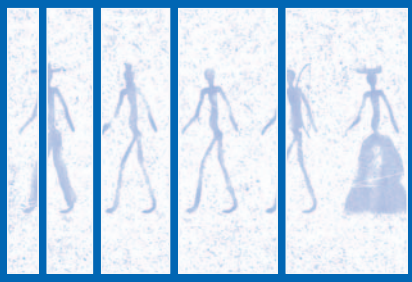
ANALYSES AND VIEWS



EDITION 1

Legal analysis of farmland expropriation in Namibia

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1 INTRODUCTION

Announcements by the Government of the Republic of Namibia (GRN) over recent months that it intends to speed up land reform and resettlement programmes and to target white-owned farms in particular for expropriation have caused much alarm. For the first time, the GRN has admitted that "all Namibian landholders could be at risk of expropriation under a policy change announcement" (The Namibian, 4 March 2004). Expropriation should not only affect absentee landlords and unproductive farms, but also productive commercial farmers as long as the land "can be used better" (The Namibian, 4 March 2004). The GRN's stated intention to select for expropriation purposes a number of farms from an unofficial list of target farms that "belong to white landowners who had wronged others in the past" (The Namibian, 4 March 2004) drew particularly hefty criticism.

The government also announced that expropriation will be in line with the law (Republikein, 4 March 2004). [1]Article 16 of the Namibian Constitution provides the state with the authority to expropriate property in the public interest subject to the payment of just compensation, and in accordance with the provisions of the Namibian Agricultural (Commercial) Land Reform Act (Act 6 of 1995).

The recent announcements by the government, assumed to constitute a policy change, have given rise to much uncertainty about the legal ramifications of expropriation with regard to constitutional requirements and the terms of the Agricultural (Commercial) Land Reform Act (Act 6 of 1995). This article analyses the legal requirements for expropriation and limitations of the government's authority to expropriate land.

2 THE RIGHT TO PROPERTY (ARTICLE 16 (1) OF THE NAMIBIAN CONSTITUTION)

Article 16 of the Namibian Constitution guarantees the right to property, with paragraph 1 thereof providing everyone with the right to acquire, own and dispose of property, alone or in association with others, and to bequeath such property.

The right to own property is also recognised as a fundamental right of the individual under international law. This right can be found in most constitutions and international conventions. Article 17 of the Universal Declaration of the Rights and Duties of Man of 1948 specifies that everyone has the right to own property alone as well as in association with others and that no-one may be arbitrarily deprived of property. [2] Since this right to property is recognised as a fundamental right, the power to deprive the individual of this right can only be granted by law and only on justifiable grounds.

3 EXPROPRIATION FOR PUBLIC INTEREST (ARTICLE 16 (2) OF THE NAMIBIAN CONSTITUTION)

Article 16 (2) of the Namibian Constitution is concerned with the expropriation of property. It provides for the state, or a competent body authorised by law, to expropriate property in the public interest, subject to payment of just compensation and in accordance with requirements and procedures to be determined by an Act of Parliament. The Namibian Constitution does not, however, define what constitutes "public interest".

The Agricultural (Commercial) Land Reform Act (Act 6 of 1995), which was promulgated as an "Act of Parliament" to provide for an expropriation policy as determined by Article 16 of the Namibian Constitution, allows in Article 14 (2) (a-d) for the compulsory acquisition of agricultural land classified as under-utilised, excessive or acquired by a foreign national, or of land where the application of the willing-seller, willing-buyer principal has failed.

The crucial questions are what requirements the "public interest" criterion sets and whether the envisaged expropriations for the purposes of redistribution as part of the land reform and resettlement programme are indeed in the "public interest".

Secondly, it is necessary to analyse whether or not the political announcements by the government to the effect that it intends to expropriate any land that "can be used better" is justified under the law. Thirdly, the question arises whether it is justifiable to specifically target land, on which mistreatment of workers is alleged to have occurred, for expropriation.

3.1 Public interest under international law

The right to expropriate property is not absolute and international law seeks to place limitations on governments' discretionary powers in this regard.

The 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources (GA Res. 1962: Paragraph 4) stated *inter alia* that expropriation "shall be based on grounds or reasons of public utility, security, or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law."

This resolution is closely connected to the principle of self-determination and it is important to note that it characterises expropriation as a right inherent in sovereignty. This means that expropriation is prima facie lawful, provided that the conditions established by international law are met.

In 1926, the Permanent Court of International Justice (PCIJ) took the position in the *Upper Silesia*

[1] *Speech by Minister Hifikepunye Pohamba (Ministry of Lands, Resettlement and Rehabilitation) given in Parliament on 2 March 2004.*
[2] *See also Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950; Article 21 of the American Convention on Human Rights of 1969; and Article 14 of the African Charter on Human and People's Rights of 1981.*

case (1926 PCIJ 7, 22) that "expropriation for reasons of public utility, judicial liquidation and similar measures" was lawful.

