The threat to property and investor rights

[From the annual South African Monitor Report of April 2019: Political factionalism, business risks and the ANC's hybrid regime]

ANC weakened European investor protection

Since 2013, several ANC-directed business bills and acts have increased distrust and concern in foreign and domestic business circles. A headline in *The Economist* of 27 March 2014 was clear: "Bashing business for votes: New legislation may save the ANC votes but will chase away foreign investment". Foreign diplomats, usually reserved, have started to voice their concerns in private and in public.[1]

Carol O'Brien, executive director of the American Chamber of Commerce in South Africa, stated in February 2015 that the plethora of legislation coming out of South Africa is causing "jitters" in US businesses with operations based in the country.[2] The chamber represents almost 40% of the six hundred US companies with operations in South Africa. She said that the stream of legislation did not send a message that foreign investment was welcome in South Africa. The Southern Africa Initiative of German Business (SAFRI), one of the main German business associations looking at the interests of about six hundred German businesses in South Africa, has expressed dismay over the direction of economic policy.[3]

Following costly arbitration claims brought against South Africa by European investors, the Zuma administration decided in 2010 to stop signing bilateral investment treaties (BITs). The Department of Trade and Industry has, since 2012, undertaken a targeted termination of all 13 treaties with European states, replacing them with the Promotion

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1. http://www.economist.com/blogs/baobab/2014/03/property-rights-south-africa; http://online.wsj.com/news/articles/SB10001424052702303948104579537802749237362; http://www.polity.org.za/article/businesses-brace-for-transformation-pressures-as-elections-loom-2014-04-08; http://www.bloomberg.com/news/2014-04-14/anc-adopts-laws-before-vote-that-may-hurt-south-african-business.html; http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill.
2. http://www.bdlive.co.za/economy/2015/02/20/barrage-of-new-laws-alarms-us-firms-in-sa.
3. http://www.dw.de/german-corporate-unease-in-south-africa/a-18078269; http://www.badische-zeitung.de/ausland-1/steinmeiers-vergebliche-visite-am-kap--95122906.html.

and Protection of Investment Bill (PPIB). The department has not terminated the equally restrictive treaties that protect Chinese and Russian investors in South Africa.[4]

Where treaties are terminated, the foreign investors currently protected by them may have no remedy against damaging policy changes. They are also likely to receive less than the "prompt, adequate and effective" compensation promised by the treaties.[5]

The new Investment Bill or PPIB was approved by Parliament and signed into law by President Zuma at the end of 2015. In terms of this law, the rights of foreign and domestic property owners have been much reduced. The PPIB is supposed to apply equally to foreign and domestic investors. "This bill is part of a worrying trend that South Africa's protection of private property is weakening," stated Carol O'Brien in 2015.[6]

South Africa is Germany's most important trading partner on the African continent. The response of SAFRI to the cancellation encapsulates the key objections of European business to the policy:

1. *Compared to the terminated BIT, the Promotion and Protection of Investment Bill (PPIB) does not provide a guarantee for the fair and equitable treatment of foreign investment. Changes in the legal framework conditions to the disadvantage of investors are possible at any time and might have the effect that both the investment protection and possible claims for compensation are cancelled.*
2. *According to the wording of the bill the legal protection of investments only comprises such cases in which there is a direct expropriation. Measures having an equivalent effect to expropriation are, however, not comprised, so that in such cases – contrary to the BIT – a claim for compensation is not provided for.*
3. *In contrast to the BIT, compensation payments in cases of expropriations can be below market value, as the basis for any decision is the general provision of fair and equitable compensation, which reflects the consideration of both public interests and the interests of the parties concerned, and not the market value.*
4. *The PPIB envisages the recourse to national arbitral jurisdiction and arbitral tribunals, whereas the access to international arbitral tribunals is neither explicitly mentioned nor allowed. However, for international*

4. Ben Winks, "Investors pawns in political power play", *Business Day*, 19 April 2016.
5. http://mg.co.za/article/2013-11-01-swiss-govt-reacts-to-termination-of-bilateral-investment-treaty-with-sa; http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill.
6. https://www.bloomberg.com/news/articles/2015-11-17/south-african-lawmakers-approve-foreign-investment-bill.

