

ON THE EXPROPRIATION BILL OF SOUTH AFRICA

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INTRODUCTION

On October 9, 2020, the government of the Republic of South Africa (“South Africa”) published a draft version of a long awaited Expropriation Bill (“the Expropriation Bill” or “the Bill”) on its government website.¹ Expropriation is the practice of taking private land for public use, and the Bill would allow the government to do so without compensating the former owner in certain circumstances.² The Expropriation Bill is one part of what has been a long and arduous journey towards land reform in South Africa.³

1. Draft of Expropriation Bill, 2020, Bill 23-2020, GN 1082 of GG 43798 (9 October 2020), https://www.gov.za/sites/default/files/gcis_document/202010/expropriation-bill-b23-2020.pdf [hereinafter Draft Bill].

2. *Id.*

3. Voltera Fietta, *Client Alert: South Africa’s Expropriation Bill 2020*, LEXOLOGY (Nov. 12, 2020), <https://www.lexology.com/library/detail.aspx?g=0d56cff7-b13e-4ec0-854e-dcd0b5038e43>.

South Africa first attempted to pass an expropriation bill under the new Constitution in 2008.⁴ However, the ratification came to a halt when the constitutionality of the bill came into question.⁵ In 2015, the process to pass an expropriation bill began once more.⁶ Though the 2015 bill passed every stage of the process and reached former President, Jacob Zuma, he returned it to Parliament twice to resolve certain constitutional issues. The 2015 bill was ultimately withdrawn on August 28, 2018.⁷ Zuma recommended any future drafts be in line with the bar on arbitrary deprivation of property in Section 25 of the South African Constitution.⁸

In February 2018, shortly after the resignation of President Jacob Zuma, Interim President, Cyril Ramaphosa, promised that he would speed up the process of returning African land back to Black citizens.⁹ Opponents to Ramaphosa found his statements alarming as he claimed, “We must ensure that we restore the dignity of our people without compensating the criminals who stole our land.”¹⁰ To some, the notion of expropriation without compensation was extreme, and it brought to mind the disastrous failures of other countries that issued similar policies in the past.¹¹ Yet, despite the opposition, Ramaphosa continued to promise an expropriation bill during his campaign for general election, all while assuring that foreign investments and food

4. Eimin du Plessis, *South Africa has another go at an expropriation law. What it's all about*, THE CONVERSATION (Nov. 1, 2020), <https://theconversation.com/south-africa-has-another-go-at-an-expropriation-law-what-its-all-about-148379>.

5. *Id.*

6. National Assembly Public Works and Infrastructure, *Expropriation Bill: Withdrawal, with Deputy Minister*, PARLIAMENTARY MONITORING GRP. (Aug. 28, 2018), <https://pmg.org.za/committee-meeting/26932/>.

7. *Id.*

8. *Id.*

9. Wendell Roelf, *Vote in South Africa's parliament moves land reform closer*, REUTERS (Feb. 27, 2018, 7:10 AM), <https://www.reuters.com/article/us-safrica-land-expropriation/vote-in-south-africas-parliament-moves-land-reform-closer-idUSKCN1GB22I>.

10. *Id.*

11. Tom G. Palmer, *SA Must Look at the Many Horrific Results of Land Expropriation Without Compensation*, CATO INST. (May 11, 2020), <https://www.cato.org/commentary/sa-must-look-many-horrific-results-land-expropriation-without-compensation>.

security would not be threatened.¹² On May 8, 2019, Ramaphosa secured a victory for the African National Congress (ANC) Party with fifty-eight percent of the popular vote.¹³

Keeping his promise, Ramaphosa established a committee in July 2019 to clarify parts of the Constitution that would allow for expropriation as well as draft new legislation and an amendment.¹⁴ However, the drafting process was interrupted and temporarily postponed as a result of the global Covid-19 pandemic.¹⁵ Finally, on October 9, 2020, after a public hearing, the Draft 2020 Expropriation Bill was published.¹⁶

Despite assurances from the South African government, opponents of the Expropriation Bill perceived the proposed legislation as a form of theft.¹⁷ This was particularly relevant in South Africa due to alleged instances of fraud and corruption by former President Jacob Zuma.¹⁸ Former U.S. President Trump even accused the Bill of targeting White farmers in an attempt to steal their land.¹⁹

Opponents also feared that the Expropriation Bill would have a negative economic impact, as it would possibly deter or halt foreign

12. Alexander Winning, Wendell Roelf, & Mfuneko Toyana, *South Africa's Ramaphosa faces obstacles to reform*, REUTERS (May 6, 2019, 2:14 AM), <https://www.reuters.com/article/us-safrica-election-ramaphosa-analysis/south-africas-ramaphosa-faces-obstacles-to-reform-idUSKCN1SC0CJ>.

13. Fergal Keane, *South Africa election: ANC wins with reduced majority*, BBC NEWS (May 11, 2019), <https://www.bbc.com/news/world-africa-48211598>.

14. *South Africa takes a step closer to land expropriation—but opponents say it can't afford it, after the coronavirus*, BUS. TECH (July 1, 2020), <https://businesstech.co.za/news/property/412357/south-africa-takes-a-step-closer-to-land-expropriation-but-opponents-say-it-cant-afford-it-after-the-coronavirus/>.

15. *Id.*

16. Draft Bill, *supra* note 1.

17. James Peron, *Expropriation without compensation sends a clear message*, CITY PRESS (Apr. 18, 2019), <https://www.news24.com/citypress/voices/expropriation-without-compensation-sends-a-clear-message-20190417>.

18. Mandla A. Mubueca, *Conflict and Corruption: Land Expropriation without Compensation in South Africa*, 9 AFR. J. PEACE AND CONFLICT STUD. 61, 67 (2020).

19. NICOLAS COOK, CONG. RSCH. SERV., R45687, SOUTH AFRICA: CURRENT ISSUES, ECONOMY, AND U.S. RELATIONS 2 (2020), <https://fas.org/sgp/crs/row/R45687.pdf>.

investment in the country.²⁰ They believed that such a policy would lead to further poverty, famine, and mass starvation.²¹ Many point to historical examples of the disastrous results of similar policies implemented through Asia, Europe, and Africa.²² Overall, opponents of the law feared further corruption, theft, and mass poverty.

While the Expropriation Bill was open for public comment, national and international debate took place among proponents and opponents of the Bill. The public comment period came to an end on February 28, 2021, and the Bill was expected to pass onto the National Assembly where it would be tabled for debate.²³ After the debate, it would be amended if necessary, before passing to the National Council of Provinces, where it would be debated once more.²⁴ This debate would then lead to further amendments before passing to the President for signature.²⁵ If signed, the Bill would become law.²⁶

Part I of this comment will provide a historical analysis of South Africa and how it led to the decision to implement the Bill. Part II will provide a history of similar policies passed by other developing countries, including Mexico, Iran, Egypt, Cuba, and Chile. Though it is true that such countries have faced economic hardships, this comment will analyze the external factors that led to their economic demise, primarily hostile intervention by developed countries. Part III will analyze the South African Expropriation Bill and argue how the fears surrounding this bill are unfounded, as South Africa's Bill differs from those of other countries due to the country's implementation of procedural safeguards. Lastly, the comment will argue that South Africa's best course of action will be to negotiate

20. Jarryd Neves, *Chilling facts about land expropriation without compensation laws that President Ramaphosa has promised to push in 2021*, BIZNEWS (Jan. 14, 2020), <https://www.biznews.com/thought-leaders/2021/01/14/land-expropriation-sa>.

