

**Presentation to the
Select Committee on
Economic and
Business
Development on the
Expropriation Bill**



BUSA
BUSINESS UNITY SOUTH AFRICA



Introduction

Business Unity South Africa (BUSA)



- BUSA is a confederation of business organisations including:
 - chambers of commerce and industry;
 - professional associations;
 - corporate associations; and
 - unisectoral organisations.
- Voice of Business on Macro-economic and high level issues.
- BUSA's function to ensure that business plays a constructive role in the country's economic growth and development.
- BUSA also represents the interests of Organised Business in NEDLAC where the Bill was thoroughly debated.



Introduction

The NEDLAC Process

- Transparent and inclusive process followed at NEDLAC.
- Areas of disagreement NEDLAC included:
 - Def. of “public interest”
 - Role of market value in compensation
 - Involuntary nature of expropriation as a factor influencing compensation;
 - 80/20% payment (20% being withheld for outstanding municipal taxes etc.; and
 - Issue of urgent expropriation.
- Most of these issues have been addressed, but a few critical issues remain

“BUSA wishes to commend the Department of Public Works on the transparent and inclusive manner in which consultations have taken place”



Remaining Areas of Concern

General comments

- BUSA realizes that expropriation is a power which governments across the globe can use as a last resort to advance the public interest.
- However, in the current economic climate, it is critical that we instill the utmost confidence in local and foreign investors.
- Certainty is key for investment confidence.
- Investors need to know
 - what kind of property can be expropriated;
 - the extent to which their property rights can be regulated;
 - whether they will be fairly compensated for loss;
 - whether they will have unlimited access to the courts; and
 - how the process of expropriation will unfold.



