that human rights, fundamental freedoms and protection of peoples' resources are adequately protected.

In its substantive part, the Act contains a wide definition of investment and of the assets that will enjoy protection under the Act (section 2). Included are shares, debentures, securities, loans, movable or immovable property, performance under a contract having a financial value, copyrights, intellectual property rights, goodwill, patents, trademarks, profits, dividends, royalties, income yielded by an investment, and rights or concessions to cultivate, extract, or exploit natural resources.

According to section 3, the interpretation and application of the Act will be subject to:

- a) The Constitution;
- b) The Bill of Rights, according to the interpretation provided for in section 39 of the Constitution, meaning that a court, tribunal or forum must (i) promote the values that underlie and open and democratic society based on human dignity, equality and freedom; (ii) must consider international law and (iii) may consider foreign law;
- c) Customary international law, which is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament (see section 232 of the Constitution);
- d) The constitutional duty to prefer any reasonable interpretation of any legislation that is consistent with international law over any other alternative interpretation that is inconsistent with international law (see section 233 of the Constitution); and
- e) Any relevant convention or international agreement to which the Republic is or becomes a party.

Section 3 of the Act further invokes the purposes of the Act in section 4 as interpretation aids. These purposes are to:

- a) protect investment in accordance with and subject to the Constitution in a manner which balances the public interest and the rights and obligations of investors;
- b) affirm the Republic's sovereign right to regulate investments in the public interest; and
- c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.

Other protective measures provided for in the Act are as follows (sections 6, 9 and 10 of the Act):

- a) Ensuring that administrative, legislative and judicial processes do not operate in an arbitrary way or denies justice to investors;
- b) The availability of administrative review of decisions consistent with section 33 of the Constitution;
- c) Right of access to information;
- d) The provision of physical security of property owned by foreign investors in accordance with the minimum standards of customary international law and subject to available resources and capacity; and
- e) The right to property in terms of section 25 of the Constitution.

The Protection of Investment Act adopts the 'national treatment' standard for the protection of foreign investments. Section 8 reads in this regard as follows:

"Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances".

What is the position if the future national investment protection standard falls below the international minimum standard of protection? Will foreign investors then be entitled to invoke diplomatic protection or is it the position of the South African government that in such instances a Calvo-type doctrine will apply?

'Like circumstances' means the requirements for an overall examination of the merits of the case by taking into account all the terms of a foreign investment. This will include the effect of the investment on the Republic; the sector in which the investments are; the aim of the measure relating to the investment; the effect on third persons and the local community; the effect on employment; and the direct and indirect effect on the environment.

3. Guarantees against expropriation of property without compensation in terms of Bilateral Investment Treaties

By way of example the 1998 Bilateral Investment Treaty between South Africa and Finland is used. This treaty is still in force and according to the Dept of International Relations and Cooperation the South African government has notified the Finnish government of its attention to terminate the treaty in 2019. If the Protection of Investment Act (above) is then in force, the investments of Finnish nationals will then, presumably, fall under the Act. The termination of the treaty seems to be part of a policy decision by the Dept of Trade and Industry to phase out bilateral investment treaties and to replace their guarantees with the guarantees under the 2015 Act. Since the guarantees contained in the treaty are based on

general state practice they have become part of the general principles of investment law and as such have relevance beyond the life of any individual treaty.

3.1 General

In this part the term ‘property’ instead of ‘land’ is used. The reasons are two-fold. Firstly, because the treaty itself uses a broad definition of “investment” in article 1 which includes a range of assets and property classes; and secondly, it is not clear at this point in time whether land and other kinds of immovable property will be the only asset class that will be subject to expropriation without compensation. The BLF and the EFF have made it clear that all property will be subject to this form of expropriation while other voices have called for the clear circumscription of the kinds of property that may be expropriated without compensation. Currently the position remains fluid which calls for government clarification in the interest of legal certainty.

Apart from the bilateral treaty itself, guarantees may derive from general international law on treaties and on the treatment of foreign nationals under international law. As regards the former, the Vienna Convention on the Law of Treaties is of immediate relevance. As a written agreement between states governed by international law it qualifies as a treaty arrangement under article 2(1)(a) of the Vienna Convention with the concomitant rights and duties provided for under the Convention. Of specific relevance are articles 26 and 27. Article 26 imposes an obligation on the parties to a treaty to give effect to the treaty in good faith while article 27 interdicts a party to a treaty to invoke the provisions of its domestic law as justification for its failure to perform a treaty. Although South Africa is not a party to the Vienna Convention, it has unequivocally accepted that the country considers itself bound by the provisions of the Convention and has made a statement to this effect on the webpage of the Department of International Relations and Cooperation. By giving public notice to the international community of states about its acceptance of the provisions in the Vienna Convention, it has laid the foundation for parties to agreements with South Africa to have a legitimate expectation that South Africa will perform in good faith the terms and conditions of such agreements.