21. Palmer, *supra* note 11.

22. *Id.*

23. *Expropriation debate: Is the Bill draconian or not? Two analysts engage the issue*, NEWS 24 (Feb. 13, 2021), <https://www.news24.com/news24/analysis/expropriation-debate-is-the-bill-draconian-or-not-two-analysts-engage-the-issue-20210213>.

24. *Id.*

25. *How a Law is Made*, PARLIAMENT OF THE REPUBLIC OF S. AFR., <https://www.parliament.gov.za/how-law-made> (last visited Apr. 6, 2021).

26. *Id.*

bilateral investment treaties with foreign countries to soothe the fears of investors from developed countries. Ultimately, the response of foreign countries will dictate whether the Expropriation Bill succeeds or fails.

I. THE HISTORY OF SOUTH AFRICA AND APARTHEID

Due to a history of colonization and exploitation, land in South Africa is currently owned in majority by a White minority. Black Africans account for eighty percent of South Africa's population, but only own thirteen percent of the land (four percent being urban land and eight percent being agricultural).²⁷ White South Africans make up less than ten percent of the population, but they own seventy-two percent of the country's land.²⁸

The circumstances that led to this disparity are the result of South Africa's long and complicated history, including the country's colonization by three major European powers: Portugal, the Netherlands, and England.²⁹ In particular, English intervention began in 1806 and by 1910, English dominion in South Africa was formalized.³⁰ Thereafter, four British colonies formed the Union of South Africa.³¹

Three years after its formation, the South African Union Parliament passed the Natives Land Act of 1913 ("1913 Act")—an act

27. Ed Stoddard, *Explainer: South Africa aims to expropriate land without compensation*, REUTERS (Mar. 14, 2021, 8:16 AM), <https://www.reuters.com/article/us-safrica-land-explainer-idUSKCN1GQ280>.

28. Christopher Clark, *South Africa Confronts a Legacy of Apartheid: Why land reform is a key issue in the upcoming election*, THE ATLANTIC (May 2, 2019), <https://www.theatlantic.com/international/archive/2019/05/land-reform-south-africa-election/586900/>.

29. Erna Oliver & William H. Oliver, *The Colonisation of South Africa: A Unique Case*, 73 HTS THEOLOGICAL STUD., Aug. 2017, at 1, 4-5; *History of slavery and early colonisation in South Africa*, SOUTH AFRICAN HISTORY ONLINE, <https://www.sahistory.org.za/article/history-slavery-and-early-colonisation-south-africa> (last visited Oct. 20, 2021).

30. See generally Jacklyn Cock & Julia Wells, *The arrival of British settlers over 200 years ago continues to cast a shadow over South Africa*, THE CONVERSATION (May 15, 2020, 4:57 AM), <https://theconversation.com/the-arrival-of-british-settlers-200-years-ago-continues-to-cast-a-shadow-over-south-africa-137319> (describing South Africa's problematic colonization by the British and takeover in 1806).

31. Oliver & Oliver, *supra* note 29, at 5.

that would serve as a catalyst for the segregation and unequal distribution of land that exists in South Africa today.³² Upon its passing, the 1913 Act forbade Native Africans from purchasing land outside of designated native areas.³³ These areas constituted only eight percent of South Africa's surface area.³⁴ The 1913 Act also outlawed rental tenancy and share cropping in White owned land, thereby immediately displacing tenants on a massive scale.³⁵ Though the effects of the 1913 Act were not immediate, it served as a foundation for the forced removals that would occur under Apartheid.³⁶

Apartheid in South Africa arose, in part, as a result of continuous economic turmoil caused by the Great Depression and World War II.³⁷ After the War, the Afrikaner National Party (the "National Party" or "NP") ran an election campaign based on the idea of Apartheid, meaning "apartness."³⁸ Ultimately, the NP's goal was to separate the White South African minority from the Black majority. However, the NP also intended to further separate the Black majority into different tribes to decrease their political power.³⁹ After their victory in 1948, the NP immediately passed the Prohibition of Mixed Marriages Act and the Immorality Amendment Act, which prohibited marriages and sexual relationships between Black and White South Africans.⁴⁰ Next, the NP passed the 1950 Population Registration Act, which classified

32. Natives Land Act, Act 27 of 1913 § 1 (S. Afr.), <https://www.sahistory.org.za/archive/natives-land-act-act-no-27-1913> [hereinafter Natives Land Act of 1913].

33. *Id.*

34. Alan Dodson SC, *The Natives Land Act of 1913 and its Legacy*, 26 THE ADVOCATE 29, 30 (2013), <https://www.gcbsa.co.za/law-journals/2013/april/2013-april-vol026-no1-pp29-32.pdf>.

35. *Id.*

36. William Beinart & Peter Delius, *The Historical Context and Legacy of the Natives Land Act of 1913*, 40 J. S.AFR. STUD. 667, 667 (2014).

37. John M. Luiz, *The Evolution and Fall of the South African Apartheid State: A Political Economy Perspective*, 26 UFAHAMU: A J. OF S. AFR. STUD. 49, 51-52 (1998).

38. *Id.*; *Confronting Apartheid Chapter 2, Early Apartheid: 1948-1970*, FACING HIST. AND OURSELVES, (2020) <https://www.facinghistory.org/confronting-apartheid/chapter-2/introduction>.

39. Luiz, *supra* note 37, at 52-53.

40. Prohibition of Mixed Marriages Act, Act 55 of 1949 § 1 (S. Afr.), http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.leg19490708.028.020.055_final.pdf.

South Africa's population by race.⁴¹ The NP also began to issue "pass laws" which required all non-White South Africans over the age of sixteen to carry a "passbook" at all times when in restricted areas.⁴² If a non-White South African was caught in a restricted area without a passbook, they could be subject to a fine or imprisonment ranging from seven days to three months.⁴³

The laws passed under Apartheid were immediately opposed by a large number of Black South Africans and the African National Congress ("ANC") led the resistance.⁴⁴ The ANC, led by Nelson Mandela, engaged in non-violent opposition that involved Black South Africans entering White territories without their passbooks.⁴⁵ However, the response to such demonstrations were not necessarily peaceable. On March 21, 1960, a crowd of 7,000 Black South Africans gathered near a police station in the white township of Sharpeville without their passbooks in protest to the pass laws.⁴⁶ Unfortunately, tensions escalated and the Sharpeville police opened fire on the crowd, killing sixty-nine individuals and severely injuring 180 more.⁴⁷ As a result of the massacre, South Africa banned the ANC on April 8, 1960.⁴⁸ The government also began arresting ANC

41. Population Registration Act, Act 30 of 1950 § 1 (S. Afr.), <https://www.sahistory.org.za/sites/default/files/DC/leg19500707.028.020.030/leg19500707.028.020.030.pdf>; There were four racial categories which included White, Bantu [Black], Coloured [mixed race], and Asian. *Id.*

42. *Id.* § 14 (The passbooks served as a form of internal passport that contained biographic details about the individual, as well as a photograph, and the individual's fingerprint, address, and employer.); *see also* Luiz, *supra* note 37 at 66 (identifying pass laws as a form of social control).