> *investors, the objective and neutral settlement of disputes according to international law is an important element in investment decisions.*[7]

Foreign companies may in fact receive zero compensation if a taking of property by the state is not recognised as an "act of expropriation" under the PPIB. According to Matthias Boddenberg, CEO of the South African-German Chamber of Commerce and Industry, the PPIB would raise the investment risk of German companies, as well as the risk insurance premiums they would need to pay.[8] German exports for the past decade show an upward curve. However, German investment in South Africa remains subdued, largely caused by the political uncertainties and the general economic situation.

Stefan Sakoschek, the executive director of the EU Chamber of Commerce in South Africa, told parliamentarians during public hearings in September 2015:

> *We are aware of a number of projects that are pending due to the degree of uncertainty related to the investment framework … The withdrawal of SA's (bilateral treaties) with EU member states has sent an alarming message to the EU business community regarding the standard of protection of investments. The new bill does not sufficiently allay those concerns.*[9]

In May 2016, Sakoschek stated that the conditions for investing and doing business in South Africa were "very different", compared to the period when bilateral treaties still protected businesses. According to Sakoschek, political instability and regulatory uncertainty was forcing European firms to reconsider investing in the country. The rules for investing in South Africa appear to be changing too quickly and too drastically.[10] In September 2017, Sakoschek again expressed deep concern over the large number of bills affecting foreign business. According to him, several will have a major impact and there is concern over the ambiguous nature of the legislation.[11]

Weakened property rights[12]

Under the PPIB, signed by President Zuma into law in December 2016, expropriated owners will receive less than market value and will have no right to damages for

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7. Southern Africa Initiative of German Business, *South Africa: New Legal Framework for Direct Investments*, 2014, pp 1-2 at www.safri.de.
8. http://www.marktundmittelstand.de/zukunftsmaerkte/ppib-deutsche-firmen-fuerchten-um-standort-suedafrika-1233191/.
9. http://www.bdlive.co.za/economy/2015/09/10/investment-bill-may-cause-investor-flight-eu-firms-warn.
10. "Rules for investing in SA changing too drastically and too quickly", *Moneyweb*, 31 May 2016.
11. http://www.ftwonline.co.za/article/126293/Pending-legislation-unsettles-EU-business/66.
12. The analysis of the PPIB's contents is heavily indebted to the analyses of Doctor Anthea Jeffery of the SAIRR and Advocate Martin Brassey, SC, as reflected in the sources quoted. Also see http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans; http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619.

consequential loss. One danger in the law is that domestic property owners will be confined to "just and equitable" compensation falling somewhat short of market value. An even greater danger is that such property owners will receive no compensation at all.

According to analyses of Senior Advocate Martin Brassey and policy analyst Doctor Anthea Jeffery,[13] this danger stems from a key clause in the legislation stating that various actions "do not amount to acts of expropriation". There will thus be no expropriation where the state's actions result "in the deprivation of property", but "the state does not acquire ownership" and "there is no permanent destruction of the economic value of the investment".[14]

This situation could arise, for example, where the state takes commercial farmland under claim as "custodian" for land claimants, and then invites them to apply to it for licences to use portions of this land for specified periods. In these circumstances, commercial farmers would be deprived of their property, but the state would acquire it as custodian, rather than as owner – and there would be "no permanent destruction of the economic value" of the land, which would continue to be farmed by others. This means there would be no "act of expropriation" under the principles established by the PPIB. As a result, no compensation would be payable.

