

State Responsibility and the Question of Expropriation: A Preliminary to the “Land Expropriation without Compensation” Policy in South Africa

Abdul Hamid Kwarteng¹ & Thomas Prehi Botchway²

¹School of Law, Zhongnan University of Economics and Law, China

²Law School, Chongqing University, Shapingba, Chongqing, China

Correspondence: Thomas Prehi Botchway, Law School, Chongqing University, Shapingba, Chongqing, China.
E-mail: abeikuprehi@yahoo.com; prehionline@gmail.com

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Abstract

Expropriation is a right granted to States under international law; however this right does not guarantee States to abuse their power to unlawfully seize properties without following due process or paying the right compensation. In August 2018, the president of South Africa proposed a bill that would allow the government to expropriate land without compensation and this bill has attracted the attention of both scholars of international law and foreign investors.

With a qualitative approach and a cross sectional analysis of data, this article seeks to analyze the nature of this bill to determine whether it infringes on the principles and practice of international law, as well as the likely consequences that the bill could have on the global image of South Africa and foreign direct investment in the country. The research approach allowed the authors to analyze important literature while making inferences to cases of expropriation in different parts of the world and juxtaposing them with South Africa’s intended policy.

The article concludes that one of the main critical issues for determining the lawful nature of expropriation is that it should be accompanied by an appropriate, adequate, effective, and prompt compensation, and as such not only does this bill constitute to a breach of international law but it will also damage the economy by scaring foreign investors away. In addition, the State would be compelled to spend millions of the already limited resources of the country in defending itself against international lawsuits that will be filed by affected individuals. It is thus suggested that a much better approach for land reform should be adopted by the government in its quest for development.

Keywords: expropriation, foreign investment protection, land reform, international law, South Africa

1. Introduction¹

In recent times, the question of property ownership has not only become the core for the protection of aliens and international investment law, it has actually become a question of human right under international law. Moreover, the denial of justice also lies at the heart of the development of international law on the treatment of aliens and foreign investment (Francioni, 2009). However, though the right to property was included in the 1948 Universal Declaration of Human Rights (Article 17[1&2]), it was not considered within those listed in the 1966 International Covenants of the UN on Civil and Political Rights, and on Economic, Social and Cultural Rights. Thus, access to justice has historically remained problematic for aliens for a long time (Francioni, 2009). The right to own property was only reasserted by the UN General Assembly in 1986 (Escarcena, 2014).

In his discussion on expropriation, Shaw (2008) posits that an assessment of international law with regards to the practice immediately poses two opposing objectives to the scholar though these need not be irreconcilable in all cases. According to him, the capital-exporting countries on the one hand, require some measure of protection and security before they will invest abroad while on the other hand, the capital-importing countries are wary of the power of foreign investments and the drain of currency that occurs, and are thus often stimulated to take over

¹ Our use of the principle of state responsibility in this analysis of South Africa’s land expropriation without compensation policy is premised on the fact that most of the would-be affected individuals and entities may either have dual citizenship or are foreign entities.

such enterprises (Shaw, 2008, p. 828).

Shaw (2008), like other scholars in the field of international law, is of the view that it can hardly be denied that nationalisation or expropriation is a perfectly legitimate measure for a State to adopt and is clearly not illegal under international law (Crawford, 2015; August, Mayer, & Bixby, 2013; Borchard, 1940). It has consequently been asserted that “not to expropriate such property in a general policy of nationalisation might be seen as equivalent to proposing a privileged status within the country for foreign property, as well as limiting the power of the state within its own jurisdiction” (Shaw, 2008, p. 828). He however is of the view that certain conditions must be fulfilled in the expropriation of foreign investments.

In the modern international system, the State is not prevented from interfering with the use of property, being it that of a national or foreigner provided that such usages produce a result that is justified and the correspondent authorities observe a fair balance between individual and community interests in the entire process (Escarcena, 2014). For instance, according to Article 14 of the 1981 African Charter on Human and Peoples’ Rights (the Banjul Charter) “the right to property shall be guaranteed”, but “may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws” (OAU/AU, 1981). This implies that expropriations are legal among members of the African community. The Article in question is however silent on the payment of compensation in any form. Also, Article 21 of the American Convention on Human Rights seeks to protect property against eventual deprivations, or encroachments on it though the Article has not been interpreted and applied extensively (Escarcena, 2014).

