

AN EVALUATION OF LESOTHO'S RIGHT TO "EXPROPRIATE" THE WATER IN THE TREATY ON THE LESOTHO HIGHLANDS WATER PROJECT IN A "CONFLICT OF USES"*

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SUMMARY

This article explores the contemporary spectre of "expropriation" within the framework of the Treaty on the Lesotho Highlands Water Project (LHWP). The LHWP is an enigma in both its scope and practical application since it is governed by two apparently complementary treaties, and it seemingly incorporates the domestic laws of both South Africa and Lesotho. This is compounded by the contradictory legislation that has been promulgated by Lesotho that prioritises its domestic water uses despite the entrenched provisions of the LHWP regime that prioritises the supply of water to South Africa. This uncertainty has significant implications for a "conflict of uses" in the LHWP that may trigger an expropriation bid by Lesotho. This article unmaskes the possible response of the LHWP legal framework to Lesotho's right to "expropriate" the water in the LHWP in light of this ambiguous and confounding legal framework.

1 INTRODUCTION

The Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (LHWP) guarantees the supply of predetermined water quantities from the Orange River in Lesotho to the Vaal River in South Africa. In return, Lesotho receives royalties which it employs to build hydroelectric dams. This project is divided into four phases, of which Phase 1 comprised Phases 1A and 1B. In essence, Phase I comprised the construction of the Katse, Muela, and Mohale Dams. Phase 1 was then

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completed in 1997, with the supply of water to South Africa commencing in 1998. Recently, the Agreement on Phase II of the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa (Phase II Agreement) has been concluded, which regulates the supply of water to South Africa during Phase II of the project and the maintenance of Phase I of the Project. If there is a conflict with the LHWP on the object of a term, the meaning stipulated in the Phase II Agreement prevails only in respect of this agreement.¹ However, the provisions of the LHWP are binding unless altered by the Phase II Agreement.² Consequently, the LHWP is the framework treaty regulating the project, and the Phase II Agreement constitutes a protocol to the LHWP. Thus, in this article, all references to the “LHWP” refer to the treaty as the regulatory regime for all the “Phases” of the water project. This means that any inferences made about the LHWP provisions also apply to the Phase II Agreement, to the extent that they are not amended by the Phase II Agreement. Phase II is projected to begin providing water to South Africa by 2022.³

To this end, it is the author’s view that Articles 4.1, 5.2, 6.8, and 7 of the LHWP and, more specifically, Annexure V of the Phase II Agreement prohibit the signatories from unilaterally altering or disturbing the supply of water to South Africa and regards the supply of water to Lesotho as “ancillary” to the supply of adequate water to South Africa. This means that the LHWP prioritises water supply to South Africa. Contrary to the LHWP, the Lesotho Water Act provides that in the case of conflicting water uses and if water is inadequate to cater for other uses, “domestic use” i.e., *including* the “taking” or “impounding” of water from a watercourse to satisfy “personal and household needs”, must prevail and be accorded first preference over other uses and it also establishes the “reserve” that also prioritises water for “domestic water uses”.⁴ This means that the LWA and the LHWP could be found to be incompatible. Thus, if there is inadequate water in the Orange River to cater to the needs of both countries, Lesotho will be compelled to either comply with its obligations under the LHWP to supply adequate water to South Africa or to supply water to the residents of Lesotho. This is termed a “conflict of uses”, which occurs when there is inadequate water in terms of quantity and quality to meet the needs of all transboundary water States.⁵ This projected conflict of uses may prompt Lesotho to expropriate the water in the LHWP. Consequently, this article seeks to evaluate Lesotho’s right to

¹ Article 1.3 of the Phase II Agreement, entered into force 11 August 2011.

² Article 3 of the Phase II Agreement.

³ Department of Water and Sanitation “Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – Current and Future Water Requirements Urban/Industrial Water Requirements” (2013) (accessed 2020-08-20) 28.

⁴ See ss 1, 13, 5(2) and 6 of Lesotho Water Act 15 of 2008 (LWA) <https://www.water.org.ls/download/lesotho-water-act-no-15-of-2008/> (accessed 2020-08-23).

⁵ Rieu-Clarke, Moynihan and Magsig “United Nations Watercourses User’s Guide” (2012) http://www.unece.org/fileadmin/DAM/env/water/meetings/Water_Convention/2016/10Oct_From_Practitioner_to_Practitioner/UN_Watercourses_Convention_-_User_s_Guide.pdf (accessed 2020-08-20) 109. See further here, Vinti “The Treaty on the Lesotho Highlands Water Project and the Principle of “Equitable and Reasonable Utilization” 2021 54 *De Jure* 328–346.

expropriate the water in the LHWP in the event of a conflict of uses. This inquiry is particularly significant in that the LHWP is cardinal to the supply of water to the Gauteng province, which is the economic hub of South Africa.

It bears mention that in Lesotho, the LHWP is managed through the Lesotho Highlands Development Authority (LHDA). The LHDA has the primary duty to supply predetermined quantities of water to South Africa.⁶ The Trans-Caledon Tunnel Authority (TCTA) administers aspects of the project located in South Africa.⁷ It is estimated that the LHWP has provided 10 000 million cubic metres of high-quality water, and it has enhanced water supply and materially lowered water treatment expenses.⁸ Water is Lesotho's largest source of non-tax revenue, contributing 10 per cent to the overall Gross Domestic Product.⁹ The project created at least 16 000 jobs in Lesotho during Phase I and also provided good quality roads.¹⁰

At the outset, it must also be noted that the regulatory regime of the LHWP is fraught with uncertainty on the exact international legal obligations of the signatories to this agreement.¹¹ This is compounded by the fact that Lesotho and South Africa regard their domestic legislation as part of the regulatory regime of the LHWP.¹² In this regard, Article 5.1 of the Phase II Agreement stipulates that parties must ensure that their domestic legislation is consistent with their obligations under the agreement and the LHWP, either through amendment of existing legislation or enactment of new legislation to that effect. This implies that the LHWP and the Phase II Agreement supersede the domestic laws of Lesotho concerning the water in the LHWP. Yet, Lesotho has promulgated legislation subsequent to the advent of the LHWP such as the LWA, which patently contradicts the LHWP in respect of a conflict of uses. It is with these considerations in mind that Lesotho's right to expropriate the water in the LHWP during a conflict of uses is considered.

⁶ Article 7.1 read with Article 7.2 of the LHWP and Article 3 of the Protocol VI System of Governance to the Treaty on the Lesotho Highlands Water Project: Supplementary Arrangements Regarding the Systems of Governance for the Project, entered into force 4 June 1999 (Protocol VI). See also, s 20 of the Lesotho Highlands Development Authority Order, 1986 <https://www.ecolex.org/details/legislation/lesotho-highlands-development-authority-order-no-23-of-1986-lex-faac128641/> (accessed 2020-08-20).

⁷ See Article 8.1 and Article 8.2 of the LHWP; Article 4 read with Article 8 and Article 8A of Protocol VI. The work of the LHDA and TCTA is monitored by the Lesotho Highlands Water Commission as provided by Article 5 of Protocol VI and Article 9 of LHWP. The "Joint Permanent Technical Commission" was renamed as the "Lesotho Highlands Water Commission" as provided by Article 2 of Protocol VI.

⁸ Parliamentary Monitoring Group "Lesotho Highlands Water Project Phase 2: Progress Report with the Minister" (26 October 2016) <https://pmg.org.za/committee-meeting/23524/> (accessed 2020-09-24) 1.

⁹ The Kingdom of Lesotho National Climate Change Policy 2017–2027 (6 July 2018) <https://www.gov.ls/documents/national-climate-change-policy/> (accessed 2020-09-24) 15.

¹⁰ Parliamentary Monitoring Group <https://pmg.org.za/committee-meeting/23524> 2.

¹¹ Orange Senqu River Basin Preliminary Transboundary Diagnostic Analysis (2008) http://www.orasecom.org/_system/writable/DMSStorage/651orange-senqu-river-basin-preliminary-transboundary-diagnostic-analysis.pdf (accessed 2020-07-20) 175.

¹² Department of Water and Sanitation "Development of Reconciliation Strategies for Large Bulk Water Supply Systems: Orange River – International Obligations" (2014) <http://www.dwaf.gov.za> (2020-08-22) 8–9.