Constitutional Court neutralized property rights clause in Constitution

The wording of this provision can be traced back to a majority judgment of the Constitutional Court in April 2013. This ruling was made by Chief Justice Mogoeng Mogoeng, an appointee of President Jacob Zuma.[15] The ruling was concerned with whether expropriation had occurred when an unused and unconverted private mining right "ceased to exist" under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Judge Mogoeng found that Sebenza Property Limited, which used to own the coal mining right in issue, had suffered a "compulsory deprivation" of its right under the MPRDA. In addition, "the custodianship" of this resource was now "vested in the state on behalf of the people of South Africa". However, the state had not acquired ownership

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13. http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans; http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619. Also see "Concourt ruling, new Investment Bill could give government sweeping powers to take property without compensation", *Polity*, 19 May 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
14. http://www.sabinetlaw.co.za/economic-affairs/legislation/promotion-and-protection-investment; http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment; http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans.
15. http://mg.co.za/article/2011-08-16-zuma-picks-mogoeng-as-chief-justice.

of the mining right. Instead, it was simply a "custodian" or "conduit" through which "broader and equitable access to mineral resources could be realised".[16]

The chief justice ruled that since the deprivation of ownership from Sebenza had not been matched by the acquisition of ownership by the state, no expropriation had taken place. It followed that no compensation was payable. Echoing this judgment, a key provision in the PPIB states that various actions "do not amount to acts of expropriation". Among the actions it lists, are "measures which result in the deprivation of property, but where the state does not acquire ownership of such property".

When Chief Justice Mogoeng handed down the ruling on Sebenza's rights, two judges of the Constitutional Court, Johan Froneman and Johann van der Westhuizen, disagreed with the majority's conclusion that no expropriation had taken place. They also cautioned against the implications of Judge Mogoeng's ruling. According to the judges, the ruling could lead to "the abolition of the private ownership of … all property" without the payment of any compensation. "Any legislative transfer of property from existing property holders" would no longer be "recognised as expropriation" if it was "done by the state as custodian of the country's resources", they said.[17]

Disempowered international and South African property owners

Government could use the PPIB's rules to take further measures to vest all mining land, mining equipment and other mining assets in the state as the custodian of the nation's mineral resources. Simultaneously, it could invite black-owned businesses in particular to apply to the Department of Mineral Resources for a licence to use a portion of these assets for a specified period. If past experience is any guide, the businesses that benefit, would usually be tied to supporters of the ANC, and not to political opponents thereof.

Similar measures, intended to generate a similar outcome, could be taken as regards all other "investments" covered by the PPIB. These are broadly defined to include companies; equities; land; movables; and intellectual property; along with mining rights and similar "licences, authorisations, or permits … to carry out economic and commercial activities". Moreover, the PPIB applies equally to domestic and foreign investors, for the need to ensure equal treatment for both categories of investor is a key theme of the measure.[18]

The PPIB's reference to "investors" is also misleading, for it suggests that the new law will apply solely to companies and other commercial enterprises. In fact, the law will

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16. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
17. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.
18. Anthea Jeffery, "The ANC govt's plan for expropriation on the sly", *Politicsweb*, 25 February 2014; Martin Brassey, "The ANC govt's property rights grab", *Politicsweb*, 22 July 2014.

apply to everyone, including "natural persons" and "regardless of nationality".[19] The law gives the state the power to take measures to acquire property of virtually any kind as "custodian" for the poor, and without the need to pay any compensation.

The Restitution of Land Rights Amendment Act came into force in July 2014, reopening the land claims window and causing uncertainty about investment in agriculture. In May 2016, Parliament approved the Land Expropriation Bill, which indicate the requirements for the state to lay claim to land for public purposes or in the public interest without the owner's consent. The term "property" in the Bill was not defined as referring to land only, meaning it was open to interpretation and could lead to movable property like shares and intellectual property being expropriated. The Bill will now be sent to the president to be signed into law.[20]

The ANC is promising that if it is re-elected, the government will *investigate* the possibility of passing legislation that would require financial institutions that invest the pension money of most salaried workers, to invest part of the funds in "prescribed assets", presumably government-controlled assets. If the government would force retirement funds to "invest" 50% of all retirement money in failing and corrupt SOEs,[21] the question arises whether a constitutional challenge to such a move would be successful.