43. *Id.* § 18.

44. Haley Summers, *Black South Africans resist pass laws and mount general strike (Sharpeville Massacre), 1960*, GLOB. NONVIOLENT ACTION DATABASE (Apr. 29, 2013), <https://nvdatabase.swarthmore.edu/content/black-south-africans-resist-pass-laws-and-mount-general-strike-sharpeville-massacre-1960>.

45. *Id.*

46. Paul Maylam, Talk given at the Faculty of Humanities Rhodes University: A tragic turning-point; remembering Sharpeville fifty years on (Mar. 23, 2010), https://www.ru.ac.za/media/rhodesuniversity/content/ruhome/documents/Sharpeville_2010_Prof_Paul_Maylam.pdf (There were about 160 White police and 130 Black police, all armed, attempting to disperse the crowd.).

47. *Id.* at 2.

48. *Id.* at 7.

leaders, including Nelson Mandela, who was sentenced to life in prison in 1964.⁴⁹

Between 1960 and 1980, as the ANC and other South Africans attempted to challenge Apartheid, over 3.5 million Black South Africans were forcefully relocated to rural “homelands” or “Bantustans.”⁵⁰ About ten Bantustans were established in South Africa and because of “The Bantu Self Government Act” of 1959, South Africans became citizens of those homelands, thereby becoming foreigners in South Africa.⁵¹ Ultimately, the purpose of this relocation was to rob South Africans of any political power.⁵²

Furthermore, the conditions in the Bantustans were generally poor as the lands were barren due to soil erosion and over grazing.⁵³ The land was also not equipped to sustain the large influx of people and overcrowding became a substantial issue.⁵⁴ “Relocated people typically only received small plots of land, about fifty yard square, with a tin hut and latrine for which they needed to pay rent to local tribal authorities.”⁵⁵ In addition to the lack of arable land, very few jobs were available.⁵⁶ As such, poverty was widespread in the Bantustans and malnutrition was alarmingly common.⁵⁷ Due to such abject poverty, crime in the Bantustans became increasingly prevalent, which caused White South Africans to fear their Bantu neighbors, thereby furthering the Apartheid agenda of separation.⁵⁸

49. *South Africa profile—Timeline*, BBC NEWS (Apr. 4, 2018), <https://www.bbc.com/news/world-africa-14094918>.

50. Martin Abel, *Long-run Effects of Forced Resettlement: Evidence from Apartheid South Africa*, 79 J. ECON. HIST. 1, 25, (2016).

51. *Id.* at 6.

52. *Id.*

53. *Id.* at 7.

54. SF Khunou, *Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid*, 12 POTCHEFSTROOM ELEC. L. J. 81, 89 (2009), <https://journals.co.za/doi/pdf/10.10520/EJC86755>.

55. Abel, *supra* note 50, at 7.

56. *Id.*

57. Khunou, *supra* note 54.

58. Abel, *supra* note 50, at 7-8.

The tide of Apartheid began to take a turn in 1976 after the Soweto Uprising⁵⁹ when over 20,000 Black students gathered in the township of Soweto to protest a mandatory Afrikaans language requirement in schools.⁶⁰ Police officers responded with violence, shooting into the crowd and an estimated 575 people died with another 3,000 left injured.⁶¹ The events of the Soweto uprising reverberated internationally and shocked the conscience of many. On June 19, 1976, the United Nations passed Resolution 392, which called “upon the South African government urgently to end violence against the African people and to take urgent steps to eliminate apartheid and racial discrimination.”⁶²

Despite the United Nations General Assembly Resolution, the government of South Africa failed to take any action to remedy the problem of Apartheid. In 1986, the United States took direct action and passed the Comprehensive Anti-Apartheid Act.⁶³ The law imposed funding and trade sanctions that could be lifted as long as South Africa met certain conditions that would bring an end to the Apartheid era.⁶⁴ The British government and the Commonwealth Nations followed America’s steps and imposed similar trade and travel restrictions under the same conditions.⁶⁵

With mounting international pressure and ongoing societal unrest, the South African government began to make concessions, releasing Nelson Mandela from prison in February 1990.⁶⁶ A year later, in 1991, South Africa’s President, F.W. de Klerk, repealed the remaining

59. Aryn Baker, *This Photo Galvanized the World Against Apartheid*, TIME (June 15, 2016, 4:00 AM), <https://time.com/4365138/soweto-anniversary-photograph/>.

60. United Press Int’l, *Soweto Uprising Recalled*, N.Y. TIMES (Jun. 17, 1986), <https://www.nytimes.com/1986/06/17/world/soweto-uprising-recalled.html>.

61. *Id.*

62. G.A Res. 392, U.N. Doc. S/RES/392(1976), at 11 (June 19, 1976).

63. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §1, 100 Stat. 1086 (1986), <https://www.govtrack.us/congress/bills/99/hr4868/text>.

64. *See generally id.*

65. *From the Archive: Sanctions agreed against apartheid-era South Africa*, THE COMMONWEALTH (Jan. 25, 2017), <https://thecommonwealth.org/media/news/archive-sanctions-agreed-against-apartheid-era-south-africa>.

66. Greg Myre, *The Day Nelson Mandela Walked Out Of Prison*, NPR (June 27, 2013), <https://www.npr.org/sections/parallels/2013/06/11/190671704/the-day-nelson-mandela-walked-out-of-prison>.

Apartheid laws, including the 1913 Land Act, the Group Areas Act of 1966, and the Black Communities Act of 1984.⁶⁷ By 1994, all South Africans were able to vote in the presidential election. Nelson Mandela, the leader of the ANC, was elected the first Black President of South Africa.⁶⁸

In 1996, shortly after Nelson Mandela took over as President, the Parliament approved South Africa's current Constitution. One of the prominent features of the Constitution was its preamble which expressly recognized the injustices and promised "to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. . . ."⁶⁹ Along with a stated commitment to heal social injustice, the 1996 South African Constitution also included a Bill of Rights that promised equality for all South African citizens before the law.⁷⁰ Among one of the protected rights was the right to property under Section 25, promising no arbitrary deprivation of property without due process of law or compensation.⁷¹

As a Presidential candidate, one of Nelson Mandela's promises was to institute land reform that would redistribute property to Black South Africans.⁷² However, despite the progress the country made in terms of its Constitution, severe inequalities still existed. Poverty was rampant amongst Black South Africans and "their average per capita incomes [were] roughly one-fifth those of the historically privileged White minority."⁷³ "[T]he per capita household income of about fifty-seven percent of Africans and twenty-eight percent of "Coloured" (mixed race) people fell below the lowest poverty thresholds,

67. Abolition of Racially Based Land Measures Act 108 of 1991 § 1, (S. Afr.), GN 1490 of GG 13341 (28 June 1991), https://www.gov.za/sites/default/files/gcis_document/201409/a1081991.pdf.

68. Suzane Daley, *The Day Apartheid Died: Photos of South Africa's First Free Vote*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/world/africa/south-africa-1994-election-photos.html>.