While, in terms of article 62 of the Vienna Convention on the Law of Treaties, a party to a treaty may invoke a fundamental change of circumstances as a ground for lawfully terminating or withdrawing from a treaty, South Africa cannot avail itself of this provision if the fundamental change is the result of a breach by South Africa of an obligation under the treaty. Moreover, in the context of article 62, South Africa will have to prove that the government was an innocent bystander vis-à-vis the fundamental change of circumstances and that such circumstances were not known at the time of the conclusion of the treaty.

Against this general background certain provisions of the bilateral Finland – South Africa agreement needs to be highlighted. Under article 2(2) investors and their investments are entitled to “fair and equitable treatment” and “shall enjoy full protection and security in the territory of the host party”. The provision further states that the “host Party shall in no way

... by unreasonable and discriminatory measures, impair the management, maintenance, use, enjoyment or disposal of investments by investors of the other Contracting party”.

Article 3 contains the well-known ‘national treatment’ principle. Its effect is that the host party is under an obligation to subject investors of the other party to “treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third state”. However, if the national treatment standard is lowered (i.e. by legalizing expropriation without compensation) this lowered standard may then equally apply to foreign investors. In such cases, the South African government will be under an obligation to inform the Finnish government in advance about the potential impact of a lowered national standard, or of other factors, on the treatment of Finnish investors under the bilateral agreement. This obligation to inform is a corollary of the good faith obligation in treaty law mentioned above. Another potential remedy in this regard is section 32 of the Constitution which entitles ‘any person’ to a right of access to information held by the state or a private person “that is required for the exercise or protection of any rights”. Read with section 6(3) of the Protection of Investment Act (if an investor can still rely on it) it means that investors, both national and foreign, will be entitled to have access to government-held information in respect of their investments in a timely fashion.

Acutely relevant in the above context is article 5 of the bilateral agreement. This provision states unequivocally that in the case of expropriation or nationalization, or another measure having the same effect, and provided that it is done in the public interest, on a non-discriminatory basis and under due process of law, prompt, adequate and effective compensation shall be paid (own emphasis). The amount of compensation shall be the “fair market value of the investment expropriated at the time immediately before the expropriation or impending expropriation became public knowledge in such a way as to affect the value of the investment”. This raises a crucial question about the appropriate time of determining the ‘market value’ of the property that may become subject to expropriation. Depending on the type of property, current debates may already have a depressing influence on the inherent value of property and in view of the fluidity of the situation a carefully considered property valuation strategy may arise as of right, especially if current debates on the need for the identification and circumscription of property that will be subject to expropriation are taken into account.

3.2 The requirements of ‘fair and equitable treatment’ and ‘full protection and security’

Both these requirements, which often overlap, reflect standard formulations in bilateral investment treaties and need further clarification in view of the general observations above on the essentials of the bilateral investment treaty between Finland and South Africa which may also occur in other bilateral investment treaties entered into by South Africa.

It is now an accepted principle that the ‘fair and equitable treatment’ of foreign nationals in the territorial state contains entitlements that must be given effect to in accordance with the international human rights obligations of the territorial state. This understanding already

became part of the International Law Commission's 1957 report on state responsibility for injuries done to foreign nationals on their territories (UN Doc A/CN.4/106 (1957) 113). At the time the principle of equal treatment was already enshrined in articles 1 and 2 of the 1948 Universal Declaration of Human Rights and which were strengthened by the catalogue of rights in the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), both of which have been ratified by South Africa. These developments, coupled with UN General Assembly resolution 40/144 (1985) on the human rights of individuals who are not nationals of the country in which they find themselves, has caused the enjoyment by foreign nationals of rights in accordance with domestic law to become subject to the international law obligations of the territorial state.

There is no doubt that the developing standards of treatment derived from international human rights law are increasingly likely to determine the content of the 'fair and equitable treatment' principle referred to above. Further support for this statement is to be found in the judgment of the International Court of Justice in the *Diallo* case where the following was said: "Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights" (*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*)(Preliminary Objections) ICJ Reports, 2007, 582 para 39).

The 'full protection and security' principle puts an obligation on a state to take measures to protect foreign investors and their investments against any negative effects in the host state (Dolzer & Schreuer *Principles of International Investment Law* 2nd ed (2012) 57. This standard now includes both legal and physical forms of security (Forster "Recovering 'protection and security': the treaty standard's obscure origins, forgotten meaning, and key current significance" in 45(4) *Vanderbilt Journal of Transnational Law* (2012) 1095 at 1107) and it involves a due diligence standard which applies to questions of state responsibility and liability.

