

PROPOSALS ON THE PROPERTY CLAUSE

1. There are several issues that divide us and the SAG. They are :
 - 1.1 the requirement that payment of compensation be expeditious
 - 1.2 the explicit listing of factors to be taken into account in determining compensation, other than market value.
 - 1.3 the specific inclusion of restoration as a species of expropriation in the public interest
 - 1.4 the content of the restoration clause - Coetzee wants to limit the laws under which dispossession to closed list of statutes (specifically excluding the Expropriation Act) set out in a schedule; require just and equitable compensation where restoration is not feasible; and the limitation of restoration to State owned land only.
2. There are several negotiation difficulties associated with the process. They are:
 - 2.1 Coetzee is disingenuous bargainer because he never articulates his interests or concerns (quite often this is because he isnt sure himself what they are). This means that you cannot address them either by persuasion or compromise and you get bogged down in a swamp of verbiage.
 - 2.2 negotiating bi-laterally means that we cannot use the good offices of the technical committee to weigh in on our side when Coetzee is obfuscatory or just plain dumb.
3. The process does however open up opportunities for us to improve on the draft clause and limit its effect. It may allow us to do the following:
 - 3.1 introduce a policing clause - a clause permitting the regulation of property.
 - 3.2 limit expropriation to the physical taking of property only.
 - 3.3 require that the compensation be set by statute and not directly by the courts acting in terms of the clause.
4. We are not sure that the best method of dealing with these bi-laterals is by trying to agree wording on all issues. Rather we suggest that principles be agreed (though wording or alternative wordings may be proposed) for submission to the technical committee.
5. Accordingly we suggest the following principles together with options and possible wording for discussion and mandate in respect of the property clause:
 - 5.1 *Principle:* Property rights be guaranteed
Wording: 'Every person shall have the right to acquire and hold rights in property and to the extent that the nature of the rights permit to dispose of such rights.'

Status: Agreed.

5.2 *Principle:* There shall be no deprivation of rights in property except in accordance with law.

Wording: '(2)(a) No person shall be deprived of rights in property except in accordance with law'

Status: This is a new clause which we should propose to have inserted before the present expropriation clause. The principle should not be difficult to sell though they will be suspicious if we suddenly propose new wording at the same time - the wording ought only to be proposed once all the principle have been agreed. The object of having the clause is threefold: (1) it suggests a distinction between deprivation and expropriation thereby limiting expropriation to physical taking only; (2) it operates as a substitute policing clause if we cannot get agreement on such a clause; and (3) it may have the effect of limiting the expropriation clause to a testing clause rather than an empowering clause in its own right.

5.3 *Principle:* Expropriation should only take place if in the public interest

Wording: (1) 'Expropriation of rights in property by the State shall....'

(2) 'Expropriation (or compulsory acquisition) of property by the State shall...'

Status: Wording (1) is the technical committee's wording. The concern that we have with it is the concern raised by G Budlender in his memo namely that if expropriation is extended to 'rights in property' then it widens the concept of expropriation beyond a physical taking.

5.4 *Principle:* Payment should not be required to be expeditious

Status: This principle is in serious contention and will in all probability not be acceded to in this bald form. A possible way forward might be to not only qualify the amount of the compensation by reference to 'just and equitable taking into account all relevant factors...' etc but also the manner of payment.

Wording: '...agreed compensation or, failing agreement, the payment of compensation which is just and equitable taking into account all relevant factors including..." etc.

5.5 *Principle:* The determination of compensation should be mediated through statute.

Status: This principle will also not sell in an unadulterated form. The object is to prevent the courts using the expropriation provision directly. In other words expropriation should only be permissible under statute. Compensation must be regulated by statute. If the statute prescribes compensation that is not 'just and equitable...' then the courts will strike it down as not being constitutionally valid.

Wording: 'Expropriation of property by the State shall be permissible in accordance with law and in the public interest...'

5.6 *Principle:* The statutory determination of compensation should not be limited to market value.

Status: This is of course the main issue in contention with the SAG. It is also contentious in our own ranks as to which is the less risky means of achieving this principle.

Wording: (1) '...just and equitable, taking into account all relevant factors including but not limited to market value'.

(2) '...just and equitable, taking into account all relevant factors including but not limited to the use to which the property is put, the history of its acquisition, its market value, the value of the owner's investment in it and the ~~interests of those affected~~ the public interest including social need.

(3) '... just and equitable taking into account all relevant factors.

(4)

6. The following principles, options and alternative wordings in respect of the restoration clause for discussion and mandate are as follows:

- 6.1 *Principle:* Restoration must be deemed to be in the public interest
Status: The SAG do not want such a deeming clause though it was the subject of some agreement on the adhoc committee and in our discussions with Coetzee.
Wording: (1) 'Expropriation of rights in property for the purpose of restoring rights in land to persons who have been dispossessed of these rights as a consequence of any racially discriminatory policy, shall for the purposes of subsection (2) be deemed to be expropriation in the public interest'
(2) 'Nothing in this section shall preclude measures designed to restore rights in land to persons who have been dispossessed of these rights as a consequence fo any racially discriminatory policy.'
- 6.2 *Principle:* Restoration be subject to the expropriation clause. This means that if there is to be any expropriation of private holders that the expropriation has to be in terms of the expropriation provisions of the property clause.
Status: This principle was insisted upon by the SAG and one of the agreed priciples in the discussions with Coetzee
- 6.3 *Principle:* The class of claimants are those who were dispossessed of land as a consequence of of racially discriminatory policy
Status: This was agreed but there was no agreement on how the the class of claimants should be circumscribed. Coetzee wants a schedule of statutes. Another option that has been proposed is a date - the SAG want 1948, others 1910. The proposal of the technical committee is the soundest namely that it should be left to Parliament to decide.
Wording: (1) '...every person who was dispossessed of rights in land as a consequence of any racially discriminatory policy within a period to be fixed by Parliament shall have the right...' (This is the technical committee's draft.)
(2) '...every person who was dispossessed of rights in land under any legislation passed after 1948/1910 which would have been inconsistent with a provision of this chapter, shall be entitled to claim...'
- 6.4 *Principle:* The right to restoration has to depend upon legislation to give it effect. In other words the class of claimants, the manner in which restoration claims are going to be determined and the amount of compensation to be paid where restoration is not possible, will all have to be set out in statute.

Status: This seems to be agreed. There was some disagreement as to whether 'according to the law' was sufficient

6.5 Principle: As far as state owned land is concerned any restoration must be according to law and it must be feasible. In the event that it is not feasible, alternative and equally suitable land may be allocated from other State land or where that is not feasible just and equitable compensation.

Status: This has been agreed

6.6 Principle: In so far as private land is concerned, any expropriation to give effect to a restoration must be conducted in terms of the expropriation clause. Where it is not feasible to restore, alternative and equally suitable land may be allocated from State land and where that is not feasible, just and equitable compensation.

Status: This has been agreed.

7. The difficulty with the restoration clause is the convoluted and obfuscatory language that Coetzee insists upon. If the process of trying to commit the SAG to principles and submitting the agreed principles to the technical committee fails or gets bogged down then serious attention should be given to a 'Nothing shall preclude' clause as suggested in 6.2 above.

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