69. S. AFR. CONST., Preamble, 1996, https://www.constituteproject.org/constitution/South_Africa_2012.pdf?lang=en [hereinafter S. AFR. CONST.].

70. *Id.* § 7.

71. *Id.* § 25.

72. Bernadette Atuahene, *Op-Ed: Nelson Mandela's uneven legacy*, L.A. TIMES (Dec. 5, 2014, 7:13 PM), <https://www.latimes.com/opinion/op-ed/la-oe-atuahene-mandela-land-south-africa-20141207-story.html>.

73. COOK, *supra* note 19, at 9.

[whereas] nine percent of Asians/Indians and only 1.5% of Whites” experienced this level of poverty.⁷⁴ Furthermore, from 1994 onward land distribution and ownership did not change.⁷⁵ Currently, seventy-two percent of the country’s arable land is owned by White South Africans, who make up less than ten percent of the population.⁷⁶ In contrast, Black South Africans make up eighty percent of the country’s population, but they only own thirteen percent of the land.⁷⁷

Because of the disparaging poverty rates and current land ownership statistics, expropriation without compensation is a logical step to remedy the country’s continuing racial inequality. Although fear exists that this new Bill is a form of retaliation towards White landowners in South Africa, the Bill merely quickens a process that has existed since 1996. For the Bill to succeed, it will be important to reassure current landowners and foreign investors that this Bill will not lead to theft. However, their reassurance should not be at the expense of Black South Africans who have been waiting decades for reform and justice.

II. A HISTORY OF EXPROPRIATION IN DEVELOPING COUNTRIES

Expropriation is a practice that has existed for centuries, but was never implemented at mass levels prior to the First World War.⁷⁸ Instead, private land regulation occurred in isolated incidents, which generally involved a direct land or property dispute between particular individuals or corporations and a nation’s government.⁷⁹ However, the

74. Carlos Gradin, *Race, Poverty and Deprivation in South Africa*, 22 J. S. AFR. ECON. 187, 188 (2012).

75. John Campbell, *Nelson Mandela and the Land Question in South Africa*, COUNCIL ON FOREIGN RELATIONS BLOG (Dec. 10, 2014, 12:56 PM), <https://www.cfr.org/blog/nelson-mandela-and-land-question-south-africa> (Only 10% of SA’s land has been transferred from White to Black South Africans.).

76. Clark, *supra* note 28.

77. Stoddard, *supra* note 27.

78. Ali Ghassemi, *Expropriation of Foreign Property in International Law*, 10 (June 1, 1999) (Ph.D. thesis, University of Hull) (on file with The University of Hull Department of Law), <https://core.ac.uk/download/pdf/2731706.pdf>.

79. *See id.* at 11 (In the *Finlay Case* (1836), a British individual was living in Greece and his land was seized by the Greek Government to make a garden for a King’s palace. The governments disputed and resolved by providing compensation. In the *Savage case* (1852), El Salvador passed a decree monopolizing gun powder

First World War had a major impact on international economies, and led to the first national case of mass expropriation.⁸⁰

In 1917, after the rise of Marxist ideology and a massive social revolution, the newly established Communist regime in the Soviet Union shocked the world when it abolished private ownership of land.⁸¹ In 1920, the Soviet Union achieved complete nationalization of property.⁸² This action disturbed foreign governments that had economic interests in the country. As a result, in 1922, numerous countries held a conference in the city of Cannes, France to consider the manner in which to approach Russia's expropriation policies.⁸³ However, the only agreement to emerge from the conference "was the recognition of the sovereign right of every State freely to regulate the system and form of property within its own borders."⁸⁴ Several of these countries filed claims against the Soviet Union to receive compensation for lost property, but those claims were abandoned after the Soviet government refused to concede.⁸⁵

Since the Soviet Union first implemented large-scale nationalization, multiple governments across the globe have undergone some form of nationalization at varying degrees. For example, in 1945, France nationalized their banking system, the gas and electric industry, the coal industry, and private airlines.⁸⁶ Likewise, after World War II, the United Kingdom nationalized activities linked to communication as well as the coal industry, electricity, and inland waterways.⁸⁷

making it impossible for US nationals to sell. Savage attempted to sell, but the government seized it. The two countries arbitrated and he was provided compensation); *See also id.* at 12 (revealing that in the Delagoa Bay Railway Case (1883), an American man received concession for the construction of a Railway in Portugal, however an English company from London purchased the rights. Portugal cancelled the concession and property was seized.).

80. *Id.* at 14.

81. UKAZ O ZEMLE [DECREE ON THE LAND] IZVESTIIA (Nov. 8 ,1917), <http://soviethistory.msu.edu/1917-2/peasant-revolution/peasant-revolution-texts/decree-on-the-land/>.

82. Ghassemi, *supra* note 78, at 16.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 30.

87. *Id.* at 32.

However, the focus of this comment is on the efforts of developing countries that have struggled to successfully execute nationalization. As the following examples demonstrate, developing countries that intended to expropriate land often failed when they would suddenly nationalize an entire industry dominated by a foreign company. This approach would lead to international pressure on the expropriating country that would destabilize their economy or political climate.

A. Mexico and The Oil Industry

An early example of expropriation in a developing country occurred in 1938 when Mexico nationalized its oil industry.⁸⁸ The decision came after a long struggle between workers and oil companies regarding wages and labor practices.⁸⁹ After particular oil industries refused to honor a Supreme Court decision in favor of laborers, Mexican President, Lázaro Cárdenas passed a decree nationalizing these industries.⁹⁰ Prior to nationalization, United States companies dominated ninety-six percent of petroleum and mining industries.⁹¹

Lázaro Cárdenas's decree was met with hostility by foreign countries. Many governments instituted an embargo against Mexican oil and superpowers, such as Britain, completely severed diplomatic relations.⁹² The response from the United States was mixed. Some urged the government to respond aggressively by threatening to suspend economic relations, while others, like President Franklin D. Roosevelt, felt it was important to maintain diplomatic relations with its southern neighbor.⁹³ Overall, the United States respected Mexico's decision to expropriate its oil industry, so long as there was adequate compensation for the displaced oil companies.⁹⁴

88. U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN FOREIGN SERVICE INSTITUTE, MEXICAN EXPROPRIATION OF FOREIGN OIL, 1938, <https://history.state.gov/milestones/1937-1945/mexican-oil> [hereinafter Mex. Exp. Collection].

89. *Id.*

90. Noel Maurer, *The Empire Struck Back: Sanctions and Compensation in the Mexican Oil Expropriation of 1938*, 71 J. ECON. HIST. 590, 591 (2011).

91. *Id.* at 597.

92. Mex. Exp. Collection, *supra* note 88.

93. *Id.*

94. *Id.*

United States Secretary of State Cordell Hull began negotiations with the Mexican government.⁹⁵ The negotiations between Mexico and the United States ultimately led to what is now known as the “Hull Formula” which required an expropriating government to provide those affected with “prompt, adequate, and effective” compensation.⁹⁶ By 1942, the two countries reached an agreement where the United States recognized the right of a sovereign State to expropriate the property of aliens within its border, but the expropriations would have to be for public purpose.⁹⁷ In exchange, the Mexican government agreed to pay \$29 million in compensation to several American firms and by 1947, had paid the British firms \$130 million.⁹⁸ After such compensation, the United States eventually gave up the prospect of beginning an oil industry in Mexico.⁹⁹ Ultimately, Mexico’s decision to expropriate was respected, but only after several countries pressured Mexico into an agreement to pay for the property taken.