In *Sporring and Lonroth vs. Sweden*, the European Court of Human Rights (ECHR) stated that a fair balance must be struck between the demands of the general interest and the requirement that the individual's fundamental rights are respected (1982 ECHR 52, 56-75).

In addition to these requirements, international case law suggests that lawful expropriation must not be discriminatory, in the sense of its being deliberately directed against the nationals of only one state (*Liamco Case* 1977, International Legal Materials (ILM) 62, 140; *Aramco Case* 1963, International Law Reports (ILR) 27, 117; Shaw 1986, 435).

3.2 Public interest under South African and comparative constitutional law

South African law sets out more detailed criteria for the definition of "public interest" in the context of expropriation.

Article 25 (2) of the South African Constitution allows for expropriation "for public purposes or in the public interest". The term "public purposes" is usually defined in contrast to "private purposes". It would include an expropriation by the state for the purposes of carrying out its administrative obligations such as, for example, building a road, a bridge or a hospital. An expropriation specifically for the benefit of a private individual or for the benefit of the state's commercial ventures would be a private purpose, not a public purpose, and would therefore not be permissible (De Waal et al. 2001: 423).[3]

The same need not, however, necessarily be true of expropriations which involve the transfer of land from one private party to another, but which are performed pursuant to a land reform policy. Where an expropriation is intended to benefit the public at large rather than a private individual, even though it effectively results in a benefit accruing to a particular individual (as would be the case with expropriation for the purposes of redistribution as part of a land reform programme), the transaction would nevertheless still clearly be in the public interest, and would therefore be constitutional.[4] The courts thus have only limited scope to set aside an expropriation on the grounds of its purpose and would generally be inclined to respect the choices made by the legislature or executive as to where the public interest lies (Charkalson et al. 1998: 22).

Article 14 (3) of the German Constitution provides that "expropriation shall only be permissible in the public interest." The public interest requirement has been interpreted to mean that expropriations cannot be undertaken solely for the benefit of the state's commercial interests or of a private person. It is possible, however, for a private person to benefit from an expropriation as long as the expropriation is undertaken in the execution of a public necessity. For example, in 66 BVerfGE 248, the court decided that an expropriation of property for the purpose of providing electricity was valid, even though the power was supplied by a private company that would have made a profit from the expropriation.

Expropriations for the purpose of land reform have also entered into case law in Australia, the Council of Europe and the United States. Van der Walt summarises these decisions as follows: "Generally, the position is that a broad, general programme of land reform can be in the public interest and that individual expropriations would be for a legitimate purpose if they form part of such a programme, even though the intention is to give or transfer the expropriated land, in terms of that programme, to a private person" (Van der Walt 1999: 342).

To dispel any lingering doubts in this regard, Article 25 (4) of the South African Constitution stipulates that the term "public interest" must be interpreted so as to include "the nation's commitment to land reform" and "reforms to bring about equitable access to all South Africa's natural resources". Any property redistribution programme thus clearly falls within the ambit of the public interest.

Article 25 (1) of the South African Constitution, however, requires that deprivation may only take place in terms of a law of general application and further provides that "no law may permit arbitrary deprivation of property". This means that the government should exercise its powers in terms of clear rules and principles set out in advance. The exercise of power is arbitrary where it does not follow rules or precedents. Even if authorised by a law of general application, a deprivation will be unlawful if its effect is to allow for "arbitrary" deprivations of property (De Waal et al. 2001: 427). Arbitrary action has been described in South African administrative law as action that is "capricious or proceeding merely from the will and not based on reason or principle" (*Beckingham vs. Boksburg Licensing Court* TPD 1931, 282).

3.3 Application of international and comparative criteria to Namibian law

According to the criteria outlined in section 3.2 above, "public interest" in Article 16 (2) of the Namibian Constitution should include expropriations for land reform and resettlement programmes. The Agricultural (Commercial) Land Reform Act (Act 6 of 1995) defines the expropriation policy. "Public interest" includes the possibility of title being transferred to other private individuals, as this outcome would occur in the context of restitution or redistribution. The government can therefore generally exercise the power of expropriation for its resettlement and agrarian reform schemes.

According to Article 14 (2) of the Agricultural (Commercial) Land Reform Act, four categories of

[3] *See e.g. Rondebosch Municipal Council vs. Trustees of Western Province Agricultural Society 1911 AD 271 at 283*
[4] *See e.g. Administrator, Transvaal & another vs. J. van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 644 (A) at 661C-D.*

expropriation are defined, namely:

- the expropriation of under-utilised land;
- the expropriation of excessive land;
- the expropriation of land owned by foreigners; and
- the expropriation of land where the state has failed in applying the willing-seller, willing-buyer principle. (Failure of the willing-seller, willing-buyer principle is not a precondition for expropriation, but rather an independent category of justified expropriation.)