An analysis of arbitral jurisprudence shows that the main elements of the 'fair and equitable standard' of treatment are focused on the following duties of the territorial state (Kläger "Fair and equitable treatment" in *International Investment Law* (2011) 116 – 119; Schefer *International Investment Law: Text, Cases and Materials* (2013) 188 – 189, ch 5):

- Promises and undertakings made by the territorial state, and upon which the investor has relied, must be honoured since they create legitimate expectations on the part of the investor;
- Treatment of a foreign investor must be non-discriminatory and non-arbitrary;
- Judicial and administrative procedures must follow due process and allow for access to a remedy;
- The legal framework and procedures of the territorial state must be transparent and clear as to what is expected of the investor;

- State measures affecting the investment must be reasonable and rationally linked to their objective and not disproportionately burdensome to the investor; and
- Where compensation is due, it must be paid promptly, adequately and effectively.

With regard to the compensation issue it must be pointed out that the payment of compensation is one of the conditions of an expropriation which must be in conformity with a state's international obligations (Marboe "Restitution, damages and compensation" in Bungenberg, Griebel, Hobe & Reinisch (eds) *International Investment Law* (2015) 1033). This legal position was also confirmed by the SADC Tribunal in the *Campbell* case which dealt with the expropriation of land belonging to mainly white farmers by the Zimbabwean government without the payment of compensation. In this matter the Tribunal held that in international law, the expropriating state has the duty to compensate and that the exclusion of compensation in the Zimbabwean constitution by means of a 2005 amendment, was contrary to the clear legal position in international law (*Mike Campbell and Others v Republic of Zimbabwe*, SADC (T) Case no 2/2207, 48 (3) ILM (2009) 534 at 547).

4. Conclusion

Investment risk associated with a lack of legal assurances and effective protection of investments in certain host countries, is the main reason for the enhanced treatment of international investment law since the second half of the previous century. This has taken the form of bilateral as well as multilateral investment arrangements between states providing protection for individual investors. The consequence of this shift is that treaties have become the fundamental source of international law in the field of foreign investments. These treaties have brought discipline to host country treatment of foreign investors by obligating them to grant investors full protection and security, fair and equitable treatment and protection against arbitrary treatment and expropriation without adequate compensation (Salacuse *op cit* 2010, 79).

Thus, if the enactment of the 2015 Protection of Investment Act is indeed intended as a step towards the phasing out of bilateral investment treaties in favour of a legislative mechanism, the protective regime of the Act must be scrutinized to assess its comparability with what investors can rely on in terms of an investment treaty or general international law principles. Such an assessment ought to be an integral part of the current constitutional review and public comment process on the issue of expropriation without compensation. With that in mind the following aspects need government's attention and clarification:

- Nowhere in the Act is there any explicit reference to the payment of compensation. If this was a deliberate omission to provide government with an option to expropriate without compensation, it may constitute a violation of the international minimum standard. Since South Africa has not explicitly denounced this standard, it may face claims based on a legitimate expectation that compensation must be provided for (see also section 6 of the Act);

- In the preamble to the Act, government has committed itself to respect international law and to ensure that human rights, fundamental freedoms and protection of peoples' resources are adequately protected. This commitment is strengthened by section 4(c) which states that the purpose of the Act is to “confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic”. Apart from providing a basis for potential claims under the Bill of Rights, there is also the question whether the reference to “laws that apply to all investors...” includes international investment law on the payment of compensation? Furthermore, by committing itself to provide “adequate protection”, government needs to explain, should it decide to expropriate without expropriation, why the taking of property without compensation is not a violation of the “adequate protection” standard.
- Finally, the above issues, among others, illustrate that a reconsideration of the Act is inevitable should expropriation without compensation become a reality. Regardless of how government is going to revise investors' legal rights the potential for investor – state conflicts over the interpretation and implementation of the applicable legal regime is significant, especially given the potentially ruinous consequences for an investor of an expropriation without compensation. The resolution of such disputes by means of litigation or other national or international means of dispute resolution usually ends in settlements or awards that have their own political, economic, cost, service delivery and governance implications, which may, at some point or another, eclipse the benefits of the expropriation.

PART 4

The economics of expropriation

by Russell Lamberti

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for AfriBusiness

1. Introduction

The recent land expropriation without compensation (EWC) motion in parliament and subsequent heated national debate over the land issue comes at a time when South Africa can least afford to play fast and loose with investor confidence.

If parliament amends the Constitution in such a way as to weaken property rights, give more control and discretion over land and real estate to the state, and make arbitrary state expropriation possible, then South Africa risks sliding into an economic abyss.