For members of the European community, according to Article I of the European bilateral investment treaty (BIT) template (Abs-Shawcross Convention, 1960), “each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties” and that “such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures.” (Abs-Shawcross, 1960)

The point must be emphasised that foreign direct investment is a major source of international development capital and thus helps in providing the much-needed infrastructure development, technology transfers, capacity building, etc. Consequently, any actions of expropriation and undue restrictions and seizure of property belonging to foreign investors as well as citizens and private individuals or corporations – being it tangible or intangible, without the appropriate, adequate, prompt, and effective compensation may have negative implications for the State in question. These will include negative implications for foreign investment and also the State may have to face responsibility. Indeed, due to the benefits that can flow from foreign investment, all countries—developing and developed—wish to attract investment into their countries and as such it is advisable that measures are taken from time to time to create conducive atmosphere for foreign investment. A key factor in this regard would be efforts to enhance the incorporation of corporate social responsibility clauses in multilateral and bilateral investment treaties (Botchway & Kwarteng, 2018). By providing safeguards on the treatment given to investments, it is argued that international investment agreements (IIAs) encourage foreign investors to venture abroad (International Institute for Sustainable Development (IISD), 2010).

Over the years, the lopsided nature of IIAs (the fact that it virtually always prescribes how host states are to treat foreign investors) has led to a number of issues that must be given the needed attention. Thus, IIAs normally stipulate that whenever an investor feels that it has not been treated as stipulated under the IIA, it may “bypass local courts or administrative review and request the formation of an international arbitral tribunal...which will decide whether the state has breached its obligations under the IIA and must pay compensation or other damages to the investor” (IISD, 2010, p. 13). These international investment tribunals thus have the mandate of deciding on the legitimacy or otherwise of host state actions or inactions, been it administrative or legislative measures of general applicability. Bilateral Investment Treaties (BITs) and IIAs consequently promote the fair and equitable treatment (FET) standard, which posits that States have the obligation to protect investors’ legitimate expectations (IISD, 2010; Newcombe, 1999).

On July 31 2018, the president of South (Cyril Ramaphosa) announced in a public speech that his government is in the process of finalizing a bill which will allow the State to expropriate land without paying compensation. This bill in fact seeks to amend Section 25 of the South African Constitution (popularly known as the ‘property rights clause’). The report of the Joint Constitutional Review Committee (CRC) was voted on by the National Assembly and the motion was given the thumbs up by 209 Members of Parliament (MPs), consisting predominantly of members of the African National Congress (ANC) and the Economic Freedom Fighters (EFF) with only 91 lawmakers opposing the motion on December 4, 2018. This was despite countless litigative actions and the threat of a legal fight-back from groups such as AfriForum and the Democratic Alliance (DA) (Daniel,

2018; Staff Writers | teleSUR, 2018).

In the speech of the president, this bill was in the right direction to speed up the process of land reform in South Africa to boost production and the economy. The country has over the years embarked on series of land reform policies mostly with the aim taking land from the 'white minority' that are believed to have access to vast plots of land through the former apartheid system.

1.1 Objective of the Study

The objective of the study is to critically analyze the nature of South Africa's expropriation bill proposed in 2018 which is intended to offer the government the power to expropriate land without paying compensation and whether this bill infringes on international law as well as the likely impact the bill will have on the image of South Africa with respect to foreign direct investment and the country's development.