3.3.1 Expropriation of under-utilised land

The Agricultural (Commercial) Land Reform Act defines any agricultural land which is not substantially utilised for agricultural purposes or which, with regard to the agricultural potential of the land, is not utilised adequately, as being under-utilised land (Art. 14 (3) (a)). The assessment of when land is not utilised in a sense that qualifies it for expropriation is, however, the discretionary prerogative of the government and is part of the land reform policy programme. As determination of "public interest" is at the discretion of the government, as stated above, it is hardly possible to set aside an expropriation order on the grounds of its purpose. The choices made by the legislature or executive as to where the public interest lies will have to be respected, unless they clearly constitute an arbitrary or discriminatory deprivation of property and are deemed to be against the rule of law.

3.3.2 Expropriation of excessive land

With regard to excessive land, the Agricultural (Commercial) Land Reform Act states that where a person holds agricultural land in excess of two economic units, whether in the same or different agro-ecological zones, that land can be classified as excessive (Art. 14 (3) (b)). Both land owned in excess of a maximum size and a farm owned by someone who owns one or more other farms can therefore be targeted for expropriation. The area of land which constitutes one economic unit will vary from one agro-ecological zone to another, as specified in Article 14 (4) (b). The assessment of what constitutes one agro-economical zone will be made on the basis of agro-economical criteria and at the discretion of the government in administrating its land reform policies.

3.3.3 Expropriation of land owned by foreigners

The protection of the rights of foreigners whose land is expropriated is properly a matter of international law. Here the international standard must apply: expropriation must not be directed against the nationals of only one state, but should rather be directed against all persons in possession of property, the expropriation of which is deemed to be in the public interest. According to the Permanent Court of International Justice, "the form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups."

The expropriation policy regarding land acquired by foreigners in Namibia is, however, not directed against the nationals of only one state, but against foreigners in general, so that Namibian nationals enjoy an advantage over foreigners with respect to land ownership and acquisition. Colonisation and unlawful land acquisition by foreigners many years ago, necessitates the disadvantaging of foreigners regarding the sensitive issue of land redistribution in order to redress the wrongs of the past and actively advantage the formerly disadvantaged. The inclusion of foreigners in the group of people whose land might be legally expropriated is not discriminatory in terms of international law, provided that just compensation is paid in accordance with international rules.

3.3.4 Expropriation of absentee landlords' land

Following the National Conference on Land Reform and the Land Question of July 1991 (GRN 1991: 24), GRN policy determined that land owned by absentee landlords, including foreigners, should be expropriated. The term "absentee landlords" also refers to those Namibian landlords who are part-time or weekend farmers, or who live abroad. According to the policy, however, a distinction with respect to owners who do not live on their farms should be drawn between foreign and Namibian owners. Consequently, in terms of the land reform policy, foreign owners should be the first to be targeted in the expropriation process. The underlying rationale of this policy is that many Namibian farmers lack sufficient land to make an adequate living, while absentee landlords frequently have alternative sources of income.

It follows from the aforesaid that a land reform policy that seeks, through expropriation, to redistribute commercial land in the public interest and in the process targets absentee landlords, is in line with the law. As stated above, however, deprivation of property may only take place in terms of a law that has general application. However, the Agricultural (Commercial) Land Reform Act, which according to Article 16 of the Namibian Constitution is regarded as the legal basis for expropriation in the public interest, does not deal with expropriation of absentee landlords. To render expropriation on the basis of the owner being an absentee landlord lawful, the Agricultural (Commercial) Land Reform Act will consequently have to be amended to include such a provision.

3.3.5 Expropriation on the basis of mistreatment of workers

Current GRN policy aims at expropriating farms on which there have been excessive disputes between management and employees, and where

management has been unsuccessful in resolving these in a satisfactory manner. The rationale is that employees, who in many cases have worked and lived on the land for many years, should not be without protection if they are retrenched or dismissed.

This policy, which conflates the need for protection of farm workers from abusive employers with the need for redistribution of land through expropriation, fails to distinguish between two politically and legally distinct and unrelated fields. Instead of strengthening the Labour Inspectorate and introducing stronger provisions into the labour laws to protect farm workers from arbitrary eviction, it now appears that the government wants to solve labour disputes by expropriating land from land owners who are perceived to be problematic.

