

Legislation that drives and influences agricultural development

7 & 8 November 2019

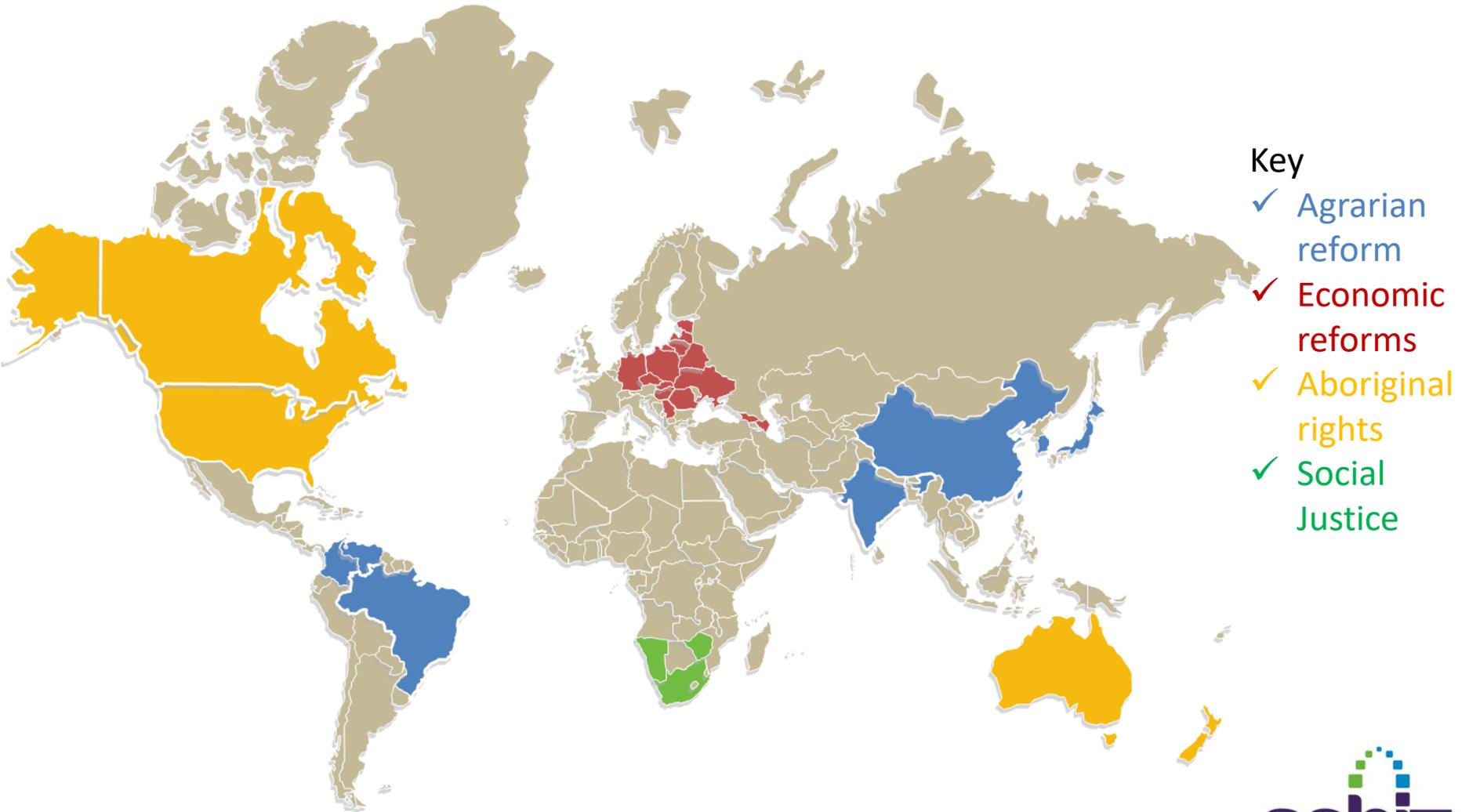
Theo Boshoff

Introduction – context is key

- There are structural problems we cannot run away from;
 - Poor service delivery & implementation;
 - Lack of transformation;
 - Competition for resources;
 - Poor economic growth.
- Can view this as a threat or as an opportunity;



Land reform not uniquely South African



Presidential Advisory Panel Report

Context NB:

- Advisory in nature – not official gov policy;
- Gov can 'pick & chose' which recommendations they take on board;
- No public comments sought;
- Immediate actions v legal amendments;

Overview

- Diverse interests and viewpoints – can never be everything to everyone;
- Agbiz will review and prepare comments where legal amendments are required.