2 “EXPROPRIATION”

It is apposite to commence this discussion by defining the term “expropriation”. The terms “expropriation” and “nationalisation” have often been used as synonyms: “expropriation” refers to autonomous meddling by the State with the property or similar rights of a proprietor in general.¹³ More specifically, “expropriations” denote “property-specific or enterprise-specific takings where the property rights remain with the State or are transferred by the State to other economic operators”.¹⁴ In this regard, “nationalisation” represents the relocation of an economic enterprise to the public sector as a facet of a programme of socio-economic restructuring.¹⁵ “Nationalisation” typically refers to the huge or large-scale acquisition of private equity in all economic sectors.¹⁶ Thus, “nationalisation” is a species of “expropriation”.¹⁷ Formerly colonised countries regarded nationalisations as a core facet of their decolonisation imperative in the period after the end of the Second World War.¹⁸ Consequently, it is accepted for purposes of this article that “expropriation” and “nationalisation” are the same.¹⁹ The focus of this article is on “expropriation”.

It must also be borne in mind that expropriation can either be direct or indirect. Direct expropriation refers to the “transfer of title and/or outright physical seizure of the property”.²⁰ However, some measures may not involve the “physical taking” but may also permanently eviscerate the economic value of the investment or deny the owner of its right to “manage, use or control its property in a meaningful way”.²¹ These measures are called “indirect expropriations”.²² State practice, doctrine, and arbitral award have established that “indirect expropriation” has the following accumulative elements:

- (a) An act attributable to the State;
- (b) Interference with property rights or other protected legal interests;
- (c) Of such degree that the relevant rights or interests lose all or most of their value or the owner is deprived of control over the investment;

¹³ Schrijver *Sovereignty Over Natural Resources: Balancing Rights and Duties in an Interdependent World* (doctoral thesis, University of Groningen) 1995 270.

¹⁴ United Nations Conference on Trade Development “Expropriation. UNCTAD Series on Issues in International Investment Agreements II” (2012) https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (accessed 2020-08-12) 5–6.

¹⁵ Schrijver *Sovereignty Over Natural Resources* 270; *Iran-US Claims Tribunal, Amoco Int'l Finance Corp v Iran*, 15 IRAN-US CTR 189 ff par 114.

¹⁶ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 5.

¹⁷ Harris *Cases and Materials on International Law* 6ed (2004) 577.

¹⁸ *Ibid.*

¹⁹ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 1.

²⁰ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 6.

²¹ *Ibid.*

²² *Ibid.*

(d) Even though the owner retains the legal title or remains in physical possession.²³

A tribunal that must adjudicate on an expropriation claim must verify that the respondent State committed the acts in question.²⁴ This is usually not difficult because takings are usually conducted through, among other things, statutes, and executive decrees.²⁵ The conduct of a State is regarded as an act of that State according to international law "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its characterisation as an organ of the central Government or a territorial unit of the State".²⁶ Finally, there are also regulatory measures, which do not usually demand compensation, but they may have the same consequences as indirect expropriation.²⁷

It must also be noted that nationalisation or expropriation in international law can occur through a court decision, a statute, or an executive act.²⁸ If a court decision in giving effect to legislation denies a foreigner their right to property, then the court order will be regarded as an act of expropriation.²⁹ This is seen by way of taking of property, the obliteration of a right, or any act which annihilates a right even if no corporeal property has been taken.³⁰ Thus, expropriation can occur through various modes.

States also have a sovereign right under international law to nationalise property owned by foreigners for socio-economic, political, social, and other reasons.³¹ Diplomatic precedents confirm this right.³² It is accepted internationally that there is no problem with a State that nationalises property if it is provided for by its own domestic law.³³ This matter would then be resolved through municipal law.³⁴ The only limit to the right to nationalise emanates from international obligations.³⁵ It is also argued that a State may nationalise to pursue national security policy.³⁶ Ultimately, a State does not have the latitude to unilaterally determine its rationale and framework for

²³ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 12.

²⁴ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 14.

²⁵ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 15.

²⁶ *Ibid.*

²⁷ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 6.

²⁸ *Van Zyl v Government of the Republic of South Africa* (20320/02) [2005] ZAGPHC 70 (20 July 2005) par 38.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 1.

³² *Texaco Overseas Petroleum Co v Libya* 17 ILM 556 par 60.

³³ *Texaco Overseas Petroleum Co v Libya supra* par 61.

³⁴ *Ibid.*

³⁵ *Texaco Overseas Petroleum Co v Libya supra* par 62.

³⁶ Schrijver *Sovereignty Over Natural Resources* 275.

nationalisation, but it is liable to international law.³⁷ However, in practice, States have extensive discretion.³⁸

There have been three distinct periods of the metamorphosis of the right to expropriate. The first significant period of expropriations occurred through revolutionary groups in Russia and Mexico;³⁹ the second phase of expropriations occurred after the period of decolonisation that occurred after the Second World War.⁴⁰ The discussion then shifted to the States' right to economic self-determination, which included the right to expropriate without "full" compensation, but instead to pay "appropriate" compensation.⁴¹

The *Chorzow Factory* case is, in certain instances, cited as one of the first decisions that recognised a State's right to take foreign property under narrow grounds.⁴² This court held that "expropriation" is a valid but unusual mechanism if the law provides for it.⁴³ The court further held that expropriation would ordinarily be a contravention of international law and contrary to how foreign property is treated.⁴⁴ Thus, this judgment established the right to "expropriate" foreign property. Similarly, in the *Anglo Iranian Oil Company* case, one of the issues before the ICJ was to decide whether the promulgation of these laws violated international law.⁴⁵ Unfortunately, the court held that it had no jurisdiction to hear this matter and thus, the "nationalisation" could not be revoked.⁴⁶ This meant that the nationalisation was accepted by default.

United Nations General Assembly Resolution 1803 triggered the creation and strengthened the unassailable sovereignty of States over their natural resources.⁴⁷ Resolution 1803 provides that nationalisation or expropriation must be based on the grounds of public or national or security interests.⁴⁸ These are regarded as superseding individual interests, both domestic and foreign.⁴⁹ The free and beneficial implementation of the right to sovereignty of countries over natural resources must be facilitated by the "mutual respect of States based on their sovereign equality".⁵⁰ Thus, Resolution 1803

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 1.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Factory at Chorzow (Germ v Pol)* 1928 PCIJ (ser A) No 17 (Sept 13) 15.

⁴² United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 111; Schrijver *Sovereignty Over Natural Resources* 271–272.

⁴³ *Factory at Chorzow (Germ v Pol)* *supra* 27.

⁴⁴ *Ibid.*

⁴⁵ *Anglo-Iranian Oil Co UK v Iran* Judgment 1952 ICJ 93 (July 22) 95.

⁴⁶ *Anglo-Iranian Oil Co UK v Iran* *supra* 115.

⁴⁷ United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962: Permanent Sovereignty Over Natural Resources and United Nations General Assembly Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 [\(http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514\(XV\)\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514(XV)) (Resolution 1803) (accessed 2020-08-12).

⁴⁸ Resolution 1803 par 4.

⁴⁹ *Ibid.*

⁵⁰ Resolution 1803 par 5.

authoritatively provides for the right to expropriate based on the right to permanent sovereignty over natural resources.

In the *Texaco* case, it was held that Resolution 1803 encapsulates the customary law of "nationalisation".⁵¹ It was then held that the right of a State to "nationalise" is universally accepted.⁵² It is a consequence of international customary law.⁵³ This exercise of the right to national sovereignty is regarded as an incidence of the State's territorial sovereignty.⁵⁴ Territorial sovereignty affords the State an exclusive power to reorganise its economic policies.⁵⁵ It is an essential right of sovereignty for national governments to freely construct an economic and social system.⁵⁶ The significance of such a right is, in fact, confirmed by the fact that, in practice, a decision to nationalise is usually made at the highest echelons of government.⁵⁷ Thus, the *Texaco* decision explicitly established Resolution 1803 as evincing customary international law.

Resolution 1803 was then affirmed in various judicial pronouncements.⁵⁸ First, Resolution 1803 was emphatically endorsed as encapsulating customary international law in the *Sedco* Case.⁵⁹ Similarly, in *Aminoil*, the arbitrator held that the legal regime for lawful nationalisation is contained in Resolution 1803.⁶⁰ It was then held that Resolution 1803 had received unanimous acceptance by the General Assembly.⁶¹ Similarly, the *Amoco Arbitration* held that Resolution 1803 constitutes customary international law.⁶² Thus, Resolution 1803 enjoys support from developing and developed States, and it recognises the right to expropriate foreign property.⁶³ Overall, there is no doubt that Resolution 1803 and the right to expropriate foreign property enjoy universal judicial support.