International law grants States the right to have full sovereignty over their natural resources and as such States are at liberty to use these natural resources in the way they deem fit for the development of the country hence the right to expropriation under international law. However an important issue that needs to be investigated is whether the right to expropriation granted to States under international law could be used as the basis for them to abuse their power and embark on policies that constitute unfair seizure of properties (be it of their citizens or foreigners) or unwarranted policies to interfere with foreign business in its territory. The answer to this question may be obvious, however the problem in this case is to draw the distinction between what constitute on one hand, legitimate regulatory measures enacted by the State on foreign business and property, and on the other hand what constitute unlawful policies or measures that infringes on the rights and interest of citizens and foreign investors per international standards and principles.

By analyzing the South African land expropriation without compensation bill as the case study, this article seeks to address whether such a bill constitute to abuse of State power on expropriation according to international law and whether the bill has the possibility of tarnishing the global image of South Africa and finally what are the likely consequences that the bill could have on foreign direct investment and development in the country.

1.2 Research Methodology

The research methodology adopted for the study is the cross sectional and qualitative data analysis. The adoption of this method offered the authors the opportunity to analyze and digest some of the important issues surrounding South Africa's expropriation without compensation bill from an unbiased perspective. Specifically, the cross sectional analysis aided the authors in comparing similar cases of expropriation in different parts of the world and the ruling that have been given by different tribunals on the basis of breach of international law and standards. By so doing the researchers were able to infer that there is a greater possibility that hundreds of international law suits could be filed against South Africa if the country continues this path and that apart from that, the country would spend huge sums of money in defending itself against these numerous law suits. The possibility of the country emerging as winner in the law suits that will be filed against it is highly improbable if the instance is compared with other similar cases from a cross-sectional analysis perspective, especially considering the fact that in most of the compared cases some form of compensation may have been paid.

The qualitative method was generally used in analyzing state responsibility in the event that it seeks to undertake expropriation per the agreed and accepted standards of international law and also whether the expropriation without compensation bill of South Africa is a breach of international law or not.

2. International Law, State Responsibility and the Question of Expropriation

International law and conventions generally grant every State the power of expropriation. However, in order to make the expropriation lawful as prescribed by international law, States are obliged to perform certain responsibilities and the expropriation process should fulfill certain requirements as stated by international law.

To begin with, expropriation must be based on public interest. This implies that when expropriation is done in the interest of the public, it is considered lawful and that in most cases the expropriating State needs to justify the fact that its action is to serve the interest of the entire public (OECD, 2004). Public interest in this context covers a wide range of issues including but not limited to environmental emergencies, development of infrastructure, public health related issues, the resettlement of people who have been internally displaced by natural disaster or perhaps individuals whose properties are located in irreparable contaminated areas, etc. Among the above listed issues that could be used as a justification for expropriation, the most common and widely used is infrastructure development like the construction of road, railways, building of hospitals, among others. These things are usually of importance to all individuals in the country and as such in the event that governments expropriate land for the construction of such projects, it is generally accepted as lawful provided due process is followed. In some

cases, the government can also expropriate property or land to relocate and give shelter to individuals who have been affected by any natural disaster and are in need of place of shelter.

The erstwhile North American Free Trade Agreement (NAFTA) Article 1110 for example stipulated that no party shall directly or indirectly nationalise or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalisation or expropriation except where it is for a public purpose, on a non-discriminatory basis, in accordance with due process of law and upon payment of compensation. The Agreement further maintained that the payment of compensation is to be the fair market value of the expropriated investment immediately before the expropriation took place and should not reflect any change in value occurring because the intended expropriation had become known earlier (NAFTA, 1992).

As can be seen from the preceding discussion, customary international law harbors the idea that a State – provided that the necessary requirements are met – could expropriate only for a public purpose. The question however remains as to who, when, and how does one define the ‘public purpose’? Moreover, provided one is even able to give a succinct answer to this question of public purpose, even the very nature of the international system implies that what might amount to a breach of international law by a State depends on the actual content of that State’s international obligations and that “there is no such thing as a uniform code of international law, reflecting the obligations of all States.” (Crawford, 2015, p. 2) This stems from the fact that different States have different interests and this is reflected in the range of treaties and other commitments they have assented to and their corresponding distinctive responsibilities. In other words, “there is no authoritative codification of international expropriation law” (Newcombe, 1999, p. 50).