As stated above, expropriation in the public interest should be applied, without discrimination, against any and all persons who own property, the transfer of which is warranted in the public interest. The critical issue here is public interest. Expropriation is a restriction of the constitutionally guaranteed right to own property and is only legitimate if there is strict compliance with legal requirements. It should always be foreseeable, non-discriminatory and based on reason or principle. The justification for expropriation on the basis of the manner in which conflicts between employers and employees have been dealt with in the past is arbitrary and not based on reason and expropriation on these grounds will not lead to equal treatment of current land owners. The discretion of the government to decide under what circumstances workers' grievances are serious enough to justify expropriation opens the door to arbitrary expropriation. It could have the effect of reducing the expropriation process to a punitive measure, rather than a means of achieving just redistribution of land in the public interest. Such measures would therefore clearly be *contra legem*. Any amendment of the Agricultural (Commercial) Land Reform Act to cover such a scenario would also be unlawful.

3.4 Limitation of fundamental rights and freedoms (Article 22 of the Namibian Constitution)

The Namibian Constitution specifies some general restrictions on limitations of fundamental rights and freedoms. Article 22 specifies that a limitation of any fundamental right or freedom is only lawful if it is provided for by legislation, if the limitation is generally applicable and not aimed at a particular individual (Article 22 (a)). The law must furthermore specify the extent of the limitation and identify the article of the Constitution on which the limitation is claimed to rest (Article 22 (b)). Any limitation of the fundamental right to property conferred by Article 16 (1) of the Constitution must be provided for by legislation and be of general application.

The Agricultural (Commercial) Land Reform Act defines itself as an "Act of Parliament to provide for an expropriation policy according to Article 16 of the Namibian Constitution". In Article 14 (2), it defines four possible grounds for expropriation: expropriation of under-utilised land; of excessive land; of foreign-owned land; and of land regarding which the state has failed in applying the willing-seller, willing-buyer principle. These categories of expropriation are lawful restrictions of the right to property defined in Article 16 (1) of the Namibian Constitution as they are provided for by law and are part of a general land reform policy, which defines specific criteria for expropriation in the public interest. The specified circumstances allowing for expropriation foreseen by the Agricultural (Commercial) Land Reform Act are generally applicable, as all farms (including those owned by foreigners) that satisfy the defined criteria could be expropriated. Expropriation of foreigners' farms is not directed at particular individuals, but is consistent with a land reform policy that aims at preferential treatment of Namibian nationals in order to redress the unequal distribution of land that is a consequence of colonisation.

Expropriation of farms where there is a perception of a history of excessive disputes between management and employees, and of management having unreasonably failed to resolve such disputes, is, however, directed against particular individuals and therefore constitutes an unlawful restriction of the right to property, as defined by Article 22 (a) of the Namibian Constitution. In any event, it is not provided for by law, but even if it were, it would still be unlawful as it would be discriminatory. Additionally, any category of expropriation which is not contemplated in the Agricultural (Commercial) Land Reform Act (and is therefore not provided for by law) is, in terms of Article 22 (a) of the Namibian Constitution, unlawful.

3.5 Summary of expropriation for public interest

According to the Namibian Constitution, expropriation is in principle lawful, provided that the conditions of public interest and just compensation are met. The Namibian Agricultural (Commercial) Land Reform Act is, however, the legal foundation for expropriation and its stipulations must therefore be adhered to.

The introduction of a new land reform policy, as announced by the government, lies within its discretion, as long as the policy is in line with the principle of public interest, is generally applicable as required by Article 22 (a) of the Namibian Constitution and is neither arbitrary nor discriminatory. For an expropriation policy to be amended so that it covers sets of circumstances not formerly envisaged, but which are consistent with Article 16 (2) of the Constitution, it would be necessary to amend the Agricultural (Commercial) Land Reform Act.

Any new policy must be directed, without discrimination, equally against all persons who own property, which if expropriated would benefit the public interest. The question therefore frequently arises whether all racial groups of national landowners

should be treated equally with regard to expropriation if their economic and property-ownership situations are comparable. In other words, the question is whether large farms or second and third farms belonging to "formerly disadvantaged" people should also be targeted for expropriation.

It could be argued that the intention and purpose of the expropriation policy is to expropriate large farms in order to distribute the land to poorer, landless people, so that they might have a means of securing their livelihoods. From this perspective, the possession of a farm beyond the measure of an economic unit, or of more than one economically viable farm, by a wealthy person, be he or she black or white, would render such a farm a justifiable target for expropriation.

On the other hand, colonial dispossession is seen as the major reason why there is a need for a land reform policy in the first place and so it can be argued that the farms of formerly disadvantaged people should therefore be immune from being targeted for expropriation, irrespective of the extent of the owners' land holdings. A strong case can therefore be made for the political and legal validity of differential treatment of "colonial" and "formerly disadvantaged" landowners. It lies within the discretion of the government to define the policies under which the land reform process will take place, provided that the process does not infringe national or international legal norms or the rule of law, which the Namibian land reform policy, insofar as it is allowed for by the Agricultural (Commercial) Land Reform Act, does not.