B. Iran and the Anglo-Iranian Oil Company

In 1951, the Iranian government, led by Prime Minister Mohammed Mossadegh attempted a similar nationalization of the oil industry, however, those efforts were not as successful.¹⁰⁰ In 1909, the Anglo-Persian Oil Company (later named the “Anglo-Iranian Oil Company” or “AIOC”) was established in the Persian Gulf.¹⁰¹ By 1950, the AIOC held the largest oil refinery in the world and was the

95. *Id.*

96. Letter from Cordell Hull to Castillo Najera, Aug. 22, 1938, in 5 FOREIGN RELATIONS OF THE UNITED STATES DIPLOMATIC PAPERS, 1938: THE AMERICAN REPUBLICS (Matilda F. Axton et al., eds.1956), <https://history.state.gov/historicaldocuments/frus1938v05/d662>; See also U.N. CONFERENCE ON TRADE AND DEVELOPMENT, TAKING OF PROPERTY, at 5, U.N. SALES NO. E.00.II.D.4 (2000), <http://unctad.org/system/files/official-document/psiteiid15.en.pdf>.

97. *Id.*

98. Mex. Exp. Collection, *supra* note 88.

99. *Id.*

100. Ghassemi, *supra* note 78, at 36.

101. Richard Cavendish, *The Iranian Oil Fields are Nationalised*, HIST. TODAY (May 5, 2001), <https://www.historytoday.com/archive/iranian-oil-fields-are-nationalised>.

second largest exporter of crude petroleum.¹⁰² During this same time, the AIOC was making pre-tax profits of approximately £85 million (\$ 116,595,775 USD), but the profits were disproportionately going to the British government.¹⁰³ Simultaneously, the AIOC discriminated against its employees by providing British workers higher skilled jobs, while Iranian workers received low wages and were prevented from training opportunities for higher skilled positions.¹⁰⁴ After pressure from within the country, the Mossadegh government attempted to renegotiate terms with AIOC.¹⁰⁵ However, the negotiations ultimately failed and the Iranian government passed the Iranian Nationalization Law of May 1, 1951.¹⁰⁶

Prepared to take military action, the British government immediately deployed troops to the Persian Gulf, but ultimately chose not to engage their troops.¹⁰⁷ The British government submitted the dispute to the International Court of Justice (“ICJ”) on May 26, 1952.¹⁰⁸ The ICJ ruled in favor of Iran and dismissed the suit on the grounds that it did not have jurisdiction absent a valid treaty between the two countries.¹⁰⁹

The British government did not accept the Court’s ruling. The country immediately imposed a worldwide embargo on the purchase of Iranian oil and banned the export of goods to Iran.¹¹⁰ These actions led to a financial crisis and political instability within Iran.¹¹¹ The United States also became involved in the dispute between the Iranian and the British governments, when the British approached the United States in an attempt to appeal to American fears of Soviet influence.¹¹²

102. Edward Henniker-Major, *Nationalisation: The Anglo-Iranian Oil Company 1951 Britain vs. Iran*, 2 SEVEN PILLARS INST. MORAL CENTS 16, 17 (2013), <https://sevenpillarsinstitute.org/wp-content/uploads/2018/01/Nationalisation-of-the-AIOC-EDITED.pdf>.

103. *Id.*

104. *Id.*

105. Ghassemi, *supra* note 78, at 35.

106. *Id.* at 36.

107. *Id.*

108. *Anglo-Iranian Oil Co., U.K. v. Iran*, Judgment, 1952 I.C.J. 93 (July 22).

109. *Id.* at 113.

110. Henniker-Major, *supra* note 102, at 20.

111. Cavendish, *supra* note 101.

112. *Aug. 19, 1953: Operation Ajax—Priya Satia*, STAN. DEPT. OF HIST. (June 25, 2020), <https://history.stanford.edu/news/aug-19-1953-operation-ajax-priya-satia>.

The two embarked on a planned coup d'état, known as Operation Ajax, which ultimately ousted Prime Minister Mossadegh.¹¹³ Once Mossadegh was gone, Britain was able to negotiate and resolve the dispute in 1954.¹¹⁴

However, Iran had to make many concessions. First, Iran was allowed to maintain ownership of the nationalized oil company (now known as the “National Iranian Oil Company,” or “NIOC”), but they were severely limited and could only conduct transactions with a consortium of international oil companies.¹¹⁵ The consortium was mainly composed of American and French companies, and British Petroleum (BP).¹¹⁶ Though Iran had ownership rights over its resources, the right to exploration, development, and production of Iranian oil fields were reserved to the consortium.¹¹⁷ Second, Iran was required to make a cash payment of £25,000,000 to the British government while also providing £67,000,000 to the consortium through use of assets and operating costs.¹¹⁸ Though the nationalization law remained in place, Iran suffered politically and was ultimately forced to compensate the original foreign owner.¹¹⁹ Once again, this demonstrated the need to compensate the foreign owner as a measure of success. Yet, as the following case demonstrates, compensation may not always be sufficient.

C. Egypt and the Suez Canal

The case of Iran and Mexico show that without the approval of developed countries, such as Britain or the United States, a plan to expropriate will likely fail. Egypt in the mid-1950's is a case in point.

113. *Id.*

114. Ghassemi, *supra* note 78, at 38.

115. *See generally* WILLIAM YONG, NIOC AND THE STATE: COMMERCIALIZATION, CONTESTATION, AND CONSOLIDATION IN THE ISLAMIC REPUBLIC OF IRAN 5, 6 (Oxford Inst. for Energy Stud. eds, 2013), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2013/05/MEP-5.pdf?a6a989>.

116. *Id.* at 6.

117. *Id.*

118. Abolbasha Farmanfarma, *The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling*, 34 TEX. L. REV. 259, 261 (1955).

119. *Id.*

On July 26, 1956, President Gamal Abdel Nasser of Egypt, nationalized the Universal Suez Maritime Canal Company by immediately transferring all shares of stock to the Egyptian government.¹²⁰ The purpose of this law was to raise capital to fund the Aswan Dam Project. However, the President also had a political motive, wishing to rid Egypt of European influence.¹²¹ Egypt's nationalization law differed from the two previous examples because Article 1 of the Decree of Gamal Abdel Nasser on the nationalization of the Suez Canal Company ensured that the displaced stockholders would be compensated according to the value listed at the "Paris Stock Exchange on the day preceding the effective date of the present law."¹²² However, despite the promise of compensation, Britain and France remained dissatisfied.

The United States, Britain, and France issued a Tripartite Statement on August 2, 1956, in which they recognized Egypt's right as a fully sovereign government to nationalize assets.¹²³ At the same time, the British, French, and Israeli government held secret military consultations where they plotted the overthrow of President Nasser.¹²⁴ After a failure to negotiate free passage through the canal on August 16, 1956, and the UN's failure to settle the dispute, Israel attacked Egypt on October 29, 1956.¹²⁵ The British and French forces joined Israel shortly thereafter.¹²⁶ The United States and Soviet government condemned the attack and were able to raise the issue with the UN General Assembly on November 2, 1956.¹²⁷ That same day, the UN passed Resolution 997 and 998, which called for an immediate

120. Law No. 285 of 1956 (Nationalization of the Suez Canal Co.) *al' waqa'i' al-Misiryah*, 16 July 1956 (Egypt), https://www.cvce.eu/content/publication/2001/10/9/50e44f1f-78d5-4aab-a0ae-8689874d12e6/publishable_en.pdf.

