

# Political Risk Assessment for South Africa with Reference to the Public Discourse on the Nationalisation of Mines

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## ABSTRACT

*The conceptual context and operational architecture of South Africa's constitutional regime remains a terrain for political contest. The public discourse on the nationalisation of the mining industry is embedded in the theoretical dichotomy of an interventionist vis-à-vis a regulatory state. The outcome of this public contest may have fundamental consequences not only for state-societal relations, but for the durability of the constitutional compromise of the early 1990s which became the dominant master narrative from which the greater good has been dispensed. This article reflects on the statutory framework of the mining industry as well as the legal and constitutional interpretations which are currently contested as part of a public discourse. This discourse is subjected to a risk assessment index of political, economic and social conditions prevailing during July/August 2011, and key indicators of risk for this period is made reference to, in substantiation for the values added in the risk index. The aim of the article is to merge the public contest on nationalisation with the political risks involved in an interventionist state.*

## INTRODUCTION

On 27 July 2011, officials of the Directorate of Priority Crime Investigation (Hawks) raided the offices of mining company Imperial Crown Trading (ICT). Two of the shareholders were under investigation. The raid formed part of an on-going investigation into the awarding of mining rights to ICT and, in particular, prospecting rights in the highly profitable Sishen



mining area. The timing of the raid was questioned as it happened only three weeks before a civil dispute between the Sishen Iron Ore Company (SIOC), ICT and the Department of Mineral Resources.

In 2010, the *Mail & Guardian* reported that prospecting rights to the Sishen mining area had been awarded to the obscure, but politically well-connected ICT. This happened despite an application by SIOC, which is controlled by Anglo-American through its subsidiary Kumba, and ArcelorMittal. SIOC suspects that the application procedure in terms of the *Mineral and Petroleum Resources Development Act*, 28 of 2002 (MPRDA) was manipulated to award the rights to ICT, which has no track record in mining, but is well-connected within the African National Congress (ANC). The dispute, which appears before the North Gauteng High Court on 15 August 2011, is set to produce another important ruling on the new mining order. ArcelorMittal South Africa (Amsa) wants the relevant court to reiterate its ruling that mining rights are non-divisible under the MPRDA. The result of such an order would be that Amsa's share in the Sishen rights are automatically transformed into new order rights.

## **MINERAL AND PETROLEUM RESOURCES DEVELOPMENT**

Under Roman-Dutch law, the owner of a piece of land also owned everything underneath the earth of the property. This included water as well as minerals. However, as early as 1955, the ANC stated in its Freedom Charter that mining rights should be transferred onto the people of South Africa.

Immediately prior to 1 May 2004, the principal legislation governing mineral rights in South Africa was the *Minerals Act*, 50 of 1991. The aforementioned Act also followed the common law position. When majority rule came to the country during the 1990s, South Africa adopted the Constitution, 1996 which not only guaranteed the right to property, but also set out to undo the legacy of Apartheid.

On 1 May 2004, the MPRDA, 2002 came into force, repealing the *Minerals Act*, 1991 and changing the South African mining landscape completely. Most importantly, section 3 of the Act replaced the common law position regarding mineral rights, by stating that:

- mineral and petroleum resources are the common heritage of all South Africans; and
- the state is appointed custodian of such resources.

Thus, real rights in minerals were abolished and replaced with limited real rights. Schedule 2 of the Act provided for a transitional period, during which so-called *old-order mineral rights* could be transformed into limited real rights. Holders of such old-order rights were to apply for such transformation within five years, in order to hold on to their rights.

Section 5 explains the nature of prospecting, mining, exploration and production rights under the new order. The holder of a new order right may enter the land together with his/her employees, erect any plant, install machinery or equipment and construct the required infrastructure to conduct its business. The holder also remains the owner of such equipment and may not be expropriated thereof, without payment. Although the holder is entitled to all minerals found during legitimate mining operations, the mining rights itself are limited real rights, which can only be obtained by the Minister of Mineral Resources and may not be traded or disposed of, without governmental consent.

Section 3 (2) of the MPRDA provides for four principal authorisations with respect to minerals – reconnaissance permission, a prospecting right, a retention permit and a mining right:

- Reconnaissance *permission* is valid for two years and non-renewable. The holder of such a right may search for minerals by way of geological and geophysical surveys.
- A *prospecting right* may be granted for up to five years and may be renewed once for a period not exceeding three years. The holder has the exclusive right to apply for and be granted a mining right.
- Issuing of a *retention permit* will be considered in cases where the holder of a prospecting right cannot proceed to actual mining because of unfavourable market conditions. It is valid for up to three years and non-renewable. The holder also has the exclusive right to apply for and be granted a mining right.
- *Mining rights* are granted for a maximum of 30 years but are renewable for an indefinite number of further periods, each of which may not exceed 30 years.