4 JUST COMPENSATION

4.1 Compensation in terms of the Namibian Constitution and the Agricultural (Commercial) Land Reform Act

According to Article 16 (2) of the Namibian Constitution, expropriation of property in the public interest by the state must be subject to the payment of "just compensation". Article 25 of the Agricultural (Commercial) Land Reform Act deals with compensation for expropriation. Although it does not specify the amount of compensation to be paid for land that is expropriated, it does establish relevant criteria for the assessment of the amount of compensation.

Article 25 (5) (a) stipulates that the enhancement of the value of the property as consequence of the use thereof must be taken into consideration, while according to Article 25 (5) (b), improvements made after the date on which the expropriation notice is served shall not be taken into account. In the case of agricultural land, however, the amount of compensation should, according to Article 25 (1) (a) (i) and (ii), not exceed the aggregate of the amount which the land would have realised if sold on the date of notice on the open market on a willing-seller, willing-buyer basis on the one hand, and the amount that would be required to fully compensate for the actual financial loss caused by the expropriation, on the other.

According to Article 25 (3), interest at the standard rate is to be paid on any outstanding portion of the amount of compensation payable from the date on which the state takes possession of the property in question.

The basic question that must be answered is whether or not the compensation that must be paid in terms of Article 25 must reflect the actual market value of the expropriated property.

4.2 Compensation according to international law

In international law, the payment of compensation is also a prerequisite for the valid expropriation of private property by a sovereign state. The right to expropriate is within the competence of a sovereign state, but the compensation requirement imposes a legal condition on this competence.

Since the beginning of the last century, the majority of states have supported an "international minimum standard" or a "moral standard for civilized states" for determining compensation. This standard is affirmed in the Declaration of the United Nations General Assembly on Permanent Sovereignty over Natural Resources (pp. 542-544) adopted in 1962. It has also enjoyed the support of many tribunals and claims commissions.

The international standard is in line with the "Hull formula", enunciated by United States Secretary of State Cordell Hull in 1938 and subsequently adopted by industrialised nations. This formula requires that compensation must be "prompt, adequate and effective". In essence, this means that the nationalising state should make payment in a currency that can be readily used (not, for example, a devaluated local currency), that it should reflect the full value of the expropriated property, perhaps incorporating an element for future lost profits, and that it must be handed over within a reasonable time after the expropriation, failing which interest should be paid (*Anglo-Iranian Oil Co. Case* 1952, ICJ Report 93, 100).

Developing states have, however, objected to this formula, not least because it requires them to pay out substantial capital sums when the very reason for the expropriation may have been that they were in serious financial difficulties. These states rather support the view that the alien can only expect equal treatment under the local law because he or she submits to the local dispensation, with its inbuilt benefits and burdens, and because to accord the alien special status would be contrary to the principles of territorial jurisdiction and equality. Developing states consequently favour "appropriate" or "just" compensation, which is taken to mean compensation assessed with reference to the economic viability of the nationalising state, the importance of the expropriated property and the

benefits which the foreign national has already acquired through commercial activities in the state (see Resolution of Permanent Sovereignty over Natural Resources of 1962; *Aminoil vs. Kuwait* 1982, 21 ILM paras. 143-144; Brownlie, 526 f.; Dugard 2003, 227 f.). This will almost certainly not be the market value of the property and will not include an amount for the loss of future profits.

This disagreement over legal principles is also a reflection of political and ideological differences and actual awards, therefore, tend to steer a middle course. Today, the standard of "appropriate compensation" seems to enjoy the greatest support and it has been approved by several arbitral awards (*Aminoil Case supra* at paras. 143-144; *Texaco vs. Lybia* 1978, 53 International Law Review 389 at para. 88). In the *Aminoil Case*, the tribunal found that in order to arrive at an "appropriate" compensation, it was necessary to have regard for all the circumstances of the case, with special reference to the legitimate expectations of the parties (*supra* at paras. 144-149).

Furthermore, the jurisprudence of the European Court of Justice offers an apposite solution with respect to expropriation of the property of nationals: in *James vs. United Kingdom* (1985, no. 98, 54) the applicants maintained that the system of leasehold enfranchisement had deprived them of their possessions without adequate compensation. They additionally argued that they were entitled to prompt, adequate and effective compensation in accordance with the general principles of international law referred to in Article 1 of Protocol 1 of the European Charter for Human Rights. The court rejected these arguments on the grounds that this reference to international law does not apply to the state's acquisition of the property of its own nationals, but is designed for the protection of aliens. The court reaffirmed this ruling in the similar case of *Lithgow vs. United Kingdom* (1986, no. 102, para. 74), which dealt with the nationalisation of various industries. In addition, the court stated that under Article 1 of the First Protocol, the acquisition of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference, which could not be considered justifiable, but that Article 1 did not guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as measures aimed at economic reform, might call for less than full reimbursement (see also Naldi 1995: 83).