FINAL REPORT OF THE PRESIDENTIAL ADVISORY
PANEL ON LAND REFORM AND AGRICULTURE

04 MAY 2019

FOR HIS EXCELLENCY THE PRESIDENT OF SOUTH AFRICA



REPUBLIC OF SOUTH AFRICA

Immediately actionable	Legal changes required	
<ul style="list-style-type: none"> Innovative financing mechanisms; Land register; Release state land; Land audit; Budget split - social v commercial land reform; 	<ul style="list-style-type: none"> Land reform ombudsman; Legally enforceable rights for off-tenure right holders; Clarifying the role of traditional authorities in natural resource management; Compensation policy; Reallocation of water rights. 	Opportunities
<ul style="list-style-type: none"> Budget split - social v commercial land reform; 	<ul style="list-style-type: none"> Reallocation of water rights; Amendment to s25 of the Constitution; Amendments to ESTA; Additional taxes on unused land; Land ceilings; Prohibition on foreign land ownership. 	Risks
<ul style="list-style-type: none"> Finalising outstanding labour tenant and restitution claims; Tenure grants to evicted occupiers; Rooting out corruption; 	<ul style="list-style-type: none"> Expanding the mandate & capacity of the Land Claims Court; Expropriating urban land for reform. 	Least interest or little control

Amend s25 of the Constitution

- Panel was split on this topic but the majority endorsed the idea to amend the Constitution;

Ad hoc Committee

- Busy receiving inputs from experts on wording;
- Draft Constitutional Amendment Bill expected by 10 December 2019
- Published for public consultation Jan 2020;
- Public hearings from Feb 2020

Agbiz will provide thoroughly researched inputs!

Compensation policy

What it is

- Prescribe compensation based on who the owner is; i.e.
 - Full (market) compensation for land acquired after 1994 or land acquired for other purposes (i.e. public works)
 - Partial compensation for large property owning companies v families;
 - Nil compensation in certain instances;
 - More than market compensation for dispossessed communities (i.e. mining in communal land)

Compensation policy

Analysis

- Can still have an impact as the Expropriation Bill still with Gov.
- May have to test with Constitutional court;
- Likely not constitutional to fix amounts for certain categories;
- Just and equitable based on the facts of each case – cannot predict the outcome;

NB – legal certainty v arbitrary decision making!

Nil compensation? - Expropriation Bill

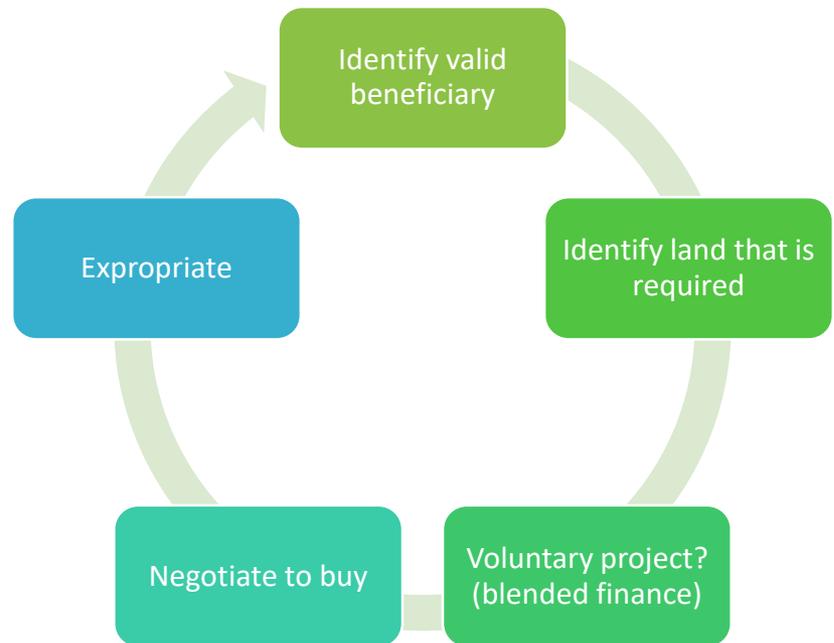
- Expropriation Bill 11 years in the making;
- Regulates process and compensation;
- Generally a very good Bill - based on international best practice;
- Compensation must be just & equitable; but
- New insertion in 2018 – may be just and equitable to award nil compensation in certain instances.