This notwithstanding, in an attempt to ensure justice for individuals and foreign investors, modern investment treaties have made efforts in formulating the standard of full protection and security in a broad manner. Arbitral tribunals have also taken this at face value and interpreted the obligation of States as imposing a duty upon them to prevent harm to the investment from the acts of government (Malik, 2011). Moreover, the application of an international minimum standard of protection can be justified as a reasonable balance between fairness for individuals and foreign investors and State regulatory autonomy, sustainable development and respect for national policy choices (Newcombe, 1999).

Secondly, per international law principles and standards, States have the right to expropriation when it is done for the purpose of safeguarding State security. National security is paramount to every State and as such every State has got the sovereign right under international law to formulate measures that will safeguard its national security including expropriation of foreign property or investment which is deemed to be a threat to a country’s national security (UNCTAD, 2018). In the event that a State has proven beyond all reasonable doubt that expropriating a property was done for the purpose of safeguarding its security in that either the existence of the property is deemed to be detrimental on national security or when there is the need to take away a foreign asset for example land for the construction of a project that will be of paramount benefit as far as the national security of the country is concerned, expropriation may be justifiable.

Furthermore expropriation must be accompanied by the right compensation determined by internal law but those laws should be in accordance with international law, principles and standards. Thus paying the appropriate compensation by the expropriating State is an important criteria and a vital responsibility that needs to be fulfilled by the expropriating State in order to determine whether the expropriation is lawful or not. However, the problem here is who to determine what constitute an appropriate compensation because this to a large extent is at the discretion of domestic law of the expropriating State. In other words, what the expropriating State is required to pay as an appropriate compensation mostly depends on what is inscribed in the domestic laws of the country. The point however remains that domestic laws of countries with respect to compensation for expropriation are in most cases not very friendly, and are often at the disadvantage of the individual or foreign investor due to the fact that naturally or perhaps logically no rational State will like to incur more cost, even as it intends to have enough funds and reserves to embark on developmental projects.

Not only is compensation expected to be paid by the expropriating State but the compensation should be adequate and prompt. By “adequate” compensation is meant “the value of the undertaking at the moment of dispossession, plus interest to the day of judgment.” “Prompt” compensation means immediate payment in cash. While “effective” means that the recipient of the compensation must be able to make use of it. In other words, monetary compensation which is in blocked currency is not effective (International Court of Justice, 1952, p. 105). In the *Aminoil* case for instance, it was stated that the determination of “appropriate compensation” was better accomplished by an inquiry into all the circumstances relevant to the particular concrete case than through abstract theoretical discussion (Cited in Shaw, 2008, p. 834).

Although international law does not explicitly state a required amount to be paid for compensation, it is generally agreed that expropriation must always be accompanied by some form of compensation which needs to meet the minimum international customs and practice. Even though it is difficult to determine what is meant by “minimum international standard”, the expropriating State is required to compare similar situations of expropriation in different parts of the world (as well as the market value of the would-expropriated property and other factors) so as to use it as the basis for paying the right compensation for expropriation.

Again, expropriation should not be discriminatory. On the question of non-discrimination, expropriation is not discriminatory if it differentiates between different economic sectors (August, Mayer, & Bixby, 2013). Non-discrimination is therefore a requirement for a valid and lawful expropriation (Malik, 2011; Francioni, 2009). Thus, though it is not cited in the 1962 resolution, the arbitrator in the *Liamco* case argued that a biased nationalisation would be unlawful. This is notwithstanding that the case held that “Libya’s action against certain oil companies was aimed at preserving its ownership of the oil and was non-discriminatory” (Shaw, 2008, p. 842). Western countries therefore regard expropriation, much as they regard eminent domain, as proper so long as it is done for a legitimate public purpose and the State pays prompt, adequate, and effective compensation, and the State’s actions are deemed not to have discriminated against the foreign investor (August, Mayer, & Bixby, 2013; International Institute for Sustainable Development (IISD), 2010; Organisation for Economic Co-operation and Development (OECD), 2004; Newcombe, 1999). Arguably, one may not be far from the truth to assert that South Africa’s proposed land expropriation without compensation policy is discriminatory. Of course, even an expropriation with compensation would be discriminatory once it targets particular sections of the society.