121. *Id.* art. 1; Ghassemi, *supra* note 78, at 40.

122. Law No. 285, *supra* note 120, art. 1.

123. Tripartite Statement Issued at London (Aug. 2, 1956) in FOREIGN RELATIONS OF THE UNITED STATES, 1955-1957, SUEZ CRISIS (Nina J. Noring & John P. Glennon eds., 1990), <https://history.state.gov/historicaldocuments/frus1955-57v16/d53>.

124. U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN FOREIGN SERVICE INSTITUTE, THE SUEZ CRISIS, 1956, <https://history.state.gov/milestones/1953-1960/suez>.

125. *Id.*

126. *Id.*

127. Ghassemi, *supra* note 78, at 41.

ceasefire, a call ultimately agreed to by the British and French governments.¹²⁸

After the end of the Suez crisis, the British, French, and Egyptian governments entered into negotiations to settle ownership disputes. On April 29, 1958, Egypt agreed “to relinquish all claims to all company assets located abroad . . . to the foreign shareholders of the Suez Canal Company.”¹²⁹ The Suez crisis demonstrated that in developing countries, despite an offer to compensate foreign owners for property taken by a government, their government had significant influence on whether the developing country would succeed. This ultimately left them at the mercy of these superpowers.

D. The Case of Cuba

An exception exists when it comes to the case of Cuba, whose nationalization efforts in the early 1960’s were nearly as dramatic as those of the Soviet Union. To this day, debates continue about whether Cuba’s efforts should be deemed as a success (due to the widespread availability of education and health care) or failure (due to the country’s relative poverty).¹³⁰ Importantly, despite various efforts from the U.S. government, Cuba persisted and maintained its nationalization policies.

The history of expropriation in Cuba began in 1959 after Fidel Castro’s military regime ousted the U.S. backed Cuban dictator Fulgencio Batista.¹³¹ In July 6, 1960, Castro’s government issued Law No. 851, titled the “Nationalization Law,” which approved “the nationalization through expropriation, of the properties or concerns belonging to natural or juridical persons nationals of the United States of America.”¹³² Unlike previous cases, this law specifically targeted

128. G.A Res. 997-998, U.N. Doc. A/RES/998(ES-I) (Nov. 4, 1956), <https://www.un.org/depts/dhl/dag/docs/ares997-998e.pdf>.

129. Frank G. Dawson & Burns H. Weston, “*Prompt, Adequate Effective*”: *A Universal Standard of Compensation?*, 30 FORDHAM L.R. 727, 748 (1962).

130. Jeffrey L. Roberg & Alyson Kuttruff, *Cuba: Ideological Success or Ideological Failure*, 29 HUM. RTS. Q. 779, 779-80. (2007).

131. *Id.* at 780.

132. Law No. 851, Nationalization Law, July 6, 1960, *reprinted in* 55 AM. J. INT’L L. 822, 823 (1961) (Cuba).

properties owned by the United States.¹³³ By 1963, all United States companies in Cuba were under ownership of the Cuban state.¹³⁴

Surprisingly, the Nationalization Law included a provision that promised compensation for expropriated property. Article 4 of the law read:

Once the expropriation has been effected and the management of the property or concern has been assumed by the person or organization appointed for that purpose, the President of the Republic and the Prime Minister shall appoint the experts they deem proper for the evaluation of the expropriated properties for the purpose of the payment thereof which shall be made in the manner provided in the next article.¹³⁵

Despite a promise for compensation, the Cuban government never paid the United States for the expropriated properties (valued at \$1.8 billion).¹³⁶ The United States responded in various ways. One response was an attempted violent take over, known as the Bay of Pigs.¹³⁷ Under the direction of Dwight D. Eisenhower, and later approval of John F. Kennedy, the Central Intelligence Agency trained exiled Cubans to invade Cuba and overthrow Castro.¹³⁸ However, the attempted attack failed and only further incentivized Castro's position.¹³⁹

A Supreme Court case, known as *Banco Nacional de Cuba v. Sabbatino*, arose as a result of Law 851.¹⁴⁰ As a defense in the case, the Cuban government argued that the United States could not review the validity of the Nationalization Bill because it was prevented from doing so under the Act of State Doctrine.¹⁴¹ However, the District Court ruled in favor of Sabbatino and held that the Act of State

133. Ghassemi, *supra* note 78, at 42.

134. *Id.*

135. Law No. 851, *supra* note 132.

136. Ghassemi, *supra* note 78, at 46.

137. U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN FOREIGN SERVICE INSTITUTE, THE BAY OF PIGS INVASION AND ITS AFTERMATH, APRIL 1961–OCTOBER 1962, <https://history.state.gov/milestones/1961-1968/bay-of-pigs>.

138. *Id.*

139. *Id.*

140. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 402-04 (1964).

141. *Id.* at 406.

Doctrine did not protect a foreign state action from judicial review if it violated international law.¹⁴² Ultimately, the Supreme Court of the United States reversed the ruling and held that the Judicial Branch would not examine the validity of a taking of property by a sovereign government, in the absence of a treaty, even if the complaint was a violation of international law.¹⁴³ This case merely reaffirmed Cuba's ability to expropriate such property without compensation.

Finally, after the failed invasion, on February 3, 1962, President John F. Kennedy issued Proclamation 3447, thereby placing an embargo between the U.S. and Cuba and ceasing all trade between the two countries.¹⁴⁴ The embargo was strengthened in 1996 with the passage of the Cuban Liberty and Democratic Solidarity ("LIBERTAD") Act, which sought to impose liability on foreign nationals who traded with Cuba.¹⁴⁵ Despite protests from various governments, the United States refused to rescind the Act and the embargo against Cuba continues to this day.¹⁴⁶

Though Cuba never rescinded its nationalization law and continues to be a socialist country, estimates hold the embargo to have cost the country \$130 billion.¹⁴⁷ The case of Cuba serves to demonstrate the actions a first world nation will take in order to maintain control over the economy of another nation. Although unclear whether Cuba's nationalization was a success or a failure, opposition to the policy from a developed power had a significant effect on the developing country.

142. *Id.*

143. *Id.* at 439.

144. Proclamation No. 3447, 22 U.S.C 2369 (Feb. 3, 1962), <https://www.govinfo.gov/content/pkg/STATUTE-76/pdf/STATUTE-76-Pg1446.pdf>.

145. Cuban Liberty and Democratic Solidarity Act, Pub. L. No. 104-114, 110 Stat. 815 (1996), <https://1997-2001.state.gov/regions/wha/cuba/helms-burton-act.html>. ("Any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages.")

146. Christopher Rhodes, *The US Embargo has Failed*, AL JAZEERA (Jul. 21, 2021), <https://www.aljazeera.com/opinions/2021/7/21/the-us-embargo-on-cuba-has-failed>.

