



Centre for
**CONSTITUTIONAL
RIGHTS**

When is a Regulatory Measure Deemed to be an Expropriation?

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Centre for Constitutional Rights

- Unit of FW de Klerk Foundation – a non-profit organisation dedicated to upholding the Constitution, the rule of law and constitutional democracy.
- Seeks to promote all values, rights and principles provided for in the Constitution on behalf of everyone.
- Monitors developments, including actions, policy and draft legislation, that might affect the Constitution and the values, rights or principles provided therein.
- Informs people and organisations of their constitutional rights and assists them in claiming those rights.

Scope

- Setting the scene: The Emperor's New Clothes
- The *Draft Protection and Promotion of Investments Bill*
- Expropriation Internationally and locally
- Towards Constructive Expropriation?
- Conclusion

The Emperor's New Clothes



The Draft Promotion and Protection of Investments Bill

- Cancellation of Bilateral Investment Treaties
- Salient provisions:
 - (a) A measure or series of measures taken by the government of the Republic that have an incidental or indirect adverse impact on the economic value of an investment;
 - (b) a measure aimed at protecting or enhancing legitimate public welfare objectives, such as public health or safety, environmental protection or state security;
 - (c) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property; and
 - (d) any measure which results in the deprivation of property but where the State does not acquire ownership of such property provided that-
 - (i) there is no permanent destruction of the economic value of the investment; or
 - (ii) the investor's ability to manage, use or control his or her investment in a meaningful way is not unduly impeded.

Expropriation Standards

- International law: public purposes , under due process of law, on a non-discriminatory basis, with compensation.
- The Constitution:
 - Section 25 (1)“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
 - Section 25(2) “Property may be expropriated only in terms of law of general application for a public purpose or in the public interest and subject to compensation, the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.



Expropriation V Deprivation

Deprivation

Expropriation

Jurisprudence

- *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance,*
- *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government.*

Custodianship

- *Mineral and Petroleum Resources Development Act 28 of 2002.*
 - Abolishment of private ownership
 - State becomes 'custodian' of mineral resources.
- *Agri SA v Minister for Minerals and Energy and Others. National Water Act 36 of 1998*
- *Draft Preservation and Development of Agricultural Land Framework Bill.*

A Third Way: Constructive Expropriation

- Expropriation is a matter involving both fact and law; when the loss to the aggrieved party is accompanied by a form of appropriation by the expropriating authority then compensation should become payable.
- *Arun v City of Cape Town*

CONCLUSION

- Rethinking interpretation approaches to recognise constructive expropriation.
- Adopt approach followed by *Arun v City of Cape Town*: no grey area between deprivation and expropriation

Thank you

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Promoting and upholding the Constitution