2. The Purpose & Benefit of Private Property

The following points summarise the reason why threatening property rights and the security of property tenure is so dangerous:

- Private property incentivises wealth creation
- Private property facilitates purposeful economic action and trade
- Private property diminishes conflict over resources

These three elements are absolutely crucial to economic development, economic progress, and poverty alleviation.

Private property gives us the security that what we work for will be to our benefit and will not be taken away from us. This incentivises us to invest our time, talent and resources into creating valuable products and services that we can trade with others in return for their valuable things. This allows people to build wealth.

Having a domain of exclusive control over something is precisely what private property recognises. Without clearly delineated private property, no one is certain who may justly use, control and trade with resources. Economic action is confused, retarded and fraught with conflict. Conflict arises over scarce resources when ownership is not delineated and

respected. The incentive to produce and trade diminishes, and the result is that productivity plummets and people create less wealth than they would otherwise.

Poverty becomes inescapable. The state may try to claim ownership of all property and promise to mitigate conflict as a sort of “final arbiter”. But since the allocation of control of property would still be arbitrary and based on political favours and cronyism, bureaucratically complex, and be subject to the whims of the political leaders of the day, it would retard purposeful economic activity and reduce incentives to produce value.

And even if the state did not try to tell everyone what to do with every piece of property, if it still retained effective legal ownership of all property then it could arbitrarily deprive people of their possessions whenever it liked or dictate how others may use property. This lack of security of and control over property would deter productive private investment and reduce wealth creation.

Private property in land allows people to have exclusive control over parcels of space to facilitate valuable economic production, consumption, dwelling and trade in land. If land tenure is uncertain, people would be less willing to invest their time, talents and resources in using it to produce value, to improve living conditions, or trade for other economic goods and services.

Placing land under state ownership or allowing the state to arbitrarily deprive people of land – like in the case with property in general – would destroy productivity on land and decimate wealth creation.

3. Dying Investment

The first mechanism through which this would happen is a curtailing of capital investment. Capital investment is the transformation of savings into productive, useful capital that is ultimately used to produce consumer goods.

Consider that investors channel voluntary savings into productive capital. Greater capital accumulation leads to more employment and higher productivity, which leads to higher pay and more and cheaper products, raising average real living standards. The path of nations who become rich is paved with savings, investment, more productivity, more savings, more investment, and so on.

As impoverished people gain employment, raise their incomes, and manage to grow their savings, so they too become investors. Indeed, anyone with savings in a pension or provident fund or invested in a family member’s business or even money in a fixed bank deposit is an investor and can begin to benefit from this wealth creation process. Even consumers with no savings benefit from this wealth, since more productivity means lower prices, rising wages, and rising real living standards (think of how even impoverished people today can still own and use a cell phone to communicate!).

This process rests fundamentally on secure, demarcated, non-arbitrary, just property rights.

It is quite another matter when state policies undermine and discourage investment attractiveness for investors whose capital is a source of business and product creation, jobs, and prosperity.

In the same week that the land expropriation motion sailed through parliament, factions within the ANC and EFF began advocating for nationalisation of the central bank. Shortly after that, the new mining minister, Gwede Mantashe, backed away from expectations that he would take a more sensible stance on the draconian Mining Charter and sector BEE rules.

All these proposed measures could threaten the security of private property. Land expropriation endangers the security of land tenure. Central bank nationalisation could be used by the state to print money and produce more inflation, robbing people of the value of their money savings. The mining charter and BEE codes strip asset owners of control of their assets, diminishing their effective ownership.

Consider how these developments affect the expectations and plans of investors. These are shades of precisely what happened in Zimbabwe, and while South Africa remains some way off Zimbabwe's total institutional political decay, it is troubling that the governing elites see moving closer to the Zimbabwe model, not further away from it, as a viable policy trajectory. It is also no surprise that investors, local and foreign, would remain sceptical and extremely cautious about investing in South Africa given the portents of what have historically proven to be very detrimental policies in other countries.

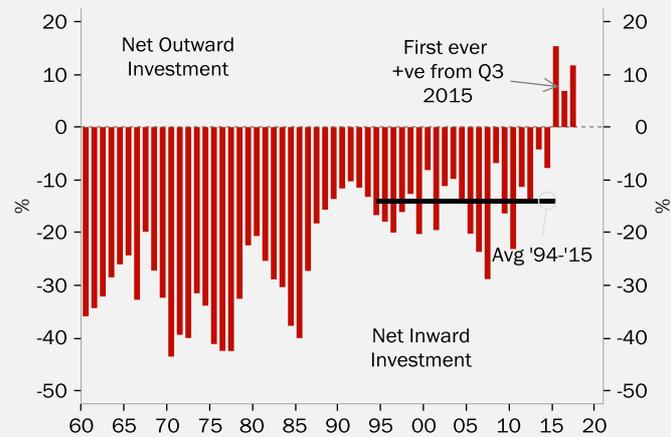
4. Investment Trends

It is not just that South Africa is risking scaring off investment capital. It is doing so after a decade already of discouraging investment, and two decades of slowly rendering the SA economy profoundly unproductive – like playing with matches on a pile of dry sticks.