147. *U.S. trade embargo has cost Cuba \$130 billion, UN says*, REUTERS (May 8, 2018, 5:10 PM), <https://www.reuters.com/article/us-cuba-economy-un/u-s-trade-embargo-has-cost-cuba-130-billion-u-n-says-idUSKBN11A00T>.

E. Chile and the Copper Industry

Another Latin American country that made a nationalization attempt was the Republic of Chile (“Chile”).¹⁴⁸ In 1970, Salvador Allende became the first democratically elected socialist President of the country.¹⁴⁹ Prior to his election, the United States had provided funds to support other candidates to run anti-Allende propaganda campaigns due to fears of his communist sympathies.¹⁵⁰ However, despite these efforts, Salvador Allende managed to win after a runoff election.¹⁵¹

President, Salvador Allende passed Law No. 17,450 on July 15, 1971, which immediately established state ownership over all mineral resources and nationalized large copper companies.¹⁵² The law provided for compensation, but also acknowledged that after decades of exploitation of the Chilean people and favorable conditions to large copper companies, the government of Chile had earned the right to deduct “excess profits” earned by the companies since 1955.¹⁵³ The government assessed the value of U.S. copper mines at \$664 million; yet, Chile also determined the excess profits to be deducted were \$774 million USD.¹⁵⁴ Ultimately, this was expropriation without compensation.

One particular company, known as the Braden Copper Company, challenged the excess profits deduction in the Special Copper Tribunals and sought compensation for the nationalized property.¹⁵⁵ However, the Tribunal declared that it was incompetent to question the amount of excess profits fixed by the government.¹⁵⁶ Similar suits were brought in France and Germany, but they too refused to issue a

148. Ghassemi, *supra* note 78, at 48.

149. *See generally id.*

150. U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN FOREIGN SERVICE INSTITUTE, *THE ALLENDE YEARS AND THE PINOCHET COUP, 1969-1973*, <https://history.state.gov/milestones/1969-1976/allende> [hereinafter Allende Years Collection].

151. *Id.*

152. Law No. 17,450, Julio 15, 1971, DIARIO OFICIAL [D.O.] (Chile).

153. *Id.*

154. Ghassemi, *supra* note 78, at 49.

155. *Id.*

156. *Special Copper Tribunal Decision on the Question of Excess Profits of Nationalized Copper Companies*, 11 I.L.M. 1013, 1047 (1972).

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ruling on the validity of Chile's "excess profits" approach to nationalization.¹⁵⁷

With the courts unable to rule favorably for these corporations, the U.S. government could do no more. However, during this time, the political situation in Chile became agitated as Allende oppositionists grew and strikes were held from 1971 to 1973.¹⁵⁸ On September 11, 1973, the strikes came to an end with a violent coup d'état led by General Augusto Pinochet, which resulted in the death of Salvador Allende.¹⁵⁹ Debates continue about whether or not the United States played an active role in the coup.¹⁶⁰

On September 13, 1973, Pinochet declared himself President, dismantled the Congress, and announced there would be no more elections in Chile.¹⁶¹ Though Pinochet would become a brutal dictator, who would commit various human rights violations, the United States was initially satisfied with his rise to power because U.S. companies reached an agreement with Chile.¹⁶² In the case of the Braden Copper Company, the Chilean State agreed to pay \$53,957,328.¹⁶³ Although Chile was able to keep its nationalized copper company, the country ultimately suffered under the wrath of the seventeen-year Pinochet dictatorship.¹⁶⁴

III. ANALYZING THE SOUTH AFRICAN EXPROPRIATION BILL

The case of South Africa differs from the previous examples because the proposed Bill would not lead to a sudden seizure of a foreign dominated industry. In fact, expropriation would not be a newly introduced practice as the 1996 Constitution already provided the government with the power to expropriate property.¹⁶⁵ Under Section 25 of the Constitution, "Property may be expropriated . . . for

157. Ghassemi, *supra* note 78, at 50.

158. Allende Years Collection, *supra* note 150.

159. *Id.*

160. *Id.*

161. *Id.*

162. Law No. 710, October 22, 1974, DIARIO OFICIAL [D.O.] (Chile).

163. *Id.*

164. See Press Release, Human Rights Watch, Chile: Pinochet Indicted for Human Rights Crimes (Dec. 13, 2004, 7:00 PM), <https://www.hrw.org/news/2004/12/13/chile-pinochet-indicted-human-rights-crimes#>.

165. S. AFR. CONST., *supra* note 69, at § 25.

a public purpose or in the public interest, and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”¹⁶⁶ Section 25 was purposely written with the thought of land reform in mind, but the provision regarding compensation delayed any significant change.

Land reform stalled in South Africa because the South African government adopted a “willing buyer, willing seller” approach to land redistribution.¹⁶⁷ Under this approach, the South African government would pay market value for disputed land before transferring it to Black land owners who made a claim for the land.¹⁶⁸ Though the purpose of this approach was to appease conservative opponents and White landowners, “the government admits the process has siphoned off its resources and delayed the reform process considerably.”¹⁶⁹ From 1994 through 2013, the South African government spent an equivalent of \$1.2 billion in buying land for distribution.¹⁷⁰ Ultimately, the stalled reform led to impatience and frustration among the Black South African population.¹⁷¹

The Expropriation Bill sought to remedy this issue. Chapter 5 of the proposed Bill delineated the manner in which compensation for land could be determined, providing that compensation must be “just and equitable.”¹⁷² Clause 12(3) would make expropriation without compensation just and equitable under certain circumstances, such as when the land would be taken for a public purpose, and:

- (a) where the land is not being used and the owner’s main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;

166. *Id.*

167. Edward Lahiff, ‘Willing Buyer, Willing Seller’: South Africa’s failed experiment in market-led agrarian reform, 28 *THIRD WORLD Q.* 1577, 1577 (2007), <https://pov-tc.pbs.org/pov/downloads/2010/pov-promisedland-willingbuyer.pdf>.

168. *Why South Africa’s land reform agenda is stuck*, THE NEW HUMANITARIAN (Aug. 15, 2013), <https://www.thenewhumanitarian.org/analysis/2013/08/15/why-south-africa-s-land-reform-agenda-stuck>.

169. *Id.*

170. *Id.*

171. Andrew Harding, *South African’s anger over land set to explode*, BBC NEWS (May 30, 2018), <https://www.bbc.com/news/world-africa-44278164>.

172. Draft Bill, *supra* note 1, at § 12(1).

(b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;

(d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.¹⁷³

Here, the differences between the South African Bill and the expropriation bills of other countries are immediately apparent. Unlike the other developing countries where an entire industry would suddenly come under state ownership, the South African Bill is limited to land that falls under the five specific categories. Particularly, land that is not in use, as is indicated by subsections (a) and (c).

Furthermore, another difference between the South African bill and those of other countries is the procedure in which expropriation would occur. Generally, in other countries, the expropriation was immediate upon the passing of a bill and the issue of compensation would be determined after the fact. However, the South African Bill comes with a notice requirement.¹⁷⁴ Chapter Four requires the expropriating party to provide the landowner with a notice of intention to expropriate.¹⁷⁵ The notice must include a description of the property, the purpose of expropriation, the reason why that property is needed, and the date of intended expropriation.¹⁷⁶ The landowner would then have 30 days to object or challenge the expropriation.¹⁷⁷

Even if an individual's property is ultimately expropriated, the Bill allows the affected party to institute proceedings to determine the

173. *Id.* § 12(3)(a)-(e).