Accordingly, for expropriation to be recognized as been legal, several international organisations and agencies have over the years recognized the need for meeting the requirements as indicated above. For instance, Section IV (1) of the World Bank Guidelines on the Treatment of Foreign Direct Investment provides that a State may not expropriate foreign private investment except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation. Section IV (2) of the same document notes that compensation will be deemed to be appropriate where it is adequate, prompt and effective. Moreover, Article 13 of the European Energy Charter Treaty, 1994 provides that expropriation must be for a purpose which is in the public interest, not discriminatory, carried out under due process of law and accompanied by the payment of prompt, adequate and effective compensation.

3. An Overview of South Africa’s Expropriation without Compensation (EWC) Bill

In actual sense, South Africa’s Constitution makes provision for the expropriation of land, and it obliges whatever government that is in power to pursue land reform. The Constitution stipulates ways by which a government in power could embark on land reform in the country and these ways are by restitution, redistribution and tenure reform (Boone, 2007).

Redistribution was the initial approach adopted by the South African Government to ensure a balance as far as land ownership is concerned. Land redistribution in South Africa simply refers to a situation where the government purchases land from owners who were not forced in any way but were willing to sell their lands to the government to be redistributed so as to maintain public confidence in the land market. This is the practice which has over the years been referred to as “the willing buyer-willing seller” approach. Redistribution, however, did not work so well in the country due to several reasons but most importantly, many owners and would-be owners criticized the policy on the basis of lack of transparency. For instance, they do not actually see the land they are purchasing and besides they are not allowed to be part of the negotiation and decision making process which finally leads to the purchase and redistribution of the land. The end result was that the owners of the land were no more willing to sell their lands to the government. Another factor related to the failure of the practice is the high cost of compensation.

Following to this, the South African Government in the year 2000 decided to make a shift from the distribution approach to tenure reform system which will be more decentralized as it will create a platform for community and area participation and the land reform process. The tenure reform system was aimed at ensuring local integration and development plans in forty-seven (47) districts. Due to some challenges this approach too was not effective. The most obvious of these challenges was the fact that it led to a situation where the local elites that served as agents dominated the system and used the opportunity to own lands in many areas at the disadvantage of the masses (Hall, 2008).

Upon the failure of the tenure reform, the South African government then decided to use the restitution approach

which is sometimes referred to as “restoration of a right in land.” This approach was simply a means to return the right of land ownership or a portion of land dispossessed after June 19, 1913 as a result of past racially discriminatory laws to the indigenous South African farmers. The aim of this approach was to return a significant proportion of land which was taken away from individuals and communities due to discriminatory or racially motivated laws which happened in the country mainly during the apartheid system and also under colonial rule.

The legal basis for land restitution in South Africa can be found in the 1993 Interim Constitution, Section 25(7) of the 1996 Constitution and the Restitution of Land Rights Act (South Africa History Online, 2014). However, inferring from the current happenings in South Africa, one can argue that redistribution and tenure reform and restitution have so far failed to achieve the intended purpose of creating a balance as far as land ownership is concerned in the country. In 2018, therefore, the South African Government then proposed to amend the current constitution in order to adopt the Expropriation of land without compensation Act.

In the year 2018, the South African Joint Constitutional Review Committee adopted a recommendation which proposed that the Constitution needs to be amended to allow the Government to expropriate land without compensation and this proposal received approval on December 4, 2018 by the National Assembly and on the December 5, 2018, the National Council of Provinces also declared their support for the amendment. Specifically, what the Committee proposed was that:

Section 25 of the Constitution must be amended to make explicit that land expropriation without compensation is a legitimate option for land reform so as to address the historic wrongs caused by the arbitrary dispossession of land and, in so doing, ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programmes (Du Plessis, 2018).