Expropriation has also been accepted by various international agreements. To this end, the UDHR provides that people have the right to own property and not to be "arbitrarily deprived" of their property.⁶⁴ Similarly, the African Charter protects the right to property and that this right may only be derogated from in the public interest and under the law.⁶⁵ The provisions

⁵¹ *Texaco Overseas Petroleum Co v Libya supra* par 59.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Harris Cases and Materials* 578.

⁵⁹ *Sedco (second Interlocutory Award)* (1986)10 Iran-US CTR 634.

⁶⁰ *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)* YCA 1984 71 ff par 143.

⁶¹ *Ibid.*

⁶² *Ibid*; *US Claims Tribunal, Amoco Int'l Finance Corp v Iran supra* par 116.

⁶³ *Harris Cases and Materials* 579.

⁶⁴ Article 17 of the Universal Declaration of Human Rights. Adopted: 10/12/1948.

⁶⁵ Article 14 of the African Charter on Human Peoples Rights. Adopted: 1/6/1981. EIF: 21/10/1986. Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted: 20/03/1952. EIF: 18/5/1954; Article 21 of the American Convention on Human Rights. Adopted: 22/11/1969. EIF: 18/7/1978; Article 17 of the Charter of Fundamental Rights of the European Union. Adopted: 2/10/2000. EIF:

of the UDHR and the African Charter bind both South Africa and Lesotho because they have ratified these pertinent instruments.⁶⁶ Therefore, there is no doubt that international law prohibits the deprivation of property except according to the rules of property law.⁶⁷ These pertinent instruments envisage the deprivation of property in the public interest.⁶⁸

To this end, the Charter of Economic Rights and Duties of States (CERDS) provides that in the application of the right to permanent sovereignty over natural resources, States have the right to expropriate subject to the payment of “appropriate compensation” taking into account its relevant law.⁶⁹ In this regard, the United Nations General Assembly Resolution 3201 provides that the States have the right to expropriate or nationalise as an “expression” of the right to full permanent sovereignty over natural resources.⁷⁰

In the water context, the United Nations Convention on the Law of Non-navigational Uses of International Watercourses (UN Watercourses Convention) provides for the payment of compensation in instances whereby the rights of a State have been infringed through “significant harm” in respect of Articles 5 and 6, which provide for equitable and reasonable utilisation.⁷¹ The same provision is made in the Revised Protocol on Shared Watercourses in the Southern African Development Community (Revised Protocol) for compensation to be paid in respect of “significant harm” as a last resort when negotiation and mitigation have failed to alleviate the harm.⁷² The Revised Protocol in Article 1 defines “significant harm” as palpable harm that can be established through probative material, which is material. The UN Watercourses Convention does not proffer a definition of the term “significant harm”. For purposes of this discussion, it is the author’s view that both the UN Watercourses Convention and the Revised Protocol regard compensation as a mechanism of last resort and is not the first option when there has been significant harm as that would have happened in the context of expropriation. By analogy, it can then be argued that international freshwater law recognises the right to compensation in respect of expropriation.

7/12/2000; Article 14.1 of the Association of Southeast Asian Nations Comprehensive Investment Agreement. Adopted: 26/2/2009. EIF: 24/2/2012.

⁶⁶ *Van Zyl v Government of the Republic of South Africa supra* par 37.

⁶⁷ *Van Zyl v Government of the Republic of South Africa supra* par 38.

⁶⁸ *Ibid.*

⁶⁹ Article 2.2(c) of the Charter of Economic Rights and Duties of States: United Nations General Assembly Resolution 3281 (XXIX), 12 December 1974 (CERDS); Article IV.1 of the World Bank Guidelines on the Treatment of Foreign Direct Investment, 1993.

⁷⁰ United Nations General Assembly 3201 (S-VI): Declaration on the Establishment of a New International Economic Order UNGA Res 3201 (S-VI) (1974) http://legal.un.org/avl/pdf/ha/ga/ga_3201/ga_3201_ph_e.pdf (accessed 2020-08-12) par 4(e).

⁷¹ Kiss and Shelton *International Environmental Law* 3ed (2004) 252; See Article 7 of the United Nations Convention on the Law of Non-navigational Uses of International Watercourses. Adopted: 21/5/1997. EIF: 17/8/2014.

⁷² Article 3.10(b) of the Revised Protocol on Shared Watercourses in the Southern African Development Community, 2000. The Revised Protocol in Article 1 defines “significant harm” as non-trivial harm capable of being established by objective evidence without necessarily rising to the level of being substantial.

Overall, for expropriation to be lawful under international law, the exercise of this sovereign right must comply with the following conditions:

- (a) Property has to be taken for a public purpose;
- (b) On a non-discriminatory basis;
- (c) In accordance with due process of law;
- (d) Accompanied by compensation.⁷³

Consequently, there is no doubt that the right to expropriate foreign property enjoys universal support. However, this right to expropriation would need to be conducted through the medium of the domestic law of Lesotho. This then requires an inquiry on the law of Lesotho in this regard. Since it would be the property of South Africa that could be "expropriated", this also necessitates a comparative discussion on the law of expropriation in South Africa.

3 EXPROPRIATION IN THE LHWP

In this regard, the Constitution of Lesotho guarantees the right to "freedom from arbitrary seizure of property" provided this right does not deny the rights of others.⁷⁴ More specifically, section 17 of the Constitution of Lesotho provides that there are three conditions for a valid expropriation under Lesotho law: first, the expropriation must be for "public benefit"; secondly, the "hardship" caused must be reasonably justifiable and lastly, it is subject to the payment of full compensation. However, it has been held that freedom from arbitrary seizure of property is not an absolute right.⁷⁵ In short, expropriation is allowed in Lesotho law.

The right to "expropriate" under the Constitution of Lesotho is entrenched by the right that every person who has an "interest" or "right" over property that has been expropriated, has the right of direct access to the High Court for—

- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and
- (b) the purpose of obtaining prompt payment of that compensation.⁷⁶

This provides for the right of judicial review on the "legality" of an expropriation, which augments the requirement that the expropriation must be through "applicable" law.

In this regard, the LWA provides for the expropriation of water rights.⁷⁷ In such an instance, the LWA requires that the government negotiate with the affected parties on the terms of such acquisition and compensation.⁷⁸ Similarly, section 5 of the LWA permits the diversion of water from any water

⁷³ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 1.

⁷⁴ S 4(1)(m) of the Constitution of Lesotho 1993.

⁷⁵ *Tsenoli v Lesotho Revenue Authority* (CC5/2009) [2011] LSHC 51 (20 April 2011) 14–18.

⁷⁶ S 17(1) and s 17(2) of the Constitution of Lesotho.

⁷⁷ S 30(2) of the LWA.

⁷⁸ *Ibid.*

source to satisfy “domestic use” needs if there is a conflict of use. This should also be regarded as an expropriation as it could permanently extinguish the interest or rights of South Africa over that water in the LHWP.

The LWA further provides that if expropriation of land under the Land Act results in a “loss of the right to use water”, then the holder of such right to use water can negotiate the terms of that “acquisition” and the compensation.⁷⁹ This means that the LWA recognises that expropriation of land can also result in the expropriation of water rights. The phrase “loss of right” read in tandem with the term “acquisition” mirrors the definition of “expropriation” which is the loss of property or rights to property that takes away the substance of the property or the right in the manner contemplated by section 17 of the Constitution of Lesotho. This means that South Africa’s water rights in the LHWP can be “compulsorily acquired” or “expropriated” according to the LWA. For purposes of this article, this means that sections 5 and 6 of the LWA permit the expropriation of the water in the LHWP in times of a conflict of use or “emergency”. This would be in the interests of public health and, ultimately, public benefit as required by section 17 of the Constitution of Lesotho. There is no doubt that a conflict of uses in the LHWP would justify the “hardship” of South Africa losing its right or interests in the LHWP. This means that Lesotho would be justified to expropriate the LHWP in a conflict of uses subject to the payment of compensation.