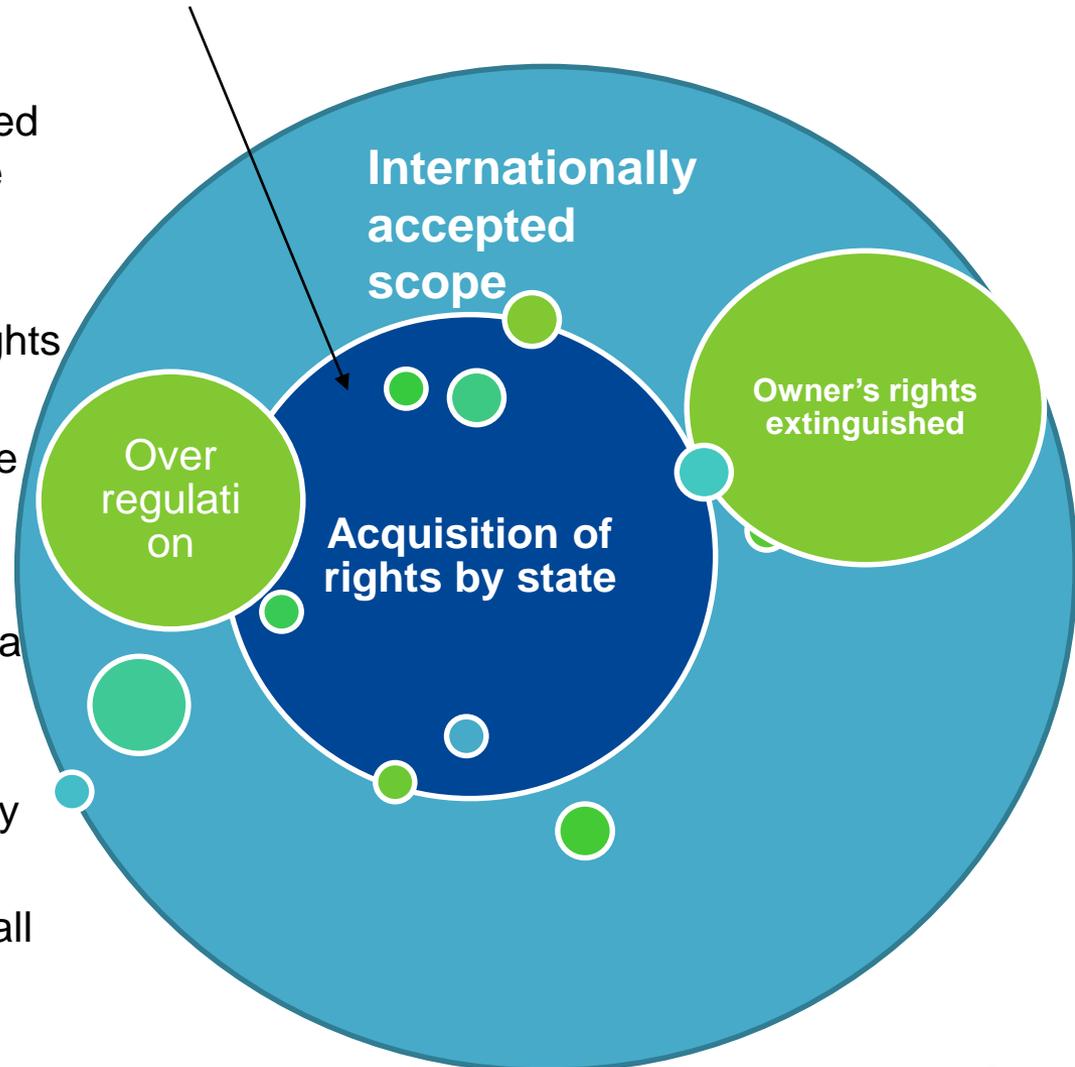
Remaining Areas of Concern

Specific Comments

Definition of “Expropriation”

- No definition in the initial Bill considered by NEDLAC; definition inserted by the Portfolio Committee.
- Proposed definition limits concept to instances where the state acquires rights in property
- This definition is limiting and out of line with international jurisdictions.
- Internationally;
 - Concept developed by the courts on a case by case basis, not defined;
 - Courts retain discretion to determine when state encroachment on property rights qualifies as an expropriation.
- Def. must be wide enough to include all forms of expropriation recognised internationally

Definition unduly limiting!



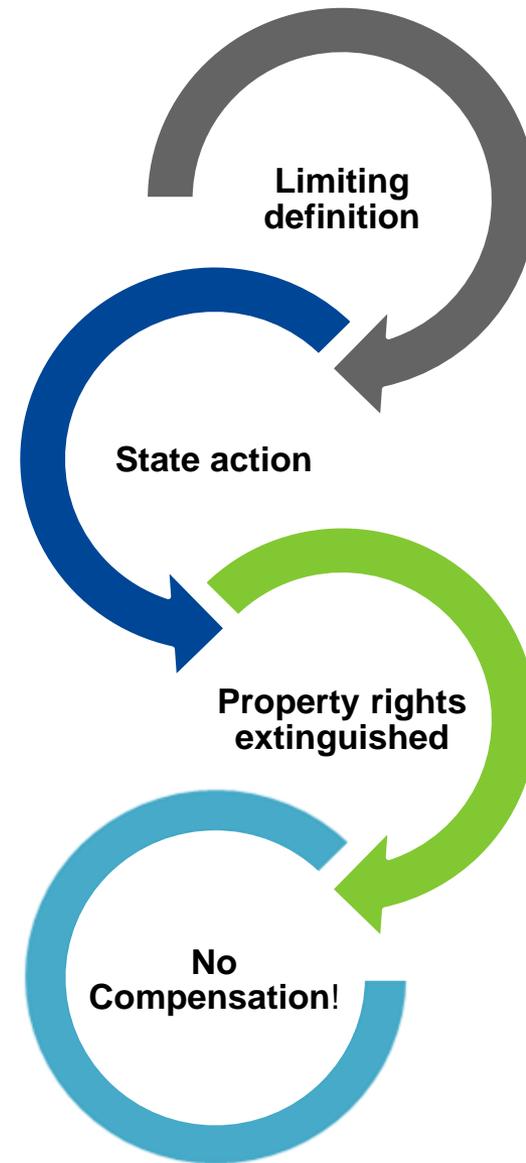
Remaining Areas of Concern

Specific Comments

Definition of “Expropriation”

- **Danger:** Narrow definition opens the door for government action that severely limits property rights without compensation!
- Concept of ‘expropriation’ not defined in the Constitution.
- **Danger:** a court could interpret the concept in the Constitution wider than proposed definition!
- Focus should be on the loss that the owner suffers, not on acquisition by government organs.
- Alternative definition:

“Expropriation means the compulsory acquisition or modification of property by an organ of state in the exercise of its statutory powers ”



Remaining Areas of Concern

Specific Comments

Definition of “Public Interest”

- Proposed definition broader than that contained in s 25 (4) of the Constitution.
- Bill does not clearly define what is meant by this additional wording.
- Open to wide interpretation, which creates market uncertainty.
- Bill should not expand on the wording in the Constitution

“Definition of “Public Purpose”

- Definition incomplete:
 - Need for clear regulation of the “public purpose” requirement in legislation to ensure conformity with section 25 (2) of the Constitution
- Provision should be made for regulations which define “public purpose”



Specific Comments

Clause 17

- Section regarding the payment of 80% of the compensation has been removed, which is welcomed.
- Clause reworded to clarify that payment takes place no later than the date at which the right to possession passes.
- Timing of payment of compensation still poses a concern:
 - If payment only takes place when possession passes, it may leave the owner and holders of unregistered rights little or no time to finance alternative accommodation.