Already, for the first time on record, South Africans invest more abroad than foreigners invest in South Africa, a sure sign of the loss of investor confidence during the Zuma era (chart below). The near-25% of GDP swing in the net international investment position from the 1994-2015 average to levels today represents a R1.2 trillion swing in net assets held. Although this can partly represent a change in existing asset ownership, it also represents a significant decline in inward capital investment and a substantial rise in outward capital investment as locals choose to allocate their savings where it will be better protected. This represents a loss of confidence in the management of the country.

This Time It's Different

SAfrica, Net International Investment Position as % of GDP



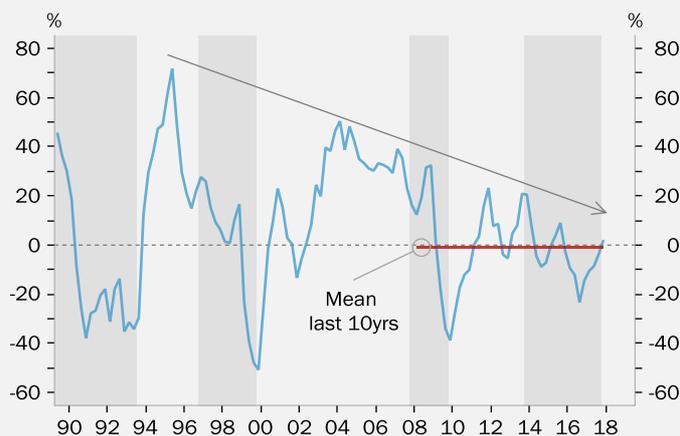
Source: Macrobond, ETM

Meanwhile, the level of new fixed capital formation, adjusted for inflation and net of capital depreciation, has stagnated for the past decade, according to Stats SA and SA Reserve Bank (SARB) estimates. This doesn't mean that the stock of capital has stagnated, but that the additional amount of net new capital formation in the domestic economy has, indicating the *net growth in the overall stock of capital is decelerating*. Although this is undoubtedly better than the stock of capital *decreasing*, it nonetheless means that productivity, wage, and overall economic growth potential is steadily falling.

With high unemployment levels and persistent poverty, these investment trends represent a chronic and severe crisis.

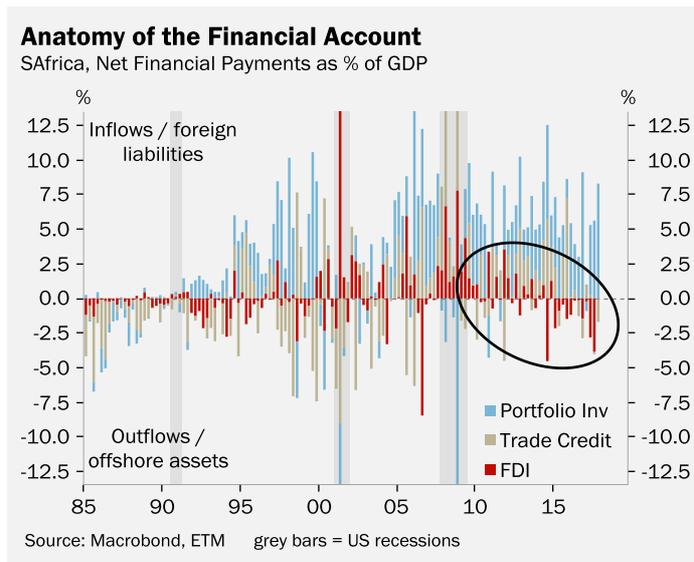
Net Fixed Investment

SAfrica, Net Real Fixed Capital Formation, 1Y %chg



Source: Macrobond, ETM grey = SARB downward business cycle phases

We can also see the lack of investor confidence in the balance of payments data for flows on the financial account. In the chart below, notice how net foreign direct investment (FDI, red bars) moved steadily negative over the past ten years. This again shows less inward investment by foreigners and more outward investment by locals.



5. Investment Quality as Important as Quantity

But it's not just the *quantity* of investment that has suffered under a regime of policy uncertainty and rising state economic control.

South Africa is also suffering from a lack of capital *quality*.