174. *Id.* § 7(1).

175. *Id.*

176. *Id.* § 7(2)(a)-(g).

177. *Id.* § 7(2)(g).

appropriate amount of compensation.¹⁷⁸ This would allow the landowner to make an argument as to why their property does not fall under the categories mentioned within clause 12(3).

With regard to foreign investors, not only would they be entitled to make claims in the courts of South Africa, but they could be entitled to further redress if a treaty between South Africa and an affected country existed. As was demonstrated in the Anglo-Iranian Oil Company case, a treaty between two countries could invoke the jurisdiction of the International Court of Justice.¹⁷⁹ According to the Investment Policy Hub of the United Nations Conference of Trade and Development, the Republic of South Africa currently has twelve Bilateral Investment Treaties, and eight treaties with Investment Provisions in force.¹⁸⁰ Common among these treaties is an expropriation provision, which generally prohibits expropriation of investments between the two countries:

Investments of investors of either Party shall not be nationalized, expropriated or subjected to measures having effects equivalent to nationalization or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Party except for public purposes, under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation.¹⁸¹

Therefore, if an expropriation were to occur, the treaties generally would require “prompt, adequate, and effective compensation.”¹⁸² However, compensation is more clearly defined in these treaties than it is under the Constitution. For example, the treaty between South Africa and Greece states:

178. *Id.* § 8(3)(h).

179. *Anglo-Iranian Oil Co., U.K. v. Iran*, Judgment, 1952 I.C.J. 93, 113 (July 22).

180. *South Africa Profile*, UNCTAD INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa> [hereinafter S.A. Treaty Profile].

181. Agreement for the Promotion and Reciprocal Protection of Investments, S. Afr.-Zim., art. 5, Sept. 15, 2010, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2281/download>.

182. *Id.*

Such compensation shall amount to the market value of the investment affected immediately before the actual measure was taken or became public knowledge, whichever is the earlier, it shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable in a freely convertible currency.¹⁸³

While the treaties require compensation to be at the market value of the affected property, under the proposed Bill expropriation must, “have either been agreed to by those affected or decided or approved by a court.”¹⁸⁴ Though market value is considered under the Expropriation Bill, it is not the ultimate deciding factor, as the court must also balance the public’s interest in deciding on a price.¹⁸⁵

Lastly, these treaties include a special provision that specifically invokes the jurisdiction of the International Court of Justice. For example, in the treaty with Finland, the language reads, “if the time limits referred to in paragraph (3) of this Article have not been complied with, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make the necessary appointments.”¹⁸⁶ Therefore, under these treaties, foreign investors have additional safeguards than those provided by South African law and have less to fear than owners of abandoned land.

The fear that the Expropriation Bill will deter foreign investors and lead to a financial crisis is unfounded. The government and other proponents of the Bill have sought to assure the public that the passing of this law will not lead to mass seizure of property without compensation.¹⁸⁷ As the language of the Bill suggests, the general rule

183. Agreement on the Promotion and Reciprocal Protection of Investments, S. Afr.-Government of the Hellenic Republic, art. 4, Sept. 6, 2001, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1480/download>.

184. Draft Bill, *supra* note 1, at § 25(2)(b).

185. *Id.*

186. Agreement for the Promotion and Reciprocal Protection of Investments, Republic of South Africa—Republic of Finland, art. 9(4), Oct. 3, 1999, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1215/download>.

187. S’thembile Cele, *South Africa Moves to Soothe Investor Fears Over Land Grabs*, BLOOMBERG (Oct. 20, 2020, 9:00 PM), <https://www.bloomberg.com>

of law will require just compensation. However, in certain exceptions, expropriation without compensation will be permissible as long as it is in the public's interest.¹⁸⁸

Many proponents of the Bill also argue that the legal framework of the Bill will protect current landowners.¹⁸⁹ In fact, important provisions of Section 25 of the Constitution will remain in place.¹⁹⁰ The first provision of Section 25 guarantees that, "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."¹⁹¹ This Bill will not lead to a massive land grab by the government, and affected parties will not be left without recourse. The South African government has spent years developing this Bill specifically to prevent unconstitutional takeovers.

South Africa's Public Works Minister further assures foreign investors that they have no reason to fear the Bill because South Africa recognizes the importance of such investors.¹⁹² South Africa would not invite investors, only to strip them of their property.¹⁹³ Admittedly, South Africa has a mere twelve active treaties currently in force, but also has twenty-seven signed treaties not yet in force.¹⁹⁴ If South Africa wishes to further ease the fears of foreign investors and of opponents to the Bill, it would be wise for the country to negotiate with other States with which it seeks to engage in business. However, the statements by the government, and the language of active treaties demonstrate a commitment to protect the rights of foreign investors.

In sum, proponents of the Bill acknowledge that this proposed legislation would work to undo a century of racial injustice without harming the country's economy and infringing on landowner's rights. Unlike similar expropriation bills, this Bill does not wish to

/news/articles/2020-10-21/south-africa-moves-to-soothe-investor-fears-over-land-grabs.

188. S. AFR. CONST., *supra* note 69, at § 25.

189. S'thembile Cele, *supra* note 187.

190. *See generally* S. AFR. CONST., *supra* note 69, at § 25.

191. *Id.* at § 25(1).

192. Patricia de Lille, *Why the international community should embrace the Expropriation Bill*, NEWS 24 (Feb. 6, 2021), <https://www.news24.com/news24/columnists/guestcolumn/patricia-de-lille-why-the-international-community-should-embrace-the-expropriation-bill-20210206>.

193. *Id.*

194. S.A. Treaty Profile, *supra* note 180.

immediately nationalize an entire industry, thus the Bill will not necessarily arouse hostility from foreign investors. If South Africa wishes for this Bill to remain successful, then it must appease foreign governments by continuing its custom of negotiating treaties.

CONCLUSION

The South African Bill is unlike the bills passed by other developing countries, as it does not seek to expropriate an entire industry dominated by a foreign nation. Through this Bill, South Africa merely seeks to remedy the economic and racial disparities that are a residue of horrific Apartheid policies.¹⁹⁵ Land acquisition has been a practice conducted since 1996,¹⁹⁶ but this new approach is meant to quicken the process. The new Bill provides ample procedural safeguards, and foreign investors can find further redress through Bilateral Investment Treaties negotiated between their countries.¹⁹⁷

As history suggests, developing countries that adopt an expropriation policy tend to fall into an economic crisis, which is generally due to foreign intervention. Sudden government takeovers of property without adequate compensation led to hostile actions by foreign investors. Foreign responses generally took the form of international pressure through economically harmful embargos, or military action that coerced a country into adopting new leadership willing to negotiate for compensation. Under international law today, South Africa is free to expropriate property within its borders and the Bill can succeed precisely because the legislation does not affect the investments of foreign governments.

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195. Harding, *supra* note 171.

196. S. AFR. CONST., *supra* note 69, at § 25.

197. Fietta, *supra* note 3.

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