In so doing, the court drew a crucial distinction between compensation for the expropriation of nationals' assets and aliens' assets and furthermore brought to the fore the notion of just compensation being determined with due regard for both public interest and the interests of the expropriated individual. This train of thought is also followed by the South African Constitution with respect to compensation for expropriated property.

4.3 Compensation according to South African law

Article 25 (3) of the South African Constitution requires compensation for expropriated property to be "just and equitable" in its amount, timing and manner of payment. The formula was already considered by the Land Claims Court in *Former Highlands Residents, in re Ash vs. Department of Land Affairs* (2000, 2 All SA 26, para. 33). Ordinarily, according to foreign property rights jurisprudence, "just and equitable" compensation would mean market value compensation (Erasmus 1990; Eisenberg 1993: 412).

Nevertheless, Article 25 also indicates that compensation below market value or, conceivably, above market value, may in some circumstances be just and equitable and therefore constitutional. Article 25 (3) requires a balancing test between the public interest and the interests of those affected by the expropriation when calculating the amount of recompense for expropriation and thereby requires that account be taken of "all relevant factors", including:

a) the current use of the property;

b) the history of the acquisition and use of the property;

c) the market value of the property;

d) the extent of direct state investment and subsidy in the acquisition and beneficial improvement of the property; and

e) the purpose of the expropriation.

Though the market value of the property concerned is only one of the criteria, the Land Claims Court pointed out, apart from factor d), which deals with the extent of state investment and subsidy, market value is the only factor listed in Article 25 (3) that is objectively quantifiable. Once market value has been determined, the court can then attempt to strike an equitable balance between private and public interests. The interests of the expropriated party may raise the compensation to above market value. Similarly, the public interest may reduce the compensation to an amount which is below market value. The order of analysis, according to the Land Claims Court, is therefore first to determine the market value of the property and thereafter subtract from or add to this amount, on the basis of other relevant circumstances, which just and equitable compensation and reference to the list in Article 25 (3) may require (*Highlands Residents* 2000, 2 All SA 26, para. 34, 35; *Khumalo vs. Potgieter* LCC 17 December 1999, unreported).

As to market value, the Land Claims Court adopted a test known to Commonwealth expropriation jurisprudence as the *Pointe Gourde* principle. In *Pointe Gourde Quarrying & Transport Co Ltd vs. Sub-Intendent of Crown Lands (Trinidad)* (1947: AC 565 (PC), the principle was established that market value at the time of expropriation must be determined by disregarding any increase or decrease in the market

value of the expropriated property arising from the carrying out, or the proposal to carry out, the expropriation scheme. This is necessary because a scheme of expropriation often has the effect of distorting the market.[5]

As to the other factors listed in Article 25 (3), no precise method for calculating values that are based on considerations of equity and justice exists and each individual case will determine the method and outcome of this process (Van der Walt 1999, 344). For example, Factor a) (the current use of the property), may be relevant where property is currently not utilised by its owner or where it is held simply for speculative purposes. In such a case, compensation calculated at less than market value may be just and equitable. Factor b) (the history of acquisition and use) can also prove to be decisive in a downward adjustment of compensation. This was notably the case in *Khumalo vs. Potgieter* 1999 in South Africa, where land occupied by labour tenants had been bought below market value after the promulgation of the Land Reform (Labour Tenants) Act (Act 3 of 1996), which protects labour tenants from eviction. Awarding the market value would have been unfair and would not have reflected an equitable balance between the public interest and the owner's interests. This factor would usually also cover cases where property was acquired from the outgoing government for less than market value. Thus, the incumbent government might be able to reverse the process by which state assets were transferred cheaply into private hands in the period leading up to the first democratic elections in South Africa.

4.4 Application of the criteria to Namibian law

4.4.1 Market value

According to Namibian law, "just compensation" is required for an expropriation to be lawful. Nowhere is it clearly stipulated whether or not in assessing "just compensation" reference should be made to the market value. Ordinarily, however, under international law, just compensation would first require an assessment of the market value of the expropriated property to establish "appropriate compensation", followed by a second step in which the circumstances of the individual case are taken into account (De Waal, 424; see also above: *Aminoil Case supra* at 144-149). This conclusion is in line with the Namibian Agricultural (Commercial) Land Reform Act, which makes clear reference in Article 25 (a) (i) to the market value and restricts the amount calculated as compensation to an amount that would be realised on the open market in a willing-seller, willing-buyer scenario. It is therefore advisable that the market value be established first, as practiced by the South African Courts.