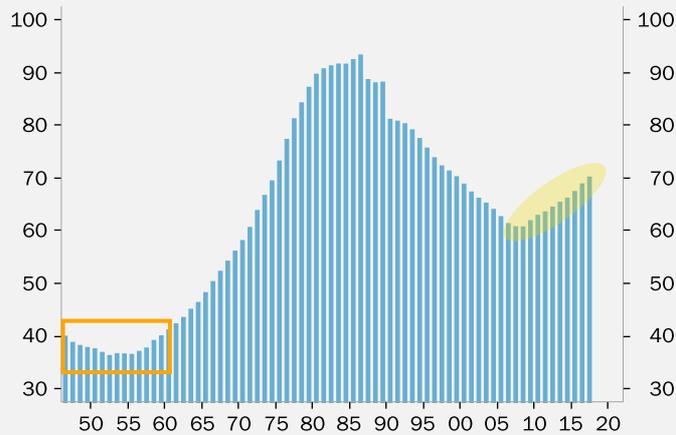
Financial account net flows have in recent years been almost exclusively portfolio inflows (blue bars in the chart above), which overwhelmingly corresponds to the buying of domestic government bonds by locals and foreigners to fund extremely unproductive government debt.

Also, since around 2006, a rising proportion of the capital stock and gross new real investment comes from the less efficient, poorly incentivised, and generally corrupt public sector, including the poorly managed state-owned enterprises.

In the chart below, periods of high economic growth followed falling, or low state-owned capital stock relative to privately-owned capital stock. Periods of high and rising state capital stock relative to private capital stock preceded low growth and stagnation. Present levels of state capital stock relative to private capital stock are roughly double today what they were at the start of the 1960s and have been rising for over a decade.

Stock of Capital

SAfrica, State (Gov & SOEs) Capital Stock as % of Private Capital Stock



Source: Macrobond, ETM

Furthermore, one can make a case that undue and heavy-handed influence by the state has increasingly impaired the private capital stock. As the size of the state has grown in the past 10-15 years and its regulatory tentacles have spread, so more and more private capital is being allocated according to political or non-market rather than market ends.

These trends clearly show a decline in the quality of investment, which is another way of saying that savings are not being efficiently allocated and sufficiently transformed into wealth creation.

The overall picture we see is undoubtedly one of a chronic loss of investor confidence, and a lack of new private sector capital investment specifically, whether by foreign investors or local.

It is rather astonishing then that the South African government should be thinking about weakening private property rights through EWC and deepening socialist policies. These policies have already proven for the past decade or more to be wholly unproductive to investment and therefore productivity, employment and all the downstream developmental benefits. Weakening property rights has also proven disastrous wherever it states have attempted it, such as in the Soviet Union, present-day Venezuela, late-90s/early-2000s Zimbabwe, and indeed in post-colonial India, much of Asia in the 20th Century, and much of Africa even to this day.

Investment quality also declines through corruption and cronyism, which creates opportunities for unproductive 'investors'.

The appeal to placate "investor confidence" is often met with frustration by those who believe sovereign nation-states should not be beholden to the wielders of savings capital. Indeed, when investors are placed at the front of the queue unduly through unfair legal privilege and to the detriment of ordinary citizens, a society does well to question the useful role of such investors. In such cases, people should demand domestic reforms that may jeopardise the plans of vested special interests to the benefit of society as a whole.

The “state capture” debacle under the Zuma administration has arguably demonstrated this issue well in recent years. The state granted privileged investors access to abuse public funds. The SAA and Eskom travails also reveal the damage of investor privilege. In the case of state-owned enterprises, the privileged investor is the state which gets to force unwilling taxpayers to keep throwing money down financial black holes. There was even, under the Zuma administration, the threat of committing vast amounts of public finances to Russian-led nuclear plant development, which threatened to tie taxpayers into endless obligations to another set of privileged investors for uncertain benefits. Even the new Ramaphosa administration has moved to give privileges to renewable energy investors, again with possible future implications for taxpayers and uncertain benefits. BEE beneficiaries too are a privileged class of investor that obtain preferential access to corporate shareholding and state projects with questionable economic rationale.

These are precisely the kind of investors to be wary of, and it is right that their benefit should not come at the expense of taxpayers, private property rights, citizens’ rights, and other fundamental freedoms and requirements of justice.

Diminishing property rights and making Constitutional provisions for greater state control of land will open the door to the same “state-capture” risks of the Zuma administration but on an even grander scale. Favoured investors could be granted favoured land to perpetuate and deepen lines of political patronage. The potential scope for corruption, nepotism, and the creation of a narrow, land-owning and controlling political elite would be vast.

This would further diminish investment quality in South Africa, causing severe misallocation of capital to serve narrow special interests, perpetuating economic decline.