Alternatively, expropriation of the water in LHWP could occur through the expropriation of land. According to the Land Act of Lesotho, land can be expropriated if it is not held under a lease for “public purposes”.⁸⁰ The Land Act further provides that one of the reasons for expropriation based on a public purpose is for “water reservoirs”.⁸¹ This would permit the expropriation of the Orange River in times of a conflict of uses. The Minister is also entitled, after consulting with the relevant allocating body, to expropriate land if it is in the “public interest” that land is required for purposes of development.⁸² This land could invariably have water. Land can be expropriated in the “public interest” for the development of agriculture by modern farming methods, construction or development of a new residential, commercial or industrial precinct, or development or reconstruction of existing built-up area.⁸³ In this way, the *Moletsane* case provides that the Land Act demands that the expropriation must specify a purpose; otherwise, it will be deemed arbitrary.⁸⁴ Therefore, the Lesotho Land Act goes further than the Constitution of Lesotho in that it provides for expropriation both for “public purposes” and in the “public interest”. Significantly, the Lesotho Land Act could be used to subtly expropriate water from the LHWP.

It bears mention that “expropriation” under the Lesotho Land Act is premised on the following principles:

⁷⁹ S 30(3) of LWA.

⁸⁰ S 49(1) of the Lesotho Land Act 8 of 2010 <https://lesotholii.org/ls/legislation/num-act/2010/8> (accessed 2020-01-20).

⁸¹ S 50(1)(c) of the Lesotho Land Act.

⁸² S 51(1) of the Lesotho Land Act.

⁸³ S 51(2) of the Lesotho Land Act.

⁸⁴ *Moletsane v Attorney General* (CIV/APN/163/2001) (CIV/APN/163/2001) [2004] LSHC 123 (18 October 2004) 64.

- (a) the Government shall first negotiate with the holder of land rights, which are the subject of potential expropriation and resort to expropriation only upon failure of the negotiations due to the unreasonableness of the holder of the rights to the land;
- (b) prior adjudication of the land proposed for expropriation and other lands, whether adjoining or not as may be affected by the expropriation;
- (c) payment or settlement of compensation as provided for in Part X of the Land Act and under the regulations;
- (d) a party whose land rights are the subject of expropriation by the Government shall have the right to seek review from the Land Court against any decision of the Government in this regard.⁸⁵

It follows then that there is a right to expropriate foreign property under Lesotho law. In fact, expropriations have been occurring under the LWA and the Lesotho Land Act in the LHWP. Thus, there is a huge possibility Lesotho could expropriate the entire LHWP joint venture. It is imperative then, to have a peek at South African law to predict the points of dispute between South Africa and Lesotho if the latter decides to expropriate the LHWP. This approach is also sound in that the LHWP is regulated by the LHWP together with the domestic legislation of both countries.

In this respect, when considering any expropriation under South African law, section 25(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) is the point of departure.⁸⁶ Section 25 of the Constitution reads:

- “(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.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a public purpose or in the public interest; and
 - (b) 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.”

The construal of this section must uphold the values that inform an “open and democratic society based on human dignity, equality, and freedom”.⁸⁷ International law should be considered and foreign law may be consulted.⁸⁸ The object of section 25 should be to protect current private property rights and to promote the public interest.⁸⁹ These are potentially conflicting imperatives and will be difficult to achieve, particularly concerning natural resources such as water and land.

The word “expropriate” in South African law generally refers to the process whereby a State organ takes property for a public purpose and this

⁸⁵ S 52 of the Lesotho Land Act.

⁸⁶ *Haffejee NO v eThekweni Municipality* 2011 (12) BCLR 1225 (CC) (25 August 2011) par 29; *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (FNB) par 60.

⁸⁷ *Haffejee NO v eThekweni Municipality supra* par 29.

⁸⁸ *Ibid*; s 39 of the Constitution.

⁸⁹ *Haffejee NO v eThekweni Municipality supra* par 31.

is normally accompanied by the payment of compensation.⁹⁰ To prove “expropriation”, a litigant must prove that the State has acquired the essence of what it was deprived of.⁹¹ Expropriation occurs through State compulsion and without the authority of the affected owner.⁹² A legislative intention to permit expropriation without compensation will not be construed without explicit words or plain suggestion or in accordance with section 25(2) of the Constitution.⁹³ The nub of expropriation is regulated by subsections 25(2) and 25(3) of the Constitution.⁹⁴ Furthermore, the rights acquired by the State do not have to be identical to the rights lost.⁹⁵ However, there must be an adequate connection or material similarity between what has been lost and what will be taken.⁹⁶ A mutual exchange is not a *sine qua non* of this process.⁹⁷

In essence, “expropriation” requires “deprivation” which causes the property to be taken by the State.⁹⁸ In the same breath, in *Msiza v Director-General for the Department of Rural Development and Land Reform* it was held that for section 25 of the Constitution to apply, it must first be found that such “deprivation” amounts to an act of “expropriation”.⁹⁹ “Deprivation” refers to the “sacrifices that holders of private property rights may have to make without compensation”, whereas “expropriation” refers to the State taking property in the public interest subject to the payment of compensation.¹⁰⁰ Thus, “deprivation” in terms of section 25 includes expunging a right enjoyed in the past, and “expropriation” is an element of this.¹⁰¹ This “deprivation” always occurs when property or rights in this regard are acquired or materially impaired, but this is not the case with “expropriation”.¹⁰² If the

⁹⁰ *Harksen v Lane NO* 1998 (1) SA 300 (7 October 1997) par 31; see Van der Walt “Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court’s *Harksen* and *FNB* Decisions on the Property Clause” 2004 121 *SALJ* 854 862.

⁹¹ *Minister of Minerals and Energy v Agri South Africa* 2012 (9) BCLR 958 (SCA) (31 May 2012) par 58.

⁹² *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37 par 58; see Slade “The Effect of Avoiding the *FNB* Methodology in Section 25 Disputes” 2019 40 *Obiter* 36 44, where it is argued that the *FNB* case approach can be avoided in certain instances; Van der Walt 2004 *SALJ* 875.

⁹³ *Arun Property Development (Pty) Ltd v City of Cape Town supra* par 59; see Marais “Common-Law Presumption, Statutory Interpretation and Section 25(2) of the Constitution – A Tale of Three Fallacies. A Critical Analysis of the Constitutional Court’s *Arun* Judgment” 2016 3 *SALJ* 629 642–645.

⁹⁴ Dugard and Seme “Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25’s Balancing Act Re Restitution and Expropriation” 2018 34 *SAJHR* 33 34.

⁹⁵ *Minister of Minerals and Energy v Agri South Africa supra* par 58.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Minister of Minerals and Energy v Agri South Africa supra* par 59. For further discussion in this regard, see Van der Walt 2004 *SALJ* 867; Van der Walt and Botha “Coming to Grips With the New Constitutional Order: Critical Comments on *Harksen v Lane NO*” 1998 13 *SAPL* 17–41; Mostert “The Distinction Between Deprivations and Expropriations and the Future of the ‘Doctrine’ of Constructive Expropriation in South Africa” 2003 19 *SAJHR* 567–592.

⁹⁹ 2016 (5) SA 513 (LCC) (5 July 2016) par 6.

¹⁰⁰ *Minister of Minerals and Energy v Agri South Africa supra* par 48.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*; Marais “When does State Interference with Property (Now) Amount to Expropriation? An Analysis of the Agri SA Court’s State Acquisition Requirement (Part II)” 2015 7 *PER/PELJ* 3033 3033; Marais “When does State Interference with Property (Now) Amount

“deprivation” constitutes an “expropriation”, then it must comply with the inquiry under section 25(2)(a) and provide for compensation under section 25(2)(b).¹⁰³ Section 25(2)(a) of the Constitution provides that expropriation must either be done in the “public interest” or for a “public purpose” whereas section 25(2)(b) provides that the expropriation requires the payment of compensation. This means that a clear distinction between “expropriation” and “deprivation” is crucial because the former requires compensation, whereas the latter does not.