Article 25 (5) (a) further stipulates that in determining the amount of compensation to be paid for expropriation, any lawful enhancement of the value of the property, as consequence of the use thereof, shall be taken into account. This means that the basic consideration for calculating compensation should be the actual value of the property, which includes enhancements consequent to the usage of the land. "Value" would mean "market value" and would constitute the upper limit of compensation as stipulated by Article 25 (a) (i) of the Namibian Agricultural (Commercial) Land Reform Act which, as indicated above, restricts the compensation to be paid to this sum. This provision makes it impossible to raise the compensation to above market value.

Excluded from the calculation are improvements made after the date of notice of expropriation, except where they were necessary for the proper maintenance of the property (Art. 25 (5) (b)). The purpose of this restriction is to prevent improvements being made in the knowledge of impending expropriation with the intention of raising the amount of compensation payable.

4.4.2 Expropriation-related inflation and deflation

Difficulties further arise in assessing compensation when, due to political circumstances arising from expropriation, the market value of assets is temporarily inflated or deflated. In most cases, impending expropriation will reduce commercial prospects for the immediate future and may disrupt cash flow, effective management, trading performance and the ability to attract new business. Prices fluctuate and political conditions unfavourable to profit-making should thus be taken into account.

Reference should be made to the South African *Pointe Gourde* principle adopted by the Land Claims Court, in terms of which the market value at the time of expropriation must be determined by disregarding any increase or decrease in the value of the expropriated property arising from the carrying out, or the proposal to carry out, the expropriation scheme.

Furthermore, in *Shahin Shane Ebrahim vs. Iran* (1995), the majority concluded that a valuation of the company on the basis of its recent performance was not appropriate, because its prospects had been adversely affected by changes associated with the Islamic Revolution, and that its current market value was therefore less than the value of its tangible assets due to a deduction for so-called "negative goodwill". Thus, if the fact of impending expropriation negatively affects the value of the assets, the compensation to be paid should not be reduced. The "value" of the assets should be understood as their value prior to expropriation becoming a factor.

4.4.3 Balancing test

A final fundamental question is whether or not, in a second step, a fair balance should be struck between the public interest and the interests of the owner whose property is expropriated, in order to determine "just compensation" in the individual case.

The Namibian Constitution and the Namibian Agricultural (Commercial) Land Reform Act do not contain any detailed provisions equivalent to Article

[5] *See e.g. May vs. Reserve Bank of Zimbabwe 1986 (3) SA 107 (ZSC). The announcement that foreign shares trading on the Zimbabwe Stock Exchange would be expropriated led to the reduction of a market premium on the shares from 77 per cent at the time of the announcement to 30 per cent at the time of the expropriation.*

25 (3) of the South African Constitution for balancing these conflicting interests. There are no references to the "history of the acquisition and the use of the property", the "current use" or the "purpose of the expropriation", as laid down in the South African Constitution. The post-independence Namibian state has left the property clause rather open for subsequent concretisation by law.

For this reason, in *Cultura 2000 vs. Government of the Republic of Namibia* (1994 (1) SA 407) the court struck down an attempt by the GRN to recover donations worth R8 000 000 made by the Administrator-General shortly before Independence. The donations had been made to a voluntary association whose main object was the preservation of the culture of the "Afrikaans, German, Portuguese, English and other communities of European descents as represented by the founding members". The State Repudiation (Cultura 2000) Act of 1991 (Nm), which nullified the donations, was declared unconstitutional inter alia on the grounds that it attempted to take possession of property without providing just compensation. [6] Had the Namibian Constitution furnished the court with a basket of considerations to ascertain the compensation, the outcome would probably have been different (Devenish 1999, 351).

The Namibian Agricultural (Commercial) Land Reform Act in Article 25 (b) (ii) nevertheless restricts the amount of compensation payable for expropriation to the amount required to compensate the actual financial loss suffered. How the actual financial loss on the part of the expropriated party is to be calculated leaves room for interpretation. Here, subjective factors, such as the use of the land (whether it is currently utilised by its owners or held simply for speculative purposes) or the amount originally paid for the land, might be taken into account. If, for example, the expropriated party bought the land for less than the market value, compensation could be under market value without being unfair.

Besides, the term "just compensation" itself asks for a balancing of the different interests at stake. Article 25 of the South African Constitution could serve as a guideline for balancing the various interests against each other in determining just compensation.

4.4.4 Compensation of foreigners

When the property of foreigners is expropriated, international legal requirements should be met: compensation should be prompt, adequate and effective, meaning that the full market value should be paid out. On the other hand, from the perspective of a developing country, it can also be argued that it would not be justifiable for foreigners to receive greater compensation than nationals would. Compensation to foreigners could therefore be calculated below market value. Such a policy could, however, scare off investors and potential investors, and thus adversely affect the economy of the country. In order to prevent such a negative outcome, the GRN has concluded bilateral investment agreements with some countries, for example Germany, to protect foreign investors from expropriation by guaranteeing the full amount invested in the event of expropriation.