“BUSA proposes compensation be paid 15 days before possession passes so as to enable the owner or right holder to make alternative arrangements”



Welcome amendments

Clauses 15 & 22

- Scrapping of the 'deeming provision'; and introduction of mediation welcomed

Clause 27

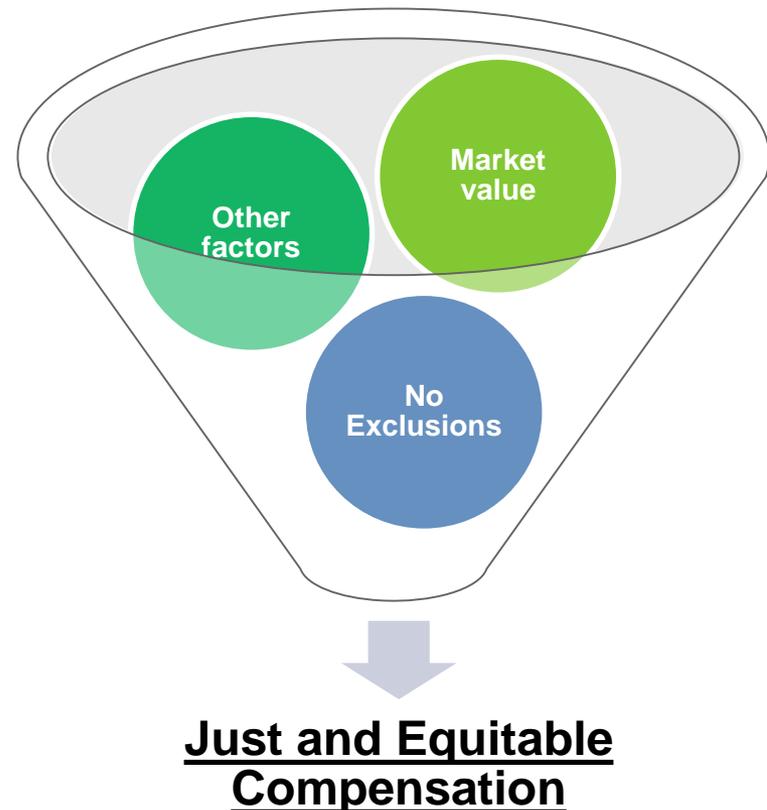
- Previously, a person would be guilty of an offence and liable to a fine or imprisonment not exceeding 6 months if that person failed to:
 - inform the authority of any holders of unregistered rights known to him;
 - inform the authority of any lease, purchase agreement or lien over the property; or
 - give the above information when the authority calls upon him to do so in the notice of intention to expropriate.
- In the latest version of the Bill, the listed conduct would no longer constitute an offence but rather civil (administrative) fine.

“BUSA welcomes this amendment”



compensation and the payment thereof

- BUSA recognises that market value is but one consideration listed in section 25 (3), However we must emphasise economic realities.
- Global regulatory requirements require lenders to use market value as the basis for mortgages,
 - BUSA therefore in support of keeping clause 12 (1) (c) as is.
- Existing Expropriation Act caters for consequential loss = no valid reason to exclude it now.
- The list of factors in the Constitution is not exhaustive, therefore no possible factors should be excluded or discounted if it could lead to a *'just and equitable'* outcome.
- Penalties required for late payment of compensation by the state.
- Market value = point of departure, other factors applied to adjust that figure (methodology applied by the courts)



Conclusion



- **BUSA understands the need for expropriation but would like to urge government to do so with caution and in strict compliance with the Constitution**
 - Especially because expropriation itself places an inordinately heavy burden on the shoulders of particular individuals.
 - Should lenders incur losses, they may tighten their lending criteria to customers, increase their interest rates or withdraw from the market altogether.
- **South Africa's economy is faced with its greatest challenges in light of a depressed global macro environment**
 - There is a need to consolidate public finances, in the context of slower growth and rising debt.
 - We are also faced with the spectre of a possible ratings downgrade
- **South Africa cannot afford to a Bill that it works against investment promotion and growth. We urge the committee to address the few remaining issues with the Bill to reassure investors and promote the much needed growth of our economy.**
- **In order for South Africa to raise the growth rate and create jobs, both the investment and business climates must be conducive.**

Thank You!