Since the promulgation of the MPRDA, a number of judgments were handed down in the country's high courts, in which the state's custodianship of minerals came under the spotlight. In 2009, the North Gauteng High Court handed down judgment in favour of Agri SA, ordering the State to pay compensation or reinstate real ownership of expropriated mineral rights (*Agri South Africa vs Minister of Minerals and Energy; Van Rooyen vs Minister of Minerals and Energy*, 2010). This is in line with section 25 of the Constitution, 1996 which states that any person whose property is expropriated is entitled to compensation.

Judge Willie Hartzenberg found that the Act gave no recognition to the holding of existing (or *old-order*) mineral rights. In his interpretation of the Act, Hartzenberg recognised that holders of mineral rights could be deprived of their rights and that such deprivation amounted to expropriation. It remains to be seen whether this ruling will be upheld in the Supreme Court of Appeal.

## Concepts in the MPRDA

The bulk of any article on South African mining law should centre on the MPDRA. To understand the law, it is important to understand three concepts: *land*, *minerals* and *petroleum*. The definition of *land* in the Act went beyond the common law position, to also include sea. When read together with the definition of *owner*, the Act seems to suggest that the owner of the land is regarded as the owner of the minerals in the land.

In order to qualify as a *mineral*, it seems that a substance must be in solid, liquid or gaseous form and must occur naturally in or on the earth or water. Further, it must be formed by, or subjected to, a geological process, or it must occur in residue stockpiles or residue deposits. In the past, substances such as sand, stone, rock, gravel, clay and soil had their status as minerals contested – now the Act makes express recognition of such status.

*Petroleum* can be any liquid or solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust, including that which has returned to a natural condition in the earth's crust. The substance may not, however, be coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation. It may also not be a gas arising from a marsh or surface deposit – those are treated as minerals, rather than petroleum.



## The state as the custodian of resources

Section 3 (2) of the MPRDA expressly appoints the state as custodian of the nation's mineral and petroleum resources. The state may grant or refuse different kinds or rights in respect of the mineral or petroleum, and to the land to which the rights relate.

It is important to note that the granting of prospecting rights or mining rights does not confer ownership of unlevered minerals. This is in line with the common law position which states that the holder of rights to minerals or petroleum who is entitled to remove and dispose of the mineral or petroleum becomes the owner of the mineral once it is extracted.

## Expropriation of mineral rights

In the case of *Agri South Africa v Minister, Minerals & Energy; Van Rooyen v Minister, Minerals and Energy* the plaintiffs (Agri and Van Rooyen) came into possession of mineral rights through cession, prior to the Act coming into operation. With the advent of the Act, those mineral rights were transferred onto the State and the plaintiffs sued for compensation, relying on Section 25 of the Constitution, 1996. The State launched exception against the claim, contending that they were vague and embarrassing.

In reaching judgment, Hartzenberg J explained the common law position before the advent of the new mining order (*supra* par. 9):

*It is evident that the holder of the mineral rights was under no obligation to exploit the (mineral) rights. He could keep it for as long as he wished. He could bequeath it to heirs. He could sell it. The State could not force him to start with the exploration of the minerals even if it would be to the public benefit. The advantage to individuals was that they could own valuable rights which they in many cases would be unable to exploit but which they could sell to mining houses or others for handsome amounts.*

The judge then proceeded to consider the new Act and its dealing with the old-order rights. In the opinion of the Court, there was no acknowledging of any existing holding of mineral rights in the MPRDA: In so far as they have not been exploited they simply disappear into thin air.

However, the Act makes provision for transitional arrangements in Schedule II, without which *the Act stood to be unconstitutional*. The Schedule conferred certain rights upon holders of *unused old order rights*, which included the plaintiffs. They were ordered to lodge, within the transitional period of five years, an application at the office of the regional manager in whose region the land in question is situated. If the applicant complied with all the requirements provided for in section 7(2) of the Schedule, the Minister had to convert such old order rights into a mining right. These requirements included payment of a non-refundable application fee, which could prove troublesome to applicants who could not afford the fee.

The Court was not satisfied that these provisions rid the state of its obligation to pay compensation to the plaintiffs. It merely provided the holder of old order rights to mitigate their damages. Thus, the transfer of mining rights to the state constituted expropriation in

terms of Section 25 as well as the *Expropriation Act*, 63 of 1975. It followed that, in terms of these legislation, the State was also compelled to pay compensation to the plaintiffs.

The MPRDA is not completely silent on the subject of compensation. Although no mention is made of mineral rights (which the Act did not consider to be expropriation), compensation is payable to any person whose property was expropriated in terms of the Act. In the event of mine nationalisation, section 12(1) of Schedule II would provide a mining company with a remedy to recover losses from the expropriation of equipment, plants, machinery and tools.

When an expropriation is averred, the claimant has to prove the extent and nature of actual loss and damage suffered. The current use of the property must be indicated. The claimant has to submit proof of ownership of the property, and provide an account of the history of acquisition of the property and the price of the purchase. The claimant has to prove the market value of the property and how the value was determined. Lastly, the claimant must indicate the extent of any state assistance and benefits in respect of such property.