6. What Lies Ahead?

Changing the Constitution to weaken property rights, give the state more discretion to decide what to do with private property, and allowing for land expropriation without compensation, would very likely be an economic disaster.

South Africa’s relative investment stagnation is not irreversible. However, an improvement in the environment for investors would require policies that lead to smaller, less intrusive, less indebted government, less onerous regulations, land restitution with stronger property rights, monetary policy soundness, and integrity of state institutions.

It would also require Herculean efforts on the part of the government to reduce state corruption and the wanton plunder of public funds.

Without reforms of this nature, investors and businesses will have to either continue seeking opportunities to deploy their capital abroad or find ways to ‘state-proof’ as much as reasonably possible their investments and businesses domestically.

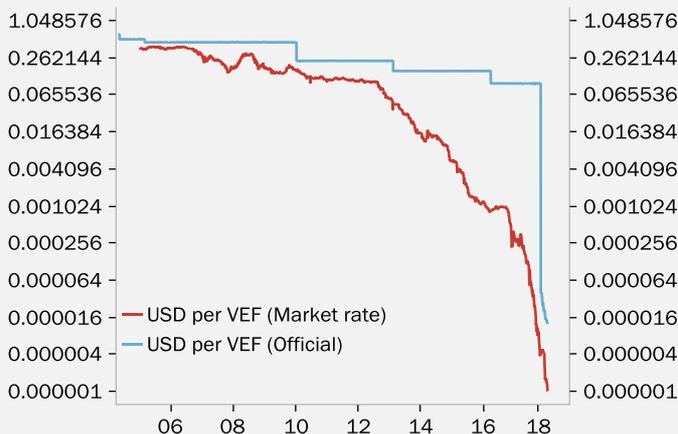
If the ruling elites continue to press toward undermining property rights and replicating policies tried in dozens of hopelessly and tragically failed states, the results shall be predictably dire, not only for investors and businesses but especially for poor, uneducated South Africans.

In the latest such experiment in disregarding property rights, nationalising mining, and corrupting the central bank, we have seen the almost total economic and social collapse of Venezuela.

Venezuela's currency, the bolivar, could acquire a quarter of a US dollar - 25¢ - a decade ago. Today it can only purchase *1-millionth* of a US dollar, or 0.0001¢, due to rampant monetary corruption and printing which is causing hyperinflation and impoverishment. Venezuela's annual inflation rate is currently running along at a staggering 21,000%.

Venezuela's Hyperinflation

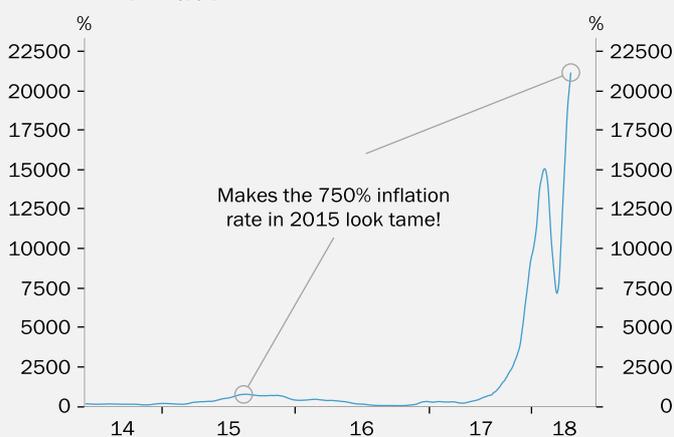
Venezuela, US\$ per Bolivar official v market rate (log scale)



Source: Macrobond, ETM

Inflation Rampant

Venezuela implied y/y price inflation



Source: Macrobond, ETM

New SA president, Cyril Ramaphosa, seems to possess a degree of understanding of the need to court back foreign investors to SA shores. This is why he assembled a team of business and political leaders to conduct a roadshow to promote South Africa as an investment destination. Since astute foreign investors are not unaware of South Africa and its hostile policy environment, this roadshow was presumably about providing inside information about specific projects and political assurances to investors. But if this process were genuinely open and transparent and about creating a conducive environment for investment generally, could this information not have been shared at far less expense in op-ed pieces or adverts placed in popular newspaper publications? Could the president not have held a single press conference in which he announced to the world the change in policy direction to reaffirm and even strengthen property rights?

It is therefore hard to see this roadshow as anything other than an attempt to court a new class of privileged investor to reap unfair rewards at the expense of ordinary South Africans and deliver narrow economic benefits or none at all.