Constitutional Law expert Pierre de Vos stated:

> *The short answer is that it might not be that easy to succeed with a constitutional challenge (especially if those who design the scheme are not catastrophically incompetent and/or dumb)… If the executive was crafty enough, and if it was well versed with the Constitutional Court jurisprudence (neither of which one can assume to be the case), it might well devise a scheme that would have the effect of diminishing the actual pension benefits of salaried employees, without falling foul of section 25(1).*[22]

Creeping state ownership in the mining and energy sectors

According to a survey published by the Chamber of Mines in December 2017, based on 16 member companies, the uncertain policy and regulatory environment had caused the mining industry to freeze investment on new projects. The estimated

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19. "A new Expropriation Bill by another name", *Liberty*, 25 February 2014, p 5; http://www.miningweekly.com/article/top-lawyers-warn-of-mining-bills-devastating-consequences-2013-09-13.
20. http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill.
21. For the section on SOEs, see Part X.
22. https://www.dailymaverick.co.za/opinionista/2019-01-17-is-the-government-coming-for-your-pension-and-would-this-be-unconstitutional/.

planned capital spending of R145 billion in mining could increase by R122 billion or 84% in a more stable and conducive environment, the survey found.[23]

Among the changes has been the amended Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Mining Bill), which was approved by the National Assembly on 1 November 2016.[24] The Mining Bill also applies to offshore oil and gas exploration and production.[25]

The law gives the minister of Mineral Resources unprecedented discretionary powers in many spheres. It gives the state a 20% "free carried interest" (or free stake) in all new ventures of this kind. It "entitles the state to a further participation interest" of an unspecified percentage, to be attained either via "acquisition at an agreed price" or through a "production sharing agreement" obliging the petroleum company in question to "share ... the extracted resource" with the state. An earlier version of the bill put this additional interest at 30% and expressly limited the state's potential stake to a maximum of "50% per petroleum operation". Now, the state can demand as much as an 80% additional share, over and above its 20% free share.

Oil and gas companies will find it difficult to negotiate an accurate price. They will be required to pay 100% of the costs of developing new projects, but will receive only 80% of the profits. This means that only projects that can fund the government's 20% free ride will be developed.[26]

Business Day, the premier business publication in South Africa, previously commented:

> *(T)he Mineral and Petroleum Resources Development Amendment Bill allows government to "cherry-pick", forcing producers to sell all of their most profitable projects to the government. They must do this at an "agreed price" rather than a market price. This means companies can never recoup the costs of exploration or of unprofitable projects. The consequences are obvious. Under such conditions companies will not explore in South Africa. Nor will they develop projects they know the government will nationalise.*[27]

In April 2016, the Department of Mineral Resources released a revised mining charter that demands a perpetual minimum of 26% black ownership per mining right. The charter was drawn up without consultation with the industry. Many companies have

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23. https://www.businesslive.co.za/bd/economy/2018-01-16-mining-output-accelerated-more-than-expected-in-november-2017/.
24. http://www.lexology.com/library/detail.aspx?g=e4cc1739-49a3-41e1-98e0-5d97cb86d704; http://allafrica.com/stories/201612050901.html.
25 http://www.miningweekly.com/article/local-mining-industry-still-in-doldrums-economists-2016-12-08/rep_id:3650.
26. http://mg.co.za/article/2013-09-13-experts-stakeholders-grill-proposed-changes-to-mining-laws.
27. http://www.bdlive.co.za/opinion/columnists/2014/03/31/a-hard-ask-for-business-to-criticise-government.

complied with this requirement, but BEE partners have exited, taking their profits, or the previous BEE partner has transferred shares to a non-BEE company. The charter now states that all BEE targets stipulated in the mining charter shall be applicable throughout the lifespan of mines. The charter increased the level of capital goods procurement from BEE-compliant companies to 60% from 40%.[28]