In determining *just and equitable compensation* all relevant factors must be taken into consideration, including those specifically listed in the Constitution, 1996 and Item 12(3) of Schedule II of the MPRDA, including:

- the current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property;
- the purpose of the expropriation;
- the state's obligation to redress the results of past racial discrimination in the allocation of and access to mineral resources;
- the state's obligation to bring about reforms to promote equitable access to all South Africa's mineral resources;
- the constitutional commitment to ensure that legislative and other measures are taken to achieve land, water and mineral reform; and
- whether the person concerned will continue to benefit from the use of the property or not.

## **The payment of royalties to the State**

The coming-into-effect of the MPRDA paved the way for several pieces of legislation, which were to give effect to the principles of the Act. One of these is the *Mineral and Petroleum Resource Royalty Act*, 28 of 2008, which orders mining companies to pay royalties on profits made.

## **The Broad-Based Economic Empowerment Charter for the South African Mining Industry**

When the MPRDA came into effect, it authorised the legislature to implement, within reasonable time, a mining charter which outlined a strategy of broad-based black economic empowerment in the mining industry. The result was the Broad-Based Socio Economic



Empowerment Charter of the South African Mining Industry (2004), commonly known as the Mining Charter.

The charter's preamble makes it abundantly clear that the nationalisation of the mining industry is not state policy:

*It is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it is not the government's intention to nationalise the mining industry. The key objectives of the Mineral and Petroleum Resources Development Act and that of the Charter will be realised only when South Africa's mining industry succeeds in the international market place where it must seek a large part of its investment and where it overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way. The transfer of ownership in the industry must take place in a transparent manner and for fair market value.*

The Charter only applies to the mining industry and not to black economic empowerment in general. It is written in the form of a social contract, in which both the state as well as stakeholders in the industry undertakes to fulfil particular requirements and objectives. This relates to issues such as human resource development, employment equity, migrant labour, housing and living conditions, procurement, ownership and joint ventures. It is important to note that the Mining Charter is not legally relevant to conversion of old order mining rights to new rights, but elements of the Charter found their way into the regulations made under the MPRDA, where the content of the social and labour plan that must be filed with the lodgement of an old order right mining right is at stake (Dale 2005:2). However, as Dale points out, both the charter and scorecard are policy documents, which at best may act as guidelines in the lodgement for conversions or in applications for new rights.

Furthermore, the charter recognises that the goals set out, entail an on-going process. Therefore, it calls upon all the industry stakeholders to report annually on their progress towards achieving their commitments. These reports are to be reviewed by external auditors.

## **MEASURING POLITICAL RISK**

Unlike economic or financial variables, political risk is not only difficult to quantify, it may well also be a rather subjective exercise which relies heavily on the scholarly experience of researchers. Risk *scores* or the quantified indicators are ultimately based on qualitative judgments (Jeffrey 1984:97).

Jodice (1985:33) suggests that any question about political risk can imply the prominence or presence of a whole array of undesirable political phenomena which range from state interventionism (which may be to the detriment of markets and international trade regimes) to the gradual erosion of the state's operational regime due to excessive, often (re-) distributive, societal demands. The question, thus, is; which temporary or prevailing conditions and phenomena, in the South African political economy, represent a general or specific risk to the political stability of the country. Risk implies that the political- and economic management of society is threatened by either weaknesses in or challenges to the state, or the prevalence

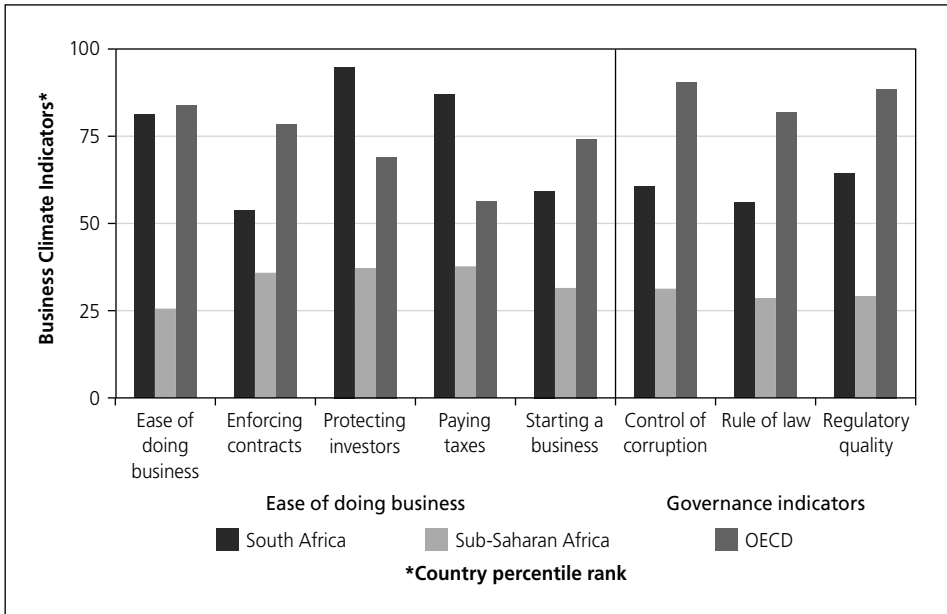
of uncivil, contending interests within society encroaching on the jurisdiction of the state (Bremmer 2005:22).