Furthermore, the *FNB* case confirms that alleged violations of section 25 of the Constitution must first be in accordance with section 25(1) prior to triggering sections 25(2) and (3).¹⁰⁴ Infringement contemplated in section 25(1) of the Constitution is restricted to establishing whether the deprivation of property is “arbitrary”, within the meaning of that concept as employed in section 25(1).¹⁰⁵ A deprivation is “arbitrary” within the confines of section 25 when section 25(1) does not avail “sufficient reason” for that specific deprivation or is procedurally unfair.¹⁰⁶ “Sufficient reason” is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question;
- (b) A complexity of relationships has to be considered;
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected;
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property;
- (e) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially;
- (f) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution;
- (g) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always

to Expropriation? An Analysis of the Agri SA Court's State Acquisition Requirement (Part I)” 2015 3 *PER/PELJ* 2983 2983; Swemmer “Muddying The Waters – The Lack of Clarity Around the Use of s 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*” 2017 33 *SAJHR* 286 294.

¹⁰³ *FNB supra* par 59; see Dugard and Seme 2018 *SAJHR* 43, who criticise the Constitutional court’s approach on amongst other reasons, the basis that it may justify arbitrary derivation of property and they question the relevance of s 36 of the Constitution in light of the internal limitation in s 25(1).

¹⁰⁴ Boggenpoel “Compliance with Section 25(2)(b) of the Constitution: When Should Compensation for Expropriation Be Determined?” 2012 129 *SALJ* 605 611.

¹⁰⁵ *FNB supra* par 61.

¹⁰⁶ *FNB supra* par 100.

bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25.¹⁰⁷

It can be seen that these listed factors presumably elaborate on the "public purpose" or "public interest" requirement of section 25(2)(a) of the Constitution. This is because, in the language of the Constitution, an "expropriation" would be "arbitrary" if it was not in the "public interest" or "public purpose". However, these factors must not be seen as a "check-list" since the courts are required to "balance" the rights in question.¹⁰⁸

This discussion invariably posits the question as to the meaning of the terms "public interest" and "public purpose" within the scope of section 25 of the Constitution. The "public purpose" requirement for expropriation is endorsed as a rule of international law.¹⁰⁹ It has been held that international law provides for expropriation for public purposes.¹¹⁰ Under international law, "public purpose" connotes that the reason for the expropriation must be based on a licit welfare objective and not private or unlawful gains.¹¹¹ The "public purpose" requirement is determined according to the law when the expropriation occurred.¹¹² It is immaterial whether or not the purport of the measure is successfully achieved.¹¹³ Equally, an expropriation that was not designed for a "public purpose" will not become lawful if the property that has been taken starts serving a "public purpose" in the future.¹¹⁴ To this end, the Constitution does not define the term "public purpose". This gap is plugged by the Expropriation Act, which provides that "public purposes" include all objectives related to the implementation of any law by a State organ.¹¹⁵ It is argued that this wide formulation is meant to give government flexibility.¹¹⁶ Regard must also be had to the fact that this illuminates the duty imposed by section 25 not to elevate private property rights over the State's

¹⁰⁷ *Ibid*; *Staufen Investments (Pty) Ltd v Minister of Public Works* (756/2017) [2018] ZACPEHC 51 (25 September 2018) par 37; see Marais 2015 *PER/PELJ* 2983–3031; see Hoops "The Alternative-Project Argument in the Context of Expropriation Law (Part 2)" 2017 1 *TSAR* 70 83.

¹⁰⁸ Kruger "Arbitrary Deprivation of Property: An Argument for the Payment of Compensation by the State in Certain Cases of Unlawful Occupation" 2014 131 *SALJ* 328 339.

¹⁰⁹ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 28.

¹¹⁰ *Van Zyl v Government of the Republic of South Africa supra* par 39.

¹¹¹ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 28–29.

¹¹² United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 31.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*; see Viljoen "Substantive Adjudication of the Decision to Expropriate Property" 2017 2 *STELL LR* 444 454.

¹¹⁵ S 1 of the Expropriation Act 63 of 1975; Hoops "Specificity of Expropriation Statutes as a Safeguard Against Third-Party Transfers For Economic Development: Lessons From German Law For New Expropriation Legislation in South Africa?" 2016 4 *SALJ* 788 789–792.

¹¹⁶ Slade "Public Purpose or Public Interest and Third-Party Transfers" 2014 17 *PER/PELJ* 167 180.

social responsibilities.¹¹⁷ It has been cautioned that this public purpose must survive the act of expropriation to be valid.¹¹⁸

It must be borne in mind that the history of South Africa does not permit the elevation of individual property rights at the expense of the paramount duty to ensure equitable access to natural resources.¹¹⁹ There is no doubt that expropriation by the State that is carried out in the private interest is unlawful.¹²⁰ However, section 25(4) of the Constitution confirms that expropriation for the benefits of a private individual is allowed in respect of land reform.¹²¹ This is because the purpose of the expropriation supersedes the interests of an individual as it is for public benefit.¹²² This approach is in line with the public interest to ensure redistribution of resources, which is the essence of section 25 of the Constitution.¹²³ Thus it has been opined that "expropriation" is a necessary instrument in a modern democratic society in that it ensures organised development.¹²⁴

In respect of "public interest", the Constitution provides that the "public interest" includes the pursuit of land reform and equitable access to all South Africa's natural resources.¹²⁵ Aside from land reform, this implies that to prove that expropriation is in the "public interest", one must prove that the measure ensures fair access to natural resources. In this regard, the National Environmental Management Act (NEMA) provides that the Minister of Environmental Affairs may, expropriate any property, subject to compensation, for any purpose under this Act, if that purpose is a "public purpose" or is in the "public interest".¹²⁶ The compensation contemplated in the NEMA must be done according to section 25(3) of the Constitution.¹²⁷ More directly, section 81(1) of the Water Services Act 108 of 1997 (WSA), and section 64(1) of the National Water Act 36 of 1998 (NWA), provide for expropriation of "property", i.e. including water and water rights, with the latter statute demanding that it must be in the "public interest" or "public purpose".¹²⁸ Both the NWA and WSA require that these expropriations be in line with the Expropriation Act. This would permit expropriation in a conflict of uses to ensure that there is enough water for "domestic uses", i.e.,

¹¹⁷ *Minister of Minerals and Energy v Agri South Africa supra* par 62.

¹¹⁸ Van der Walt and Slade "Public Purpose and Changing Circumstances: *Harvey v Umhlatuze Municipality & Others*" 2012 129 SALJ 219 233.

¹¹⁹ *Minister of Minerals and Energy v Agri South Africa supra* par 62.

¹²⁰ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15.

¹²¹ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 14.

¹²² *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15; Boggenpoel 2012 SALJ 613.

¹²³ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 15.

¹²⁴ Gray "Human Property Rights: The Politics of Expropriation" 2005 16 *STELL LR* 398 399; *Waters v Welsh Development Agency* 2004 1 *WLR* 1304 par 1.

¹²⁵ S 25(4)(a) of the Constitution; see Du Plessis "The (Shelved) Expropriation Bill b16–2008: An Unconstitutional Souvenir or an Alarmist Memento?" 2011 22 *STELL LR* 352 359.

¹²⁶ S 36(1) of the Act 107 of 1998.

¹²⁷ S 36(3) of the NEMA.

¹²⁸ See further, Couzens "Expropriation as a Weapon For Environmental Protection in South Africa" 2010 127 SALJ 18 22–24.

including water that is diverted or taken from a watercourse for personal and household needs, as is contemplated by sections 1, 5, and 6 of the LWA. Overall, it can be argued that the “public purpose” denotes government purposes while “public interest” refers to purposes that are to the advantage of the public.¹²⁹ It is conceivable to argue then, that the purposes of government and the public should coincide, and thus, these terms are the same.