The proposal made by the committee was targeted at amending section 25 of the current South African constitution because currently section 25 of the Constitution gives conditions that should be satisfied in order for the government to acquire a property but the current provisions does not mandate the government to expropriate land without compensation. As it stands now, Section 25 of the Constitution stipulates that some key measures must be taken into consideration in determining “a just and equitable government acquisition.” These considerations include a payment which reflects “an equitable balance between the public interest and the interests of those affected”: the current use of the property, the history of the acquisition and use of the property, the market value of the property, the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation. If this section is amended, its scope will be expanded to include provisions that will legally mandate the government to expropriate land without paying any compensation.

However, it is important to note that South Africa’s expropriation without compensation bill does not equate to land invasion where private individuals will be mandated to seize or acquire land from owners without going through the laid down procedures. This stems from the fact that the amendment of Section 25 of the Constitution does not necessarily change South Africa’s property laws to any significant margin, though the proposed amendment will change property ownership relations. Thus, even if the Constitution is amended and the necessary legislation enacted, the South African property laws does not allow private individuals to arbitrarily take pieces of land and claim them as their own because the current property law that exist in the country as well as international law only mandates States to engage in expropriation of property.

The uncertainty that surrounds South Africa’s expropriation without compensation bill is enormous, for instance a lot of uncertainties still remains regarding relations to the circumstances of application of this intended policy if it eventually becomes effective. Thus questions linger as to whether in some cases the State will pay some form of compensation when it deems fit or whether expropriation will always go with zero compensation. These uncertainties when addressed will go a long way to clarify the purpose and sense of direction of the bill. That notwithstanding, whatever form the policy may take, the road ahead would definitely be a bumpy one for the African National Congress, the Economic Freedom Fighters, and all South Africans for that matter.

3.1 Some Cases of Expropriation

Cases of expropriation abound. Well-known cases include the *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (*Biwater v. Tanzania*), *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (*CME v. Czech Republic*), *Ronald S. Lauder v. Czech Republic*, UNCITRAL (*Lauder v. Czech Republic*), *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8 (*CMS v. Argentina*), *Continental Casualty Co. v. Republic of Argentina*, ICSID Case No. ARB/03/9 (*Continental Casualty v. Argentina*), *Glamis Gold Ltd. v. United States of America* (*Glamis v. United States*), *Methanex Corp. v. United*

States of America (*Methanex v. United States*), the *Aminoil* case, the *Liamco* case, etc.

In the *Siemens A.G. v. Republic of Argentina*, ICSID Case No. ARB/02/8 (*Siemens v. Argentina*), the Arbitral Tribunal posited that not every breach of a contract by a State can be termed as an act of expropriation. According to the Tribunal, for the State to suffer international responsibility, it must use its public authority or “superior governmental power” to interfere with the contract (IISD, 2010).

According to the Tribunal that arbitrated the *Biwater v. Tanzania*, the key elements that establishes an expropriation claim are that the State (1) acts through the exercise of its sovereign authority (as opposed to acting merely as a contractual party) and (2) unreasonably deprives an investor of its rights. Consequently, on the basis these principles, the Tribunal found that Tanzania had cumulatively expropriated the *Biwater’s* rights in violation of the BIT. In *Tecmed v. Mexico*, the Tribunal explained that a measure would only be expropriatory if it permanently and irreversibly “neutralized or destroyed” the “economic value of the use, enjoyment or disposition of [the investor’s] assets or rights” (para. 116).

4. The Invocation of State Responsibility and Consequences of Internationally Wrongful Acts

At some point in time, some countries have taken the position that the doctrine of equality must serve as the final test of international responsibility – an argument that is quite familiar among Latin and Southern American countries. It is in the heat of this argument that Borchard (1940) asserted that “if it is true that the doctrine of equality is the final test of international responsibility, then the source of international responsibility lies in municipal law” and that “only when a state denies equality, may international responsibility be asserted” (Borchard, 1940, p. 447). Thus, the conflict between the application of municipal and international law always raises its head in issues pertaining to expropriation. To resolve this conflict while at the same time ensuring that sovereignty of States are not unduly undermined requires that due process of the law must be internationalized and that international tribunals must necessarily draw on the “mores of the average and not of the crudest municipal practice” (Botchway, 2018; Borchard, 1940, p. 447). There is also the need to adopt more flexible yet formidable approaches such as the Corporate Social Responsibility Approach to Building International Law (CRASBIL) as well as economic diplomacy in order to reduce frequent tensions and high financial costs associated with expropriations (Botchway & Kwarteng, 2018).