While the concern is a political risk, it is an accepted maxim that political phenomena and economic trends are too integrated to be assessed independently from each other (cf Kennedy 1988:78). In the context of this, it is assumed that social stability precedes the prospects for growth, employment creation and a competitive economy. Economies are successful when they fulfil the aspirations and needs of their societies to the extent that the *natural* stress between societal expectations and institutional capacities are reduced to manageable levels (cf Mangcu 2008:101). Political stability or the lack thereof, under verifiable conditions however, may not necessarily undermine direct foreign investment, or the extractive capacities of the state, or the legitimate (re)distributive regime of the government, or the prospects for growth in both the formal and the informal economy. Angola, during the 1990s, attracted more direct foreign investment than South Africa, but as those investments were embedded in the oil industry it actually strained diversification of the economy and had very little to no beneficial consequences for ordinary citizens living beyond the capital, Luanda.

The graph below provides for a typical range of indicators which are considered in an investors' confidence index.

In India, the (democratic) political system is often described as mortally unstable, but the economy grows at levels which should be the envy of South Africa. On the down side South Africa has, to use the words of Moeletsi Mbeki, *de-industrialized* heavily over the last decade, which contributed significantly to the unemployment figure (see Statistics South Africa) of around 25% (Mbeki 2009:44). Escalating expectations amongst the formally employed people has put unbearable pressure on wages to increase at levels not justified by

**Table 1 Business and governance indicators**



Source World bank – doing business and governance matters databases

underperforming levels of productivity in the economy in general. Labour absorption is the lowest in the world (at a rate of 3-4% economic growth) and the quality of service delivery varies too much, and varies in line with socio-economic status. The rich get good services and the poor bad or no services at all. On the positive side, South Africa has become a key investor in many African economies. Foreign investment in the significantly expanding economic activities of Africa has grown six-fold and South Africa's contribution to the continent's investment flows has expanded eightfold (*cf* Theodore 2001:66).

## **KEY POTENTIAL RISK AREAS WHICH MAY EMPHASISE EXISTING STRESSED DETERMINANTS**

**The discourse on nationalisation of land and the mining industry** may well be a much needed opportunity to reach important compromises with regard to a consensus on these important issues. The process can lead to a formalised statutory architecture from which to consolidate the operational confines of private property and ownership in South Africa. The required extent of state interventionism which will enhance social stability and a more even distribution of the *greater good* is an important feature of the public and political discourse in developing political economies. The protracted and acrimonious nature of the debate, however, is cause for concern, as well as the extremity of positions advanced by contending interests. It leaves the impression that the middle-ground, or the final compromise, may culminate in a political stalemate, as opposed to a generally (financially) beneficial agreement.

Risk is often more perception than reality, but perception is an important driver in decision-making processes. The *dispute* is impacted upon by other more diverse contests such as the distributive intentions of the liberation struggle, and the more recent presidential succession discussion within the ruling party, allowing for a disproportionate political importance *vis-à-vis* economic sensibilities. Ideally this dichotomy (politics and economics) should be approximated (through a compromise) to delicately balance contending interests, and to, at the same time, allow for the maximisation of benefits and the greater good to South Africans in general.

**The Public Protector (PP)** is an important Chapter 9 institution of the Constitution, 1996. For the institution to contribute in a meaningful and effective manner to the discourse on the public interest and good governance, it needs the protection of Parliament (to which it is accountable) and the political commitment of the Executive (government). If the Public Protector is left to fend for itself, corrupt individuals and dysfunctional institutions of the state under investigation may well seek to stigmatise the work of the Public Protector, or even deliberately undermine it.

The potential harm done to the Constitution, 1996 in general, and the Office of the Public Protector specifically has fundamental consequences for the notion of institutional oversight, and the subsequent eradication of mismanagement, corruption and maladministration. Perceptions that officials in *high office* are insulated from accountability and justice – through its historical relations with the Executive – is not only contrary to the interests of a constitutional state, but also weakens the capacity of both the state and society to protect itself from regime contenders.