Furthermore, if expropriation is “arbitrary”, the consequent limitation or deprivation must be evaluated in terms of section 36 of the Constitution.¹³⁰ The availability of less restrictive means to achieve the same purpose is relevant to this inquiry.¹³¹ This means that more is required to prove “expropriation” even though there is a correlation and no clear line of separation between sections 25(1) and 25(2).¹³² Consequently, section 25 of the Constitution prohibits the “arbitrary deprivation” of property and it allows for the expropriation of property under the following conditions: First, the expropriation must be according to a “law of general application” and secondly, it must be implemented for a “public purpose” or in the “public interest”.¹³³ Thirdly, the time and manner of the compensation that must be paid must either be agreed to by those affected or must be decided on by a court and must also be “just and equitable”.¹³⁴ The question of whether expropriation has indeed occurred must be done on a case-by-case basis.¹³⁵ This is so because the acquisition is likely to occur in different ways.¹³⁶

The provisions of the Protection of Investment Act 22 of 2015 (PIA) must be considered concerning nationalisation/expropriation. This is because the PIA provides that investors have the right to property as provided by section 25 of the Constitution.¹³⁷ This means that their property may not be expropriated without the safeguards and conditions provided for by section 25 of the Constitution. Significantly, the PIA provides that foreign investors and their investments must be treated the same as South African investors in “like circumstances”.¹³⁸ This means that any privilege, advantage, or benefit accorded to South African investors must be given to all foreign investors in “like circumstances”. For purposes of the PIA, “like circumstances” include the following factors amongst others:

- (a) effect of the foreign investment on the Republic, and the cumulative effects of all investments;
- (b) sector that the foreign investments are in;
- (c) aim of any measure relating to foreign investments;

¹²⁹ Slade “Public Purpose or Public Interest and Third-Party Transfers” 2014 17 *PER/PELJ* 167 187.

¹³⁰ *Staufen Investments (Pty) Ltd v Minister of Public Works supra* par 37.

¹³¹ *Staufen Investments (Pty) Ltd v Minister of Public Works supra* par 39.

¹³² *Minister of Minerals and Energy v Agri South Africa supra* par 48 and 67; *Ethekwini Municipality v Haffejee NO; Haffejee NO v eThekweni Municipality* [2010] 2 All SA 358 (KZD) par 22.

¹³³ *Ethekwini Municipality v Haffejee NO; Haffejee NO v eThekweni Municipality supra* par 22.

¹³⁴ *Ibid.*

¹³⁵ *Minister of Minerals and Energy v Agri South Africa supra* par 64.

¹³⁶ *Ibid.*

¹³⁷ S 10 of the PIA.

¹³⁸ S 8 of the PIA.

(d) direct and indirect effect on the environment.¹³⁹

This list is obviously not exhaustive as seen by the use of the word “including”. Each factor is given equal weight in this assessment.¹⁴⁰ This provision is particularly significant for the LHWP. First, the PIA provides that an “investment” for purposes of this Act, includes “any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic, committing resources of economic value over a reasonable period of time, in anticipation of profit”.¹⁴¹ This would include the LHWP venture. In respect of the notion of amending the Constitution to provide for expropriation without compensation or even that the Constitution could indeed provide for this, it is the author’s submission that the national treatment provision could be employed to argue for discriminatory treatment of foreign nationals. The factors listed as implicitly disqualifying one from equal treatment under the “like circumstances” criteria are extensive and ambiguous such that they could be manipulated to justify a reason why the government decided not to grant due compensation for expropriation. It is argued that this provision has the effect of negating the national treatment clause in section 8 of the PIA, which accords equal treatment for foreign investors and domestic investors.¹⁴² This is compounded by the inadequate “physical protection” that is afforded by section 9 of the PIA that makes such protection subject to the “availability of resources” and “capacity”.¹⁴³ It is noteworthy that the PIA also analyses the effect of the “investment” on the environment. This is ambiguous. However, it is presumed that if an “investment” irreparably harms the environment, then it will not be treated like other investments.

It is poignant that there is a widely held view that the PIA was prompted by the *Foresti* case, which despite not making any findings on the merits of the case, exposed South Africa to the jurisdiction of an international tribunal on its natural resources.¹⁴⁴ Thus, many commentators have opined that the PIA was promulgated to negate the unpalatable prospect of subjugating South Africa’s control of its natural resources to an international tribunal.¹⁴⁵

¹³⁹ S 8(2) of the PIA.

¹⁴⁰ S 8(3) of the PIA.

¹⁴¹ S 2(1)(a) of the PIA.

¹⁴² Qumba “Safeguarding Foreign Direct Investment in South Africa: Does the Protection of Investments Act Live Up to its Name?” 2018 25 *South African Journal of International Affairs* 341 347.

¹⁴³ Qumba 2018 *South African Journal of International Affairs* 349.

¹⁴⁴ *Piero Foresti, Laura de Carli v Republic of South Africa* ICSID Case No ARB(AF)/07/1.

¹⁴⁵ Qumba “South Africa’s Move Away From International Investor-State Dispute: A Breakthrough or Bad Omen For Investment in the Developing World?” 2019 52 *De Jure* 358 360; Ngobeni “The African Justice Scoreboard: A Proposal to Address Rule of Law Challenges in the Resolution of Investor-state Disputes in the Southern African Development” 2019 LII *CILSA* 1–21; Kondo “A Comparison with Analysis of the SADC FIP Before and After its Amendment” 2017 20 *PER/PELJ* 1 17; Mhlongo “A Critical Analysis of the Protection of Investment Act 22 of 2015” 2019 34 *SAPL* 1 3; Picker “Legal Protection of Property under the Protection of Investment Act 22 of 2015” 2018 17 *Acta Juridica* 17–42; Schlemmer “Dispute Settlement in Investment-Related Matters: South Africa and the BRICS” 2018 112 *American Journal of International Law Unbound* 212 213; Government of the Republic of South Africa “Bilateral Investment Treaty Policy Framework Review:

The last requirement for an expropriation to be valid is that it must be coupled with “compensation”.¹⁴⁶ Different approaches to valuation may be used to establish the amount of compensation.¹⁴⁷ There is no proof in treaty law that States can refuse to pay compensation or freely establish the amount of compensation.¹⁴⁸ It actually requires the payment of compensation and prescribes the amount of compensation.¹⁴⁹ International law provides that where the property of a foreigner has been expropriated, then “prompt, adequate and effective” compensation should be made in the case of expropriation of a specific property.¹⁵⁰ This means that nationalisation/expropriation requires compensation for the affected persons. To this end, section 17(c) of the Constitution of Lesotho provides that expropriation requires prompt payment of “full” compensation. In this regard, the LWA provides that where the compulsory acquisition of land is required, compensation must be made according to the Land Act.¹⁵¹ On this score, the Lesotho Land Act provides that in instances where land is expropriated, the affected person must be paid compensation at “market value”.¹⁵² This further highlights the notion that the expropriation of land will sometimes also entail the expropriation of water and water rights.

In the same breath, the Lesotho Land Act provides that in evaluating compensation, regard must be had—

- (a) to the value of the property as certified by an odd number of valuers one of whom shall be the Government valuer, having regard to the present and replacement value; and
- (b) to the expenses incidental to any necessary change of residence or of place of business.¹⁵³

This means that “market value” under the Land Act takes precedence in the determination of compensation.

On the contrary, the Constitution takes a different approach to the issue of “market value” and its place in determining compensation. The Constitution provides that the “amount of the compensation and the time and manner of payment should be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected”.¹⁵⁴ “Relevant circumstances” in this regard include amongst others:

- (i) the current use of the property;
- (ii) the history of the acquisition and use of the property;
- (iii) the market value of the property;

Government Position Paper” (2009) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf> (accessed 2020-08-22).

¹⁴⁶ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 40.

¹⁴⁷ *Ibid.*

¹⁴⁸ Schrijver *Sovereignty Over Natural Resources* 278.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Van Zyl v Government of the Republic of South Africa supra* par 39.

¹⁵¹ S 30(1) of the LWA.

¹⁵² S 56 of the Lesotho Land Act.

¹⁵³ S 58(2) of the Lesotho Land Act.

¹⁵⁴ S 25(3) of the Constitution; *Haffejee NO v eThekweni Municipality supra* par 38.

(iv) and the purpose of the expropriation.¹⁵⁵

These factors identified in section 25(3) are not hierarchical.¹⁵⁶ Market value is usually considered as the point of departure to the analysis because it is the most concrete factor in all of the elements specified in section 25(3).¹⁵⁷ This does not mean that market value is the most significant factor in the evaluation of just and equitable compensation; the goal is to ascertain compensation that is "just and equitable", not to establish the market value of the property.¹⁵⁸ Thus, market value acts variable, which would achieve an equitable balance between the public and private interest.¹⁵⁹

Consequently, it has been held that there is a two-leg process to determining compensation: first, establishing the market value of the property and secondly, deducting from or increasing the amount of the market value, as the context requires.¹⁶⁰ The ethos for this two-leg approach is that there is no specific method for calculating elements that hinge on equity.¹⁶¹ This marks a departure from the Lesotho approach. In practice, South African law uses "market value" as the "starting point" of the compensation determination, but it is not on its own, dispositive of the amount of compensation to be paid.¹⁶²

In this regard, the Expropriation Act, which was promulgated during the apartheid era, provides that market value is the formula for establishing compensation payable to an individual whose property has been expropriated by the State.¹⁶³ However, the Expropriation Act does say that the amount of compensation must reflect the aggregate of the market value of the expropriated property and the actual financial loss caused by the expropriation and if it is a right, the amount lost by the expropriation of the right.¹⁶⁴ It bears mention here that the Expropriation Act is regarded as in conflict with the Constitution in that it emphasises the "willing seller to a willing buyer" principle, which disavows this principle.¹⁶⁵

Furthermore, the obligation to compensate requires that the owner of the expropriated property "may not be in a better or worse plight as a result of

¹⁵⁵ *Haffejee NO v eThekweni Municipality supra* par 38.