Perhaps this assessment is too cynical. Maybe the Ramaphosa administration indeed wants to make South Africa “open for business” as president Zuma so often liked to pretend on his overseas trips. If this is the case, then it is going to have to show its strong commitment to keeping the central bank out of the hands of the political populists and money-grubbers, actively reduce BEE and labour regulations, and fight for a process of just land restitution that does not weaken but strengthens property rights. If Ramaphosa and his appointees can do these things and at the same time decentralise bureaucratic authority and political decision-making, then his administration will achieve what many sceptics think nearly impossible.

Whether the South African government can turn away from endemic corruption, socialist-style policies, and undermining property rights toward encouraging lots of high-quality capital investment, remains to be seen. But it is a most paramount and urgent undertaking.

PART 5

Amendment of article 25 of the Constitution: Motion of Mr J.S. Malema in Parliament – 27 February 2018

by Johann Bornman

AgriDevelopment Solutions

for AfriBusiness (18/02/2018)

The content of the motion, as presented to Parliament by Mr. Julius Malema in terms of the amendment of Article 25 of the Constitution regarding land expropriation, deserves commentary regarding the information as per points 3, 4 and 5. Because the sources of the information are unclear, just the following:

- i) Under point 3, the statement is made: “the African majority was only confined to 13% of the land in South Africa, while whites owned 87% at the end of the apartheid regime in 1994”.

The Department of Agriculture’s 1993 Agricultural Census indicates Developing Agriculture in former Homelands covers 17,1 million ha or 13,9% of the total South African surface. Should unusable land such as mountains and rivers be left out of the equation, the area amounts to 15%.

In 1994 the following land surfaces were transferred to people of colour, as well as the government:

“State land”	13,8	million	ha
“TBVC-state, self-governing and development trust land”	18,0	million ha	
Total	31,8	million ha	

(Source: ADS, Agri SA and Farmer’s Weekly land audit, 2017.)

This land area makes out 28% of the total usable surface in South Africa.

- ii) Under point 4: “... only 8% of the land transferred to black people since 1994...” and 5: “... black people own less than 2% of rural land, and less than 7% of urban land...” the following:

The information can simply not be accepted as correct. Even the orders of magnitude in the motion under points 3 and 4 indicate bigger surfaces.

Based on the information as contained in the **ADS, Agri SA and Farmer's Weekly** land audit of November 2017, the surface in possession of people of colour amounts to 38% of usable surface in South Africa. In terms of agricultural land: 26,7%.

According to the land audit report by the Department of Agricultural Development and Land Affairs of November 2017, people of colour own 46% of the yard surface in towns and cities.

(Table 10: Individuals' erven land ownership by race in hectares. Page 12 of the report.)

This is a substantial difference from the information as presented by Mr. Malema.

It is unfortunate that the information to Parliament is being skewly presented.

PART 6

AfriBusiness's position on private property and expropriation without compensation

1. AfriBusiness supports private property rights and free markets as matters of justice and in the interest of the well-being of everyone in South Africa.
2. AfriBusiness is opposed to an amendment of the constitution to allow for expropriation without compensation, regardless of whether such amendment is achieved by way of an alteration
 - a. to the text of the constitution; or
 - b. to the interpretation of the constitution.
3. AfriBusiness generally supports transfers of land that occur as part of
 - a. Land restitution (the return of rights in land to persons from whom such rights had been unjustly deprived since the 1913 Land Act, or proper compensation in the alternative)
 - b. The free market (buying, selling, donating, bequeathing and other transfers between mutually agreed partners)
 - c. Voluntary empowerment projects (in which owners of land encourage employee and community participation in the management and ownership on mutually acceptable terms)
4. AfriBusiness generally opposes transfers of land that occur as part of
 - a. Redistribution (the confiscation, expropriation or purchase of land previously held by rightful owners in order to transfer such land to preferred recipients of the state on a discretionary basis)
 - b. Nationalisation (when the state expropriates land to become its new owner)
 - c. Custodianship (when the state takes control of property away from an owner, but, under a convenient legal construction, does not become the official owner, but rather its custodian)

5. AfriBusiness warns that expropriation without compensation, regardless of whether it is performed under an altered constitutional text or alternative interpretation of the current text, would lead to great personal, economic and public harm.
6. AfriBusiness objects to the statistical errors on which the motion for a constitutional amendment to facilitate expropriation without compensation rests.
7. AfriBusiness considers it important to oppose expropriation without compensation firmly and will not be soothed by assurances from politicians in the absence of deep policy reform.
8. AfriBusiness undertakes to support private property rights and free markets in the interest of its members, the economy in general and a vibrant civil society and constitutional order.
9. AfriBusiness will provide free legal aid to the first of its members who becomes a victim of expropriation without compensation due to an amendment of the property rights clause in the Constitution. All members of AfriBusiness, both individuals and companies, will enjoy this protection.



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