**The instability within the tri-partite alliance** could be expressed as natural, generic, and even necessary to the process of democratic contestation. It should not be a fundamental cause for concern. Each feature of the alliance represents a very important, but quite distinct constituency, with varying and often contending interests. The question whether the national economy or the state's distributive interests should be *interventionist* or *regulatory* falls within the scope of normal political contest. What may well be problematic is the extent to which the Alliance has become a battle-ground for control over the institutions of the state. A further concern is the extent to which both the conceptual and the operational architecture of the constitutional regime (e.g. property rights and the role of the Public Protector) is still contested seventeen years into the democratic regime. In mature libertarian systems, and open societies, the constitutional contest and contestation represent a marginal feature of the public discourse, while managerial attributes of the agreed-upon distributive and accumulative regime of the state is embedded in sufficient consensus. Contestation and compromises which challenge the national consensus – in which the Constitution, 1996 is assumed to have been conceived – undermines endeavours to establish and consolidate libertarian states.

**The national strike season** holds no political threat to the stability of the political system. It is a right enshrined within the Constitution, 1996. The protracted nature thereof, however, may have economic and financial consequences, which may in turn have political consequences. The levels of intimidation and violence associated with the strikes certainly is beyond the legal framework of bargaining and compromise, but it may well add a descriptive dimension to labour relations (the challenged coercive apparatus of the relatively weak state) in South Africa rather than being a predictive indicator of an unstable state. With double digit demands, the wage bill of the public sector will strain the national budget even further, making it difficult for the Treasury to reduce the deficit as a percentage of the Growth Domestic Product (GDP). This will eventually put allocations on public spending and the state's welfare grants under pressure, but these are economic and (politically) medium term concerns. The Wage Bill for state employees has increasingly strained the budget, making it more difficult for the Treasury to reduce a deficit it projects at 5,3% of GDP for 2010/11. International risk agencies do not consider unstable labour relations an immediate political risk, quite rightly so.

**Weaknesses in the institutional** capacities of the state are considered a real, if not grave, concern by a large number of civil society organisations in South Africa. In a recently published peer review report (APRM), behavioural trends within the police force (general excessive force as well as the deaths of civilians during service delivery protests), the way the state deals with xenophobia (despite hundreds of deaths, not a single successful prosecution has been noted), the high levels of violent crime in South Africa (between 50 and 60 murders per day with a conviction rate of approximately 14%), and escalating trends of corruption (an emphasis on the lack of visible prosecution and the lack of an acceptable statutory protection for whistle blowers) are listed as a manifestation of not only institutional weaknesses on the part of the state, but as a verifiable trend of the state being undermined from within as well as by sectarian interests within society.

The public debate on the role of the media *vis-à-vis* the state and the initiative on behalf of the state to institute a degree of regulation of the media, is raised as threats to the durability of democratic practice and media freedom in South Africa. The report gave South Africa a

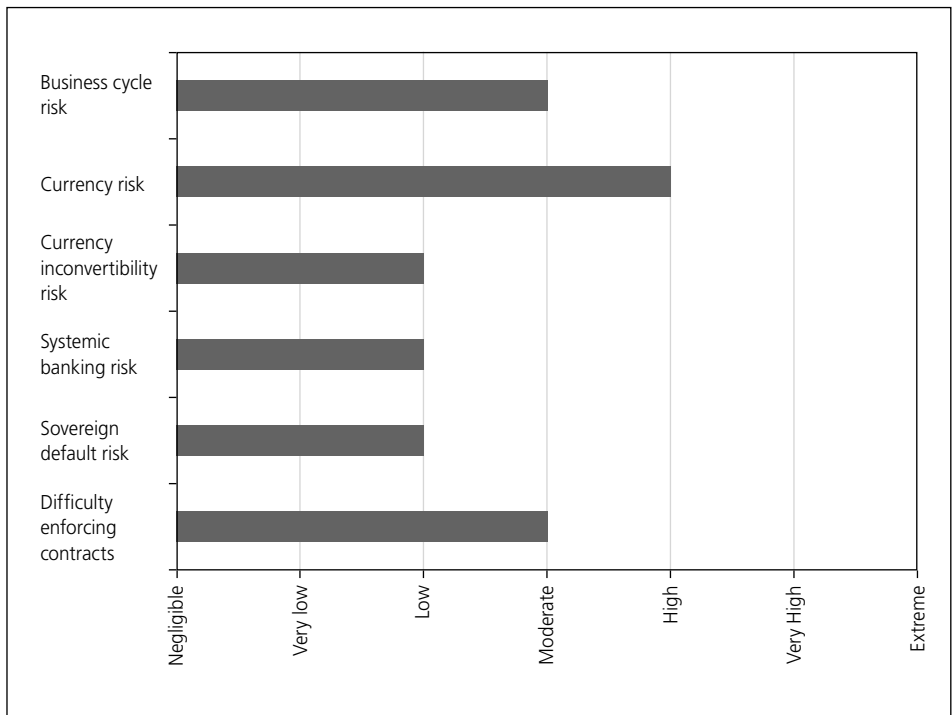
red rating for blurring the state-party-divide, cadre deployment, party-political funding and the politicisation of the institutions of the state.