In international law, the invocation of state responsibility and the subsequent acceptance (or otherwise) of the offending State may usually lead to a number of consequences which usually includes *cessation* and *reparation*. With regards to cessation, “the state responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition if circumstances so require” (Shaw, 2008, p. 800). For instance, the Tribunal in the *Rainbow Warrior* case held that in order for cessation to arise, the wrongful act had to have a continuing character and the violated rule must still be in force at the date the order is given. The case for reparation on the other hand is more vividly stated in the *Chorz’ow Factory* case, where the Permanent Court of International Justice emphasised that:

The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

Articles 31 and 34 of the Articles on State Responsibility are relevant articles that focus on reparation. The payment of compensatory damages is a key element of reparation in the international system. In this instance of South Africa’s *popular but unpopular* bill and intended policy, legal suits leading to issues of State responsibility and related damages, reparations, and cessations, etc. may only mean that the country will lose in the long run (particularly if the political clouds covering the bill does not settle down soon for more appropriate means to address the land reforms problem of the country).

4.1 Objections to State Responsibility and South Africa’s Chances of Success with the EWC

Under international law, States can raise several objections to complaints brought against them, including lack of standing, lack of nationality, lack of a genuine link, and failure to exhaust remedies (August, Mayer, & Bixby, 2013; Shaw, 2008).

In most international tribunals such as the ICJ, only a State can file a complaint. Thus if a private person or company were to appear as a plaintiff, the case would be dismissed for lack of standing. Consequently, the only way for the matter to be heard in these tribunals is for a State to sponsor the suit of its national. The lack of standing objection would however obviously not apply in tribunals such as the International Center for the Settlement of Investment Disputes (ICSID) or the European Court of Human Rights, where the right of private persons to bring actions against a State is allowed (August, Mayer, & Bixby, 2013).

Given South Africa's circumstance, the fact that the expropriation without compensation virtually targets the 'white minority' (most of whom are actually South Africans), it will be a major hurdle to even raise questions lack of standing, especially when affected individuals may have been denied fair hearing and appropriate redress by municipal courts. The issue may become even dicey as most of the targeted individuals may possess dual citizenship. It is also important to bear in mind that though according to *Article 4* of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws "a State may not afford diplomatic protection to one of its own nationals against a State whose nationality such person also possesses", after World War II, a new rule evolved that allows the State of which the individual has the master nationality (i.e., the one with which he or she has the most links) to complain against the other (August, Mayer, & Bixby, 2013).

International law also requires that a person whose suit is being sponsored by a State in an international tribunal must be a real and bona fide national of that State. For companies, the ability of a State to sponsor a complaint depends on the particular company's nationality. States can therefore raise the "*Lack of a Genuine Link*" objection in response to an invocation of State responsibility by other States. International law also requires that before an individual or business firm can seek the help of its home State in supporting a complaint of mistreatment by a foreign State, the individual or firm must exhaust all of the local remedies available to it within the foreign State. Failure to exhaust remedies is thus an objection that the foreign State may raise in an international tribunal (August, Mayer, & Bixby, 2013; Shaw, 2008). It must however be noted that the failure to exhaust remedies objection can be exempted on certain grounds such as: if an adequate remedy is clearly unavailable; if the requirement to exhaust a person's remedies is waived by treaty; if the injury was done directly to a State (rather than to a private person); and if the defendant State has delayed excessively in granting a remedy. For instance in the Robert E. Brown Case (1923), the arbitral tribunal indicated that "Brown was not required to exhaust his local remedies in South Africa" since "all three branches of the government conspired to ruin his enterprise..." (August, Mayer, & Bixby, 2013, p. 78) Under the current situation, South Africa's EWC bill will definitely mean that there will not be an adequate remedy for affected individuals and entities. This makes the country very susceptible to international suits under principles of State responsibility.