5 MANNER AND TIME OF PAYMENT

Article 16 of the Namibian Constitution does not specifically establish any limits for the manner and time of payment of compensation. International law requires that compensation be "appropriate", also with regard to the manner and time of compensation. It should thus be paid within a "reasonable" time and in such a manner that the recipient of compensation is able to make use of the compensation. For example, monetary compensation in a blocked currency would not be effective. South African law explicitly extends the notion of just and equitable compensation (Art. 25 (2) and (3) of the South Africa Constitution) to the manner and time of payment, so that these too should be just and equitable.

Although there is no explicit reference in Namibian law to the manner and time of compensation, the requirement of "just compensation" should also cover payment in a just manner and within a just timeframe, reflecting an equitable balance between the public interest and the interests of individuals. It may, however, be an option for the state to provide compensation in a form other than cash, if the private interest in cash compensation is outweighed by the public interest in the expropriation, in circumstances where constraints on public spending preclude compensation by way of full cash payment (Charkalson et al. 1998: 25).

The same is applicable to the time of payment. Ordinarily, prompt payment of compensation would have to follow an expropriation (Erasmus 1990; Charkalson et al. 1998: 25). The notion of "just compensation" does not preclude the possibility of delayed compensation. In this regard, factors such as the use to which the property is being put may, in particular cases, be relevant to the time within which compensation is paid. If an owner is not using a particular property and does not intend to gain any material benefit from that property in the immediate future, it may well be just to allow for delayed payment of compensation.

6 PROCEDURE

According to Article 14 (1) of the Agricultural (Commercial) Land Reform Act, the Minister of Lands, Resettlement and Rehabilitation may, after consulting with the Land Reform Advisory Commission (Article 3), decide to expropriate any farm identified as being suitable for resettlement. The Commission, which is composed of all stakeholders, was established in accordance with Article 4 of the Agricultural (Commercial) Land Reform Act in order to assist the Minister in administering the Act.

[6] *See Government of the Republic of Namibia vs. Cultura 2000 1994 (1) SA 407 (Nms).*

The Minister has then to serve the owner with an expropriation notice which must include a clear and full description of the property in question, the date of expropriation and the date upon which the state will take possession of the property. (According to Article 20 (2), the date on which the state takes possession should not be more than six months after the date of notification of expropriation.) On receipt of the expropriation notice, the owner is required to prepare and submit a claim for compensation to the Minister of Lands, Resettlement and Rehabilitation, who represents the acquiring authority under Article 22(1) (b). Where an amount of compensation is already offered in the expropriation notice, an owner who receives the notice may formally state to the Minister whether or not he or she accepts the expropriation and the amount offered as compensation (Article 22 (1) (a)). This must be done within 60 days of the date on which the expropriation notice was served (Article 22 (1)). The expropriation notice will be followed by an inspection and valuation of the property. A counter-offer to the owner's claim for compensation is possible, should the Minister deem the owner's claim for compensation to be excessive (Article 23).

If the owner does not accept the Minister's offer, the Minister has to inform the owner that he or she has 90 days from the date of notice to make an application to the Lands Tribunal in terms of Article 27 of the Agricultural (Commercial) Land Reform Act for the determination of compensation (Article 23 (4) (a)). If no agreement can be reached between the Minister and the owner, the Land Tribunal will determine the compensation to be paid for the expropriated property (Article 27 (1)).

Where a lease agreement exists and the owner of the expropriated land proves that such a lease is still in force, compensation to the amount of the owner's losses resulting from the premature termination of the lease will be paid and the lease will be terminated.

Article 14 of the Agricultural (Commercial) Land Reform Act is in line with Article 18 of the Namibian Constitution, which gives persons aggrieved by governmental actions the general right to seek redress before a competent court or tribunal.

One important procedural point should, however, be underlined: it should be clearly laid down in the expropriation notice in terms of which Article of the Agricultural (Commercial) Land Reform Act the expropriation is to take place. Failing this, there would be no way for the owner of the land which is to be expropriated to object to an expropriation notice which is against the law.

7 CONCLUSION

In conclusion, it can be said that the rules defined by the Namibian Constitution and the Agricultural (Commercial) Land Reform Act for expropriation of farmland are in line with national and international law. It is up to the government to abide by the rules in order to render the process of land reform lawful. It is therefore important for an expropriation policy to be transparent. It can be seen as a duty of the government to make its actual land reform policy open to the public, so that the public might know the criteria on the basis of which expropriation of farm land can be anticipated. It is a civil right of the public and an integral aspect of democratic order to be informed about governmental policies that affect the individual. The government should therefore inform the public about political decisions concerning the land reform process.

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