The new Mining Charter III published in 2017 increased the uncertainty in the sector. It proposed an increase in black ownership targets to 30%; the creation of more onerous ownership requirements for suppliers to the industry; and demands that research and development should be focused locally, ideally at previously disadvantaged universities.[29] The Mining Charter agreed on in late 2018 indicated a continued emphasis on black economic empowerment. For existing mines however, the minimum of black ownership now stays at 26% for the duration of existing mine rights. New mining right holders will need 30%. There now is no required increase in the final draft if it has met the previous metrics laid out in the 2010 Mining Charter. A mining project that was launched following the publication of the 2018 version must meet new, higher standards. The option of paying "equity-equivalent" benefits to local communities has been added.[30]

Mining Charter III's acceptance by the government in late 2018 was the culmination of months of intensive engagements with stakeholders in the industry, including mining companies, investors, mining communities, labour, financial institutions, as well as the legal fraternity. The withdrawal of the MPRDA Amendment Bill and the ongoing development of a separate regime for oil and gas resources, demonstrated that extensive lobbying by business may still improve policy certainty and create an environment that is conducive to investment.[31]

However, it remains to be seen whether a new ANC government will be able to provide the longer-term policy certainty that the mining industry requires for its projects of long-term investment. The investment actions by mining companies reflect that many are doubtful whether current political dynamics favour such policy certainty.

Increased state ownership and control of the lucrative security industry

ANC attempts at other forms of creeping expropriation can be expected in the hybrid regime in the next decade. The Private Security Regulation Amendment Bill of 2013 (alias the Security Bill) was adopted by Parliament in February 2014 and is to be signed

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28. "Department blindsides miners with new charter", *Business Day*, 15 April 2016.
29. https://www.moneyweb.co.za/moneyweb-opinion/soapbox/mining-industry-hopes-that-the-new-broom-sweeps-clean/.
30. https://www.mining-technology.com/features/the-final-shape-of-south-africas-new-mining-charter/; https://www.bloomberg.com/news/articles/2018-10-02/south-africa-s-latest-mining-charter-what-s-new-and-who-wins.
31. http://www.miningweekly.com/article/policy-certainty-lifts-sentiment-safety-slips-and-a-challenging-2019-forecast-2018-12-14.

into law. A provision reintroduced in the closing stages of the parliamentary process requires that "at least 51% of the ownership and control" of security companies must be "exercised by South African citizens". Foreign-owned companies will be forced to sell 51% of their shares to South Africans.

The clause on expropriation speaks of a minimum of 51% local ownership, but leaves it up to the minister of Police to decide on a higher figure. Both the South African Chamber of Commerce and Industry (SACCI) and the Security Industry Alliance (SIA) have requested Zuma not to sign this bill.[32] There are concerns that the bill is focused less on legislating the companies and more on regulating them as businesses. This would mean that the sector would be subject to government's "transformation" strategies and discouraging foreign investment in favour of South African ownership.[33] These clauses would be in violation of South Africa's commitments under the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO).

According to Stefan Sakoschek, the director of the EU Chamber of Commerce and Inustry in Southern Africa, the Private Security Industry Regulation Amendment Bill currently is a priority concern. "Our concern is that it introduces the topic of nationalisation again. The legislation gives power to the minister of Police to expropriate up to 100% of a foreign-owned security company. The bill also allows for foreign ownership of local private security companies to be limited." He said in terms of the legislation the definition of a security company was extremely broad in the bill. "We have many companies that manufacture and import security products into South Africa and this bill could impact on them negatively."[34]

It remains to be seen how Ramaphosa's ANC government deals with this issue. However, as in the other sectors covered in this report, the ANC is likely to promote extensive local ownership in the security industry, which will also maintain or create opportunities for its politics of patronage. ■

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32. http://www.bdlive.co.za/national/2014/06/19/business-groups-urge-zuma-not-to-sign-disputed-bill-on-private-security; http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security; http://www.prweb.com/releases/2014/06/prweb11907317.htm.
33. https://businesstech.co.za/news/business/175651/new-laws-could-mean-the-end-of-private-security-as-we-know-it-in-sa-report/; http://city-press.news24.com/Business/Private-security-amendment-bill-the-enemy-of-SA-economy-20151009.
34. http://www.ftwonline.co.za/article/126293/Pending-legislation-unsettles-EU-business/66.