¹⁵⁶ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 33.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*; see in this regard, Van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" 2005 122 *SALJ* 765 772–776.

¹⁵⁹ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 35.

¹⁶⁰ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 34.

¹⁶¹ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 36.

¹⁶² Van Wyk "Compensation For Land Reform Expropriation" 2017 1 *TSAR* 21 26.

¹⁶³ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 32.

¹⁶⁴ S 12(1) of the Expropriation Act; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 33; see further, Van Wyk 2017 *TSAR* 23.

¹⁶⁵ Dugard and Seme 2018 *SAJHR* 41.

the act of expropriation”.¹⁶⁶ The affected person must be returned to the same position they were prior to the expropriation through a financial award and the equivalent in value should be given to cover the property lost.¹⁶⁷ Thus, courts are of the view that the value of a property “is its value in the owner’s hands and not in the hands of the expropriator”.¹⁶⁸ In a similar domain, the PIA provides that expropriation of foreign property must be determined according to section 25 of the Constitution.¹⁶⁹ Qumba submits that this greatly compromises the protection afforded to foreign investments.¹⁷⁰ Overall, the Constitution rejects the market-driven method of compensation in cases of expropriation.¹⁷¹ Market value is merely one of the factors under deliberation in this regard.¹⁷² Thus, compensation, which is less than the market value, may be in accordance with the Constitution if it is “just and equitable”.¹⁷³ This could open the door for the expropriation of foreign investments without compensation.¹⁷⁴ This would have significant implications for South Africa’s rights under the LHWP.

The Lesotho Land Act also provides that compensation must in all instances of compulsory acquisition, be paid before the expropriation is concluded.¹⁷⁵ The Constitution of Lesotho does not explicitly provide for compensation prior to expropriation as it requires a “prompt” payment of compensation.¹⁷⁶ This is vague, and it is unclear whether this refers to “prompt” payment before or after the expropriation. In this regard, section 25 of the Constitution allows for compensation prior to a valid expropriation, but the opposite is equally conceivable.¹⁷⁷ Thus, it has been held that section 25 of the Constitution permits the interpretation that compensation must occur before expropriation.¹⁷⁸ In the same vein, it has been held that the Expropriation Act does not require that the amount of compensation and the time and manner of payment be established before expropriation takes effect.¹⁷⁹ However, the transfer of ownership and possession of the affected

¹⁶⁶ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) par 21.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ S 10 of the PIA.

¹⁷⁰ Qumba 2018 *South African Journal of International Affairs* 352.

¹⁷¹ *Msiza v Director-General for the Department of Rural Development and Land Reform supra* par 32.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ See further, Sibanda “Amending Section 25 of the South African Constitution to Allow For Expropriation of Land Without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership” 2019 35 *SAJHR* 129–146; Van der Schyff “Constructive Appropriation – The Key to Constructive Expropriation? Guidelines From Canada” 2007 XL *CILSA* 306–320; Thabo Mbeki Foundation “What Then About Land Expropriation Without Compensation? The National Democratic Revolution Must Resolve the Intimately Inter-Connected Land and National Questions!” 2018 53 *Journal of Public Administration* 285–309; Viljoen “Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 1)” 2020 1 *TSAR* 35–48; Viljoen “Expropriation Without Compensation: Principled Decision-Making Instead of Arbitrariness in the Land Reform Context (Part 2)” 2020 2 *TSAR* 259–270.

¹⁷⁵ S 60 of the Lesotho Land Act.

¹⁷⁶ S 17(1)(c) of the Constitution of Lesotho.

¹⁷⁷ *Haffejee NO v eThekweni Municipality supra* par 35.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Haffejee NO v eThekweni Municipality supra* par 14.

property may occur prior to that determination.¹⁸⁰ The duty to pay compensation is a requirement for expropriation, but not a prerequisite for its implementation.¹⁸¹ Thus in South African law, compensation can be paid before or after the “expropriation”.

In this regard, international law provides that an act of expropriation complying with the requirements established by international law “constitutes a lawful act of the State, and the duty to pay compensation is the consequence of the legal exercise of a recognised sovereign right of a State”.¹⁸² This requirement may be complied with from the beginning or after litigation when expropriation is determined.¹⁸³ Failure to pay any compensation for a direct expropriation can be fatal to the legality of an expropriation.¹⁸⁴ However, this is not the case when a measure in question is an “indirect expropriation”.¹⁸⁵ The duty to pay compensation should only occur as a result of a finding of expropriation.¹⁸⁶ The obligation to compensate is conferred on the entity conducting the expropriation.¹⁸⁷ Thus, under Lesotho law, compensation should be paid prior to expropriation, which is in line with international law and South African law.

Furthermore, the standards of compensation differ for both countries. South African law provides for “just and equitable” compensation, whereas Lesotho and the LHWP provide for “full” compensation.¹⁸⁸ To this end, Article 7.18 of the LHWP provides that the LHDA must ensure that all the local communities in Lesotho that are “affected” by the project, be enabled to maintain a standard of living not inferior to that which existed at the time of the first disturbance and if such measures are not adequate, compensation must be provided.¹⁸⁹ In the same breath, the Phase II Agreement provides that compensation in the LHWP must be paid according to Article 7.18 and the principles in Article 15 of the LHWP Treaty.

Article 7.18 of the LHWP bears due consideration. The term “affected” in Article 7.18 of the LHWP refers to those people that are impacted by “expropriation”. Secondly, this provision requires the maintenance of a standard of living of a person at least similar to the time before the project commenced. Thirdly, this provision implies that “compensation” is secondary to other “measures” that could be used to address the diminution in the standard of living. Thus, the other “measures” are the primary instrument of restitution for the affected parties, and “compensation” need not be paid unless the “measures” are deemed “inadequate”. This is in line with the *Chorzow Factory* case, which provides that in the case of expropriation, the first mechanism is the restitution of property, but if this is not possible,

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 44.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ S 57 of the Lesotho Land Act.

¹⁸⁸ See s 25(3) of the Constitution and s 17(1)(c) of the Constitution of Lesotho.

¹⁸⁹ Article 7.18 of the LHWP.

payment of the value of the expropriated property plus compensation of any incidental losses is the probable remedy.¹⁹⁰ In this regard Article 15 of the LHWP requires the maintenance of the welfare of the persons immediately affected by the project. In the same breath, section 44(2)(a) of the LHDA Order states that “as far as reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons”. This means that the LHDA Order goes further than the Phase II Agreement and the LHWP as well as the Constitution in that they provide that “income of persons” is also another factor that deserves compensation. Therefore, the LHWP seeks to maintain the “welfare” or “standard of living” as the object of the compensation of affected communities.

To this end, the Phase II Agreement provides for the payment of compensation in cash or in-kind for the loss of “benefits” caused by the LHWP.¹⁹¹ This could mean that Lesotho could pay South Africa in kind through, say, electricity, for the expropriation of the Orange River. Interestingly, this provision implies the payment of compensation for the loss of “benefits”, which is a wide ground for claiming compensation. In this regard, the newly minted LHWP Phase II Compensation Regulations defines “compensation” as payment in cash or kind or other legal payment tendered for the property or resource that is acquired or affected by the project.¹⁹² Thus, these regulations include a broad compensation paradigm as it provides for “other legal payment”. This approach mimics the LHWP, which provides for other “measures” in lieu of compensation.