## RISK AT A GLANCE

The decline in South Africa’s manufacturing output is still the real reason and concern for its *stagnant* growth (World Bank Statistics 2011). In an ironic sense, South Africa’s export to African countries have grown significantly over the last few years. Critics of the managers of the South African economy use this lack of economic growth to question economic policies ranging from inflation targeting to the extent of the state’s role in the economy and the market. This directly relates to the political presence of the state in the lives of the between six to eight million unemployed South Africans and the conditions of living at the lower end of the socio-economic scale.

Numerous political parties and interest groups such as Congress of South African Trade Unions (COSATU) have endeavoured to make political capital out of this weakness in the South African political economy. The questions in this regard are valid: if the business climate is conducive to direct foreign or local capital investment, its credit rating is commendable, and the *per capita* income of its citizens is relatively high, why the reluctance of capital to make a permanent commitment to the local economy and its labour force? Moeletsi Mbeki (2008:66) argues that this six to eight million unemployed South Africans are the real and

**Table 2** Key risks to exporters and investors



Source World Bank Statistics 2011

clearly identifiable constituency of the ruling party, and that their electoral or socio-political behaviour thus may have a measurable impact on the state's legitimacy. The argument culminates in the suggestion that the political contradictions and turmoil in this constituency are most visible in service delivery protests.

There may not be sufficient evidence to support such extrapolations between economics and politics and some indications are that this economically deprived sphere of society is actually politically much more passive than the theory suggests. The variables to investigate in this regard are numerous, but the recent suggestions by Adcorp that Statistics South Africa may have methodological problems in its assessment of unemployment data (estimates of total employment with the Statistics South Africa method have a confidence value of just 34%, and four out of nine provinces have confidence values below 40%) and that a figure of below double digits may be more appropriate, should be considered. In the Adcorp measure it seems that definition of being *employed* overlaps conceptually with the operational feature of informal survival. While that may be problematic, such a measure may just give some explanatory value to the relative social and political stability amongst the identified six to eight million *unemployed* South Africans. It may also explain to some extent the loyalty of this constituency to the liberation movement.

Currency risk is typical to developing political economies and may have severe economic consequences for countries already finding the, to use the terms of Trevor Manuel, *amorphous* markets and protectionism in some industries (such as agriculture in Europe) difficult to deal with. Currency risk is however a medium to long-term risk for South Africa. Having stated that, the South African Rand is currently considered to be over-valued by approximately 10-15% and its stability is considered a (positive) predictor (indicator) of stability in most international indices. A slight weakening of the currency will certainly make South African manufacturing and mining more competitive, and an intervention by the Reserve Bank to that effect is often advanced by labour unions as a partial solution to the marginal nature of the manufacturing industry. There is, however, no evidence that the Governor of the Reserve Bank will manipulate the value of the Rand for reasons, and by margins, which are not justifiable in market terms.

Each indicator of risk is weighted comparative to other indicators on a scale of 1-5; 1-10; 1-15 and 1-20. 1 = low risk and the higher end of the scale reflecting a high political risk. Indicators scaled 1-5 present the lowest risk and those scaled 1-20 the highest political risk.

## REFLECTION IN RECENT KEY INDICATORS OF RISK

**Land reform** is quantified as a medium risk to social and political stability in the short term. While it dominates the discourse on the distributive interests of the liberationist agenda, the capacity of proponents of the nationalisation of land to mobilise societal activism seems to be limited. The Zimbabwean scenario does not present itself as a viable alternative to the uneven distribution of land in South Africa. The ruling party's stated intention to redistribute land in accordance with a negotiated statutory regime remains the most likely outcome.

**Nationalisation** of the mines amongst other industries has become a policy issue since it was emphasised by the ANC Youth League (ANCYL). The Minister of Mineral Resources has stated publicly that nationalisation will not be government policy in her lifetime and the ANC



**Table 3 Index of Political Risk in South Africa – Approximated for July/August 2011**

Indicators	Scaling	Risk	%
Land reform	10	7	70
Nationalisation	10	7	70
BEE	5	2	40
Elections	10	2	40
Racism	20	14	70
Xenophobia	10	7	70
Policing	20	15	75
Bureaucratic capacities	20	15	75
Cabinet	20	10	50
President/Executive	20	15	75
COSATU/Labour	20	15	75
ANC Youth League	10	7	70
ANC Women's League	5	2	40
Civil society consensus	20	8	40
Macro economics	20	8	40
Legislatures	20	12	60
Judiciary	20	2	10
Media	20	8	40
Corruption	20	16	80
Private sector growth	20	16	80
Level of consensus in Alliance	15	9	60
<b>Total</b>	<b>335</b>	<b>197</b>	<b>58.57</b>

Low Risk: 5 – 40  
 Medium Risk: 45 – 70  
 High Risk: 75 – 100

has expressed views which suggest that private ownership remains an important feature of the discourse on nationalisation. An ANC research document is currently being prepared to assess the conceptual framework of nationalisation. The likeliness of nationalisation is a medium risk, but should it be implemented in an orthodox, interventionist fashion it will present a high risk to both the political and the economic systems of South Africa.