Other objections such as laches and "dirty hands" may also be raised by States in contending against State responsibility. Though all these options may be available for South Africa in dealing with future countless international suits due to the seemingly unpopularity of the EWC, existing cases and evidence gives an indication that none of these objections may suffice due to the seemingly arbitrary and discriminatory nature of the policy. (Our view in this regard may sound quite harsh and emphatic and not too pleasing to some who believe in 'righting the wrongs of yesteryears', but we are being pragmatic and realistic about the situation – EWC could have serious negative ramifications for South Africa).

5. Conclusion

In conclusion, one can infer from the above that per international law and standards, every State has the right to expropriation but the expropriating State has some duties and responsibilities to fulfil in order to make the expropriation lawful and one of such important responsibility is that the State is obliged to pay compensation to the individual or organization whose property is been expropriated. On this basis, South Africa's bill of expropriation without compensation to a large extent is a breach of international law and accepted standards which will eventually tarnish the image of the country worldwide because it will portray the country as unfriendly to foreign direct investment and the repercussions may be huge if care is not taken.

This bill will also be detrimental to the South African economy in the long run because foreign investors are likely to relocate to other parts of the world where they believe their investments and properties will be well protected by both domestic and international law. This notwithstanding most of the aggrieved foreigners who will be affected by this law are likely to launch series of international law suit against the country which will eventually compel the country to use its scarce reserves, money and time to defend these lawsuit and this has the possibility of draining the economy financially.

Although, it is an undisputed fact that historically - from the period of the apartheid - native South Africans have suffered quite a great deal in the hands of the 'minority whites' which has eventually triggered the leaders of the country to embark on series of policies with the aim of ensuring that native South Africans gain control of important sectors of the economy, an expropriation without compensation bill is really not the way to go because it is below the belt and the likely negative consequences that the country will face in the long term far exceeds the short term benefit that the country may acquire. It is thus suggested that the leaders of the country should adopt a much better and realistic approach to land reform than enacting such policies. We would recommend something like an adjusted or reconfigured compensation. By this, we are proposing the need for a form of

‘settlement’ for would-be affected groups and persons. In other words a ‘*negotiated compensation*’ is needed. This negotiated compensation could not necessarily be equivalent to the market value of the expropriated land, but it should be something that is also not meant to do undue harm to those ‘whose lands’ are to be expropriated.

It is worth noting that though South Africa’s proposed expropriation without compensation (EWC) bill specifically targets the expropriation of lands, the ramifications of this supposedly new land reforms strategy will not be on just the land, it will in fact have ripple effects on all sectors of the country’s economy. Moreover, though the policy seems to be targeting land ownership, it is worth noting that these same lands harbor the country’s natural resources and agricultural potentials that have been the linchpin of the country’s development all these years. In effect, any haphazard, knee-jerk and ‘politically’ motivated policy aimed at changing land ownership without accurate calculations and long term visions of proper planning and integration could only spell doom for the country.

In short, the harboring of any ideas of expropriation without compensation as “a highly technical and lengthy process” will indeed become “an understatement” even as the thinking that the non payment of compensation would “shorten the process is equally naïve.” (Du Plessis, 2018a) There is the need for serious reflections on the matter. It is right to seek justice for the oppressed and the underprivileged but it is equally right to be pragmatic and not to cause people to become underprivileged and oppressed in order to justify historical misdeeds. A right balance must be sought in this very dicey situation – land expropriation without compensation is certainly not the right path after reconciliation.

In addition, though the “willing buyer, willing seller” policy may seem a bit ‘outdated’ – given the practical ineffectiveness of the policy as is evident from the available results, so is the populist rhetoric of not paying for a “stolen land” untenable.

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