The Phase II Agreement also provides that compensation must be made according to the Phase II Compensation Policy and in a “fair” and “prompt” manner.¹⁹³ More specifically, the Phase II Compensation Policy provides that where the expropriation is permanent, the affected parties are entitled to “full” compensation.¹⁹⁴ If there is a “temporary acquisition”, the Compensation Policy provides that the LHWP will, as far as possible, reinstate the resource to its prior condition.¹⁹⁵ This implies that under the LHWP, “acquisition” can be either “temporary” or “permanent”. This could be a reference to “deprivation” as opposed to “expropriation” because “temporary expropriation” requires restoring the resource to its previous condition. A “temporary acquisition” falls short of an “expropriation” and does not give rise to “full compensation”. This provision is significant in that Lesotho could allege that the acquisition of water under sections 5 and 6 of the LWA could be seen as “temporary” acquisitions of the water in the Orange River and could simply be restored by returning the quantity of water lost by South Africa. This would not require any compensation to South Africa.

¹⁹⁰ *Factory at Chorzow (Germ v Pol)* *supra* 47; United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 113.

¹⁹¹ Article 7.2(c) of the Phase II Agreement.

¹⁹² S 2 of the Lesotho Highlands Water Project Compensation Regulations 2017 <http://www.lhda.org.ls/lhdaweb/documents/documents> (accessed 2020-08-12).

¹⁹³ Article 15.4 of the Phase II Agreement.

¹⁹⁴ LHWP Phase II Compensation Policy par 3.2.

¹⁹⁵ LHWP Phase II Compensation Policy par 3.3.

The legal regime in international law for ascertaining the type and extent of the compensation to be paid and the circumstances of its payment are not well established.¹⁹⁶ In the latest international investment agreements, there is an emerging consensus concerning the standard of compensation that must be paid to make an expropriation lawful.¹⁹⁷ One of the fundamental trends among these agreements is that most of them accept the “standard of prompt, adequate and effective compensation”, also called the “Hull standard”.¹⁹⁸ In this regard, compensation is regarded to be “prompt” if paid without undue delay, “adequate”, if it has a “reasonable relationship with the market value of the investment concerned”; and “effective”, if made in “convertible or freely useable currency”.¹⁹⁹ The determination of what amounts to an “adequate” compensation involves consideration of the “investment’s fair market value, market value, just price, real value, and genuine value or real economic value”.²⁰⁰ However, the Hull standard does not enjoy the required State support.²⁰¹

It must be noted that full compensation reflecting the market value of the property is not the only available threshold of compensation.²⁰² The standard mostly cited in the 1960s and 1970s is that of “appropriate” compensation, located in United Nations General Assembly Resolutions, and could still encapsulate the standard of customary international law.²⁰³ The *Texaco Award*, the *Aminoil Award*, and the *Ebrahimi Award* affirm the “appropriate” compensation standard in Resolution 1803.²⁰⁴ There is no explanation as to the meaning of the term “appropriate” compensation.²⁰⁵ However, these norms have been impugned by developing States who replace the compensation standard with their domestic standards.²⁰⁶ Hence, in South Africa, where Resolution 1803 is part of the legislative framework, “appropriate” compensation has been replaced with “just and equitable” compensation, whereas Lesotho provides for “full” compensation.

Similarly, the CERDS provides that “appropriate” compensation must be paid in line with the law of the State implementing such measures in the

¹⁹⁶ *Iran-US Claims Tribunal, Amoco Int'l Finance Corp v Iran supra* par 117; see further, Cotula “International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection Under Human Rights and Investment Law in Africa” 2008 33 *SAYIL* 62 86–88.

¹⁹⁷ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 40.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ Harris *Cases and Materials* 598.

²⁰² United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 41.

²⁰³ *Ibid.*; see Resolution 1803 par 4; Article IV.1 of the World Bank Guidelines on the Treatment of Foreign Direct Investment.

²⁰⁴ *Ebrahimi v Iran* (1994), Iran-US Claims Tribunal, 12 October 1994, The Hague, par 88 and 95; *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL) supra* par 143; *Texaco Overseas Petroleum Co v Libya supra* par 87–88.

²⁰⁵ Harris *Cases and Materials* 598.

²⁰⁶ *Van Zyl v Government of the Republic of South Africa supra* par 36.

exercise of sovereignty and international law.²⁰⁷ The CERDS further provides that where the question of compensation is a contentious matter, it should be resolved according to the municipal law of the nationalising State and by its courts; unless it is freely agreed on other “peaceful” alternatives.²⁰⁸ It is then opined that Article 2 of the CERDS highlighted rising Third World discord about the international principle propagated by Resolution 1803.²⁰⁹ While it permits the “appropriate” compensation, it uses the term “should”, subject to the relevant legislation and the relevant circumstances.²¹⁰ It does not mention international law standards and procedures.²¹¹ However, it has been argued that the standards contained in Article 2.2(c) have not been universally accepted by States.²¹² Reasons for advancing the grounds of Article 2.2(c) of CERDS are based on the notion that current law consistently ignores the interests of the indigent, and that there is no way to disturb this status *quo* except by dismantling the legal framework of that order.²¹³ It is conceivable that this standard permits less than full compensation where this is equitable in the circumstances in question.²¹⁴

In this regard, the ASEAN Comprehensive Investment Agreement provides for payment of “adequate” compensation, which is defined as compensation that reflects the “fair market value” upon expropriation.²¹⁵ Alternatively, the Charter of Fundamental Rights of the European Union and the United Nations Declaration on the Rights of Indigenous Peoples provides that expropriation must be accompanied by “fair” compensation.²¹⁶ It has already been established that in respect of transboundary water law, States have a right to compensation, but the UN Watercourses Convention and the Revised Protocol are silent as to the standard of compensation. In the absence of direction, the applicable approach will be the one proffered by international law, which itself is plagued by uncertainty. Thus, international law is undecided on the standard of compensation as it vacillates between “full”, “fair” “adequate” and “appropriate” compensation standards. It must be noted here that the Phase II Agreement provides that in the event of a dispute, the adjudicator must apply the provisions of that agreement together with the rules of international law that are not in conflict with this agreement and the LHWP.²¹⁷ This approach is in line with the Constitution, which

²⁰⁷ Article 2.2(c) of the CERDS; *The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)* *supra* par 143–144; Article IV.2 of the World Bank Guidelines on the Treatment of Foreign Direct Investment.

²⁰⁸ Article of the 2.2(c) of the CERDS.

²⁰⁹ Visser “The Principle of Permanent Sovereignty Over Natural Resources and the Nationalization of Foreign Interests” 1988 XXI *CILSA* 76 83.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Visser 1988 *CILSA* 87.

²¹³ Visser 1988 *CILSA* 88.

²¹⁴ United Nations Conference on Trade Development https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf 41.

²¹⁵ Article 14.1(c) of the Association of Southeast Asian Nations Comprehensive Investment Agreement. Adopted: 26/02/2009. EIF: 24/02/2012.

²¹⁶ Article 17 of the Charter of Fundamental Rights of the European Union; Articles 10 and 28.1 of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.

²¹⁷ Article 18.9 of the Phase II Agreement.

provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.²¹⁸ In this way, the Phase II Agreement and section 232 of the Constitution could be used to exempt the LHWP treaty and its protocols from the rules of customary international law that are in conflict with these treaties. However, the Constitution provides that when reading any statute, every court must accept any “reasonable interpretation” of the statute that is in accordance with international law over any “alternative interpretation” that is in conflict with international law.²¹⁹

4 CONCLUSION

On the whole, there is no doubt that Lesotho has the right to expropriate the water in the LHWP for “public benefit” in the manner contemplated by sections 5 and 6 of the LWA and the Land Act because this is an incidence of the right to permanent sovereignty over natural resources. The right to expropriate foreign property is universally endorsed and is also provided for by the laws of South Africa and Lesotho. In light of the above, it is the author’s view that the expropriation of the water in the LHWP by Lesotho would require “full” compensation as provided by the LHWP: Phase II Compensation Policy and the Constitution of Lesotho. This approach finds favour with international law, which endorses the payment of “full” compensation for expropriation. However, it must be noted that the LHWP regime does not favour compensation as the first form of redress and rather, would countenance the restoration or restitution of the water that is lost. Consequently, South Africa may not receive financial compensation. This approach could conceivably be justified under the “just and equitable” standard of the Constitution.

²¹⁸ S 232 of the Constitution.

²¹⁹ S 233 and s 39(1)(a)–(b) of the Constitution.