**Broad-based Black Economic Empowerment** is contentious as it may lead to a concentration of capital, but as an economic and political feature of the South African political

economy it also legitimised the market economy amongst the previously disadvantaged and distributed wealth to a significant degree. It holds a very low risk of political instability.

**Racism and xenophobia** are distinctive problem areas in democratic South Africa. While the prospect of these indicators transcending into high-risk features of the political system is real, it seems to reflect a sporadic political occurrence and incidence, which holds a medium threat to political stability in South Africa. However, its is quantified at the high end of medium and precariously close to being a high risk.

**Policing, beauracratc capacities and corruption** are at the high end of risk. These are indicators which reflect the durability of the constitutional dispensation of the country. These are important institutions which have to protect the freedom of citizens and distribute justice and the greater good. Currently these indicators hold a high risk to both long- and short-term political stability in South Africa.

**Private sector growth** is under severe strain and jobs are being shed at an alarming rate. The labour absorption rate of the economy is dangerously low and unemployment is high. A range of problems, from labour market rigidity to low levels of savings by individuals are relevant. The *Diagnostic Report of the National Planning Commission, 2011* is an attempt to understand the weaknesses in the political economy and so are the range of initiatives by the Minister of Economic Development. The suspicion that the two members of the executive may have competing agendas and incentives, and that they do not necessarily share a loyalty to the macro economics of the government is a cause for concern.

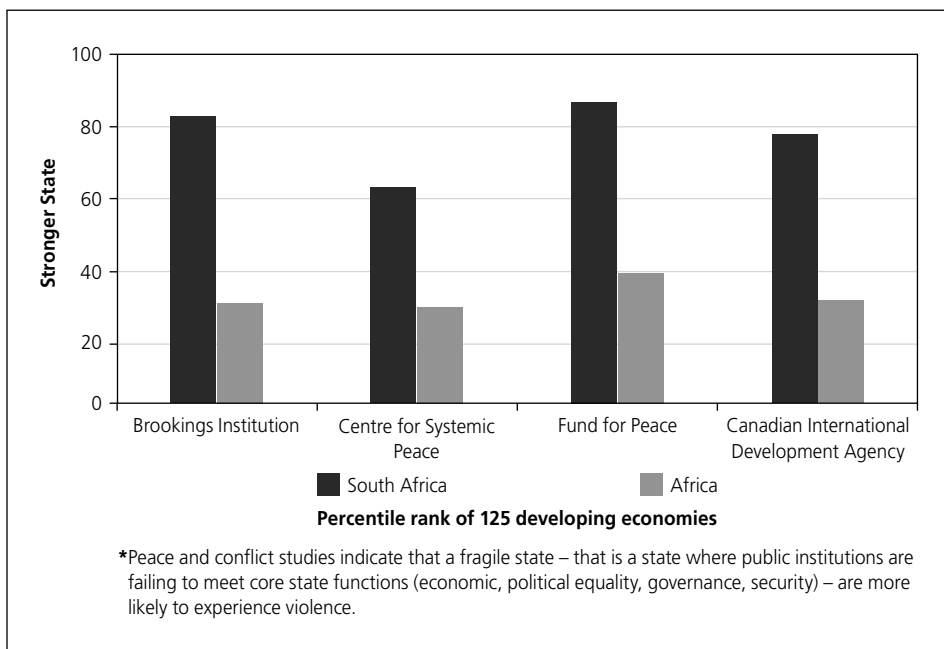
The judiciary, the macro economic framework of the state, the media, the Women's League of the ANC, and civil society organisations present low levels of political risk. While these institutions may be under political strain from time to time and draw acrimony from the ruling party, they are generally passive and hold a low threat to political stability.

The ANCYL has always been an important feature of liberationist politics. The organisation has, perhaps beyond its normal capacity to influence the national political agenda and discourse, entered the public sphere with the rise to prominence of its president, Julius Malema. The Polokwane Conference and the subsequent recall of Thabo Mbeki as President of South Africa led to the consolidation of the Youth League's dominance on issues pertaining to land reform, nationalisation and the succession debate within the ruling party. However, dominating public discourse and influencing policy may not necessarily coincide operationally. Indications are that the Youth League has more recently alienated the alliance partners of the ANC to such an extent that its capacity to influence is further diminished. No empirical evidence exists for claims of the organisation to represent either the working class or the unemployed. That, however, does not mean that the complexity of issues the Youth League raises have no relevance to ordinary South Africans, it certainly is highly relevant. But, the Youth League has only *ex officio* status on the National Executive Committee of the ANC which makes it difficult to determine the agenda of the ruling party. If public discourse and the policy process is distinguished from each other, the dominance of the Youth League is appropriated, and it holds only a medium threat to political stability.

The diagram above draws a comparison between Africa and South Africa from different indices (state fragility indexes) and sovereign ratings by international rating agencies. South Africa is rated as a moderate to low (political and economic) risk, mainly due to its established financial systems, the perceived to be predictable macro economic policies, and relative political stability.



**Figure 1 State fragility indexes**



Source World Bank Statistics 2011

## CONCLUSION

The question is often asked; what are the chances of South Africa degenerating into the Zimbabwean scenario. The short answer is that it is remote, the longer answer perhaps slightly more disconcerting. South Africa’s constitutional institutions are under severe strain from both civil society formations and institutions of governance. The Public Protector is the most recent example of a Chapter 9 institution that had its legitimacy and functionality questioned by individuals within the state. This institution needs the Executive to protect it by recognising its importance as a means to protect society from excesses from the government or the state. Cadre deployment has eroded its impartiality as well as its constitutional requirements to oversee state-societal relations. The Judicial Service Commission has also not escaped being tainted in its oversight responsibilities through Cape Judge President John Hlophe, and even the Constitutional Court has more recently been affected by the efforts of the President which could have resulted in an *unconstitutional* extension of the term of Chief Justice Ngcobo by President Zuma (the candidate later withdrew his application for the position).

The public discourse on nationalisation could have been considered in the context of a renegotiated regulatory framework. Nationalisation as an interventionist regime requires a new compromise on constitutional principles, and it may have dire consequences for an industry which over the past few years contracted by 1,5%, while mining internationally expanded at roughly 5,5%. The South African state already has a questionable capacity to manage the regulatory framework governing mining, it almost certainly does possess the

capacity to manage the process of production. Indications are that the state will, wisely, not go the latter route, but rather consider a complex scenario of public-private partnerships instead.

Unemployment remains a fundamental weakness in the political economy and presents a real medium to long term risk to South Africa. A third of all South Africans are unemployed and below the age of 25. There is no evidence of this group being highly politicised, but they are exploitable by opportunistic political interests. In 2006, South Africa ranked as the thirty-sixth most competitive economy in the world, in 2010 it was ranked fifty-fourth. South Africa invests 5,4% of its total budget on school education (the highest in Africa), but less than 50% of all learners complete matric. Between 50 and 60 people are murdered daily in South Africa, with a conviction rate of approximately 14% for homicides. The list of worst-case scenarios is endless if you want to be pessimistic. However, South Africa is a relatively new democracy with a strong Constitution, vibrant civil society, free media, independent judiciary and industrious people – no more unstable than most other developing political economies, and instability will, without exception precede democratic consolidation.

The gradual erosion of South Africa's constitutional regime may lead to a Zimbabwean scenario, but certainly not in the short to medium term. There is nothing to indicate that the system of governance follows the Zimbabwean trajectory. South Africa's political risk is no worse than medium or moderate. The complexity of the economic, political and constitutional system makes it almost impossible for a single variable or act to mortally undermine the democratic nature of state-societal relations.

The political risk measure for South Africa has increased with a degree of significance. The increase relates largely to events which reflected negatively on the constitutional architecture of state-societal relations. As far as the economy is concerned, the last quarter shows a rapid decline in economic growth to below 2% and an even further increase in unemployment. Although this trend is congruent with stagnation in the international economy, it comes on the back of an increase in political risk in South Africa due to a measurable erosion of the constitutional features of state-societal relations. The publication of the *Protection of Information Bill*, 2011, introduced a new trend in the National Assembly with the majority party deliberately trying to pass legislation which lack partisan consensus for the Constitutional Court to resolve the impasse by juristic interpretation. With the legitimacy of the Constitutional Court being challenged by recent events in the Judicial Service Commission, this sets a dangerous precedent.

The public discourse on the issue of nationalisation has shifted to the terrain of a more considered and rational interpretation. Both the ANC and COSATU have indicated that the conceptual perimeters of nationalisation will have to be determined by an appropriate analysis of the operational realities of South Africa's market economy. While an interventionist regime is still COSATU policy, it seems the so-called Zimbabwe-scenario is not under consideration at all. The Minister of Finance has also added his voice to what could be termed a more market-friendly interpretation of South Africa's labour legislation-regime. The disciplinary hearing of the ANC Youth League executive and its president made no impact on the markets and the South African rand showed no weakness during the first few days of the hearing. This behaviour is in line with the realities of the rather limited institutional authority of the ANCYL and its president. Now that the destructive capacities of the ANCYL are challenged by the ruling party, the capacity of its president to influence government policy, especially policy pertaining to nationalisation and the economy, is approximated.



The high risks for South African politics remain, policing, institutional (managerial) capacities, the weaknesses (mostly related to a perceived fragile consensus and weak leadership within the institution) of the Executive, high levels of corruption and contracted private sector growth.

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