Expropriation Bill

- **New Insertion:**
- *May* be just and equitable for *land* to be expropriated at nil compensation:
- Labour tenants, speculation, abandoned land, SOE land and where subsidies exceed market value;
- NB – discretion retained – *may* and not *will* be nil compensation. Will still depend on the circumstances;
- Bonded land? – DM Cronin’s opinion that it will never be just and equitable to award less compensation than outstanding debt.

Role of Expropriation in land reform

- Panel was not explicit on when expropriation should be used; however
- 1 of many mechanisms including;
 - Innovative finance;
 - Land donations.
- Logic dictates that it will be a last report;
- *Expropriation is not a shortcut! – very onerous process for the state.*



Enabling recommendations

Innovative funding & land register;

What is it?

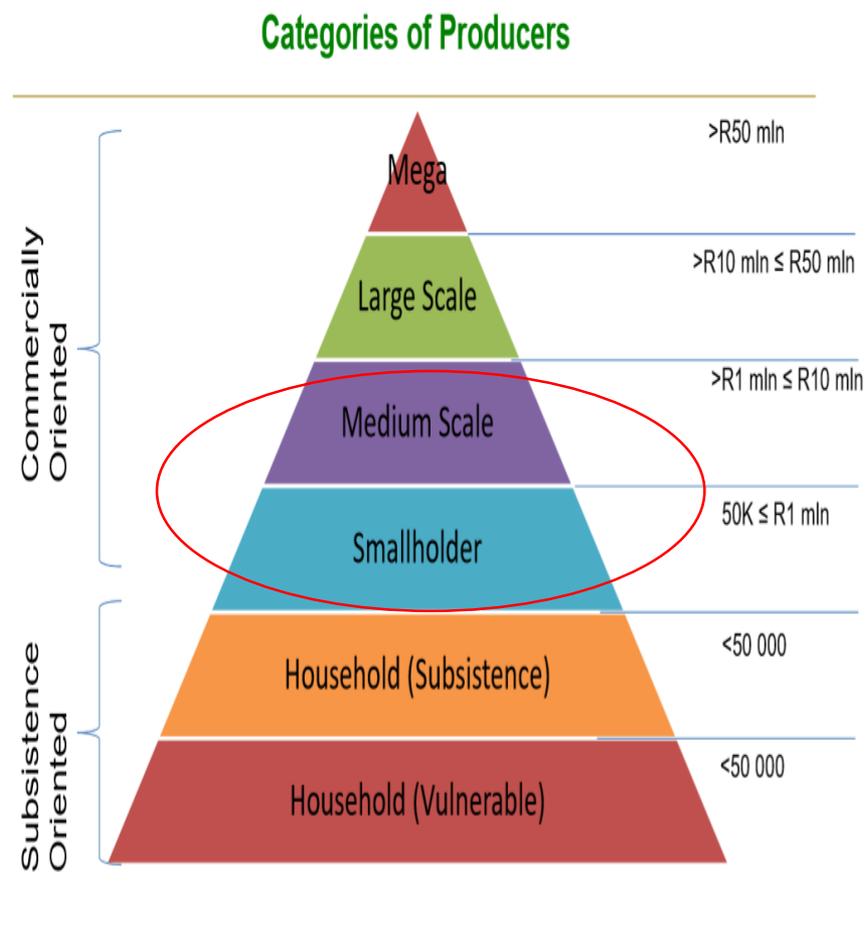
- To incentivise voluntary land reform / transformation;
- Develop product based on 50% grant + 50% loan;
- Parallel efforts underway but not gaining sufficient traction:
 - Agricultural Development Agency;
 - DAFF / Land Bank blended finance facility;
 - Agbiz/BASA model;
 - Motsepe foundation / Agri SA initiatives;
 - Industry-specific & Jobs Fund initiatives.
- Good idea but confusion as to where it will be housed or who will administer it.

Blended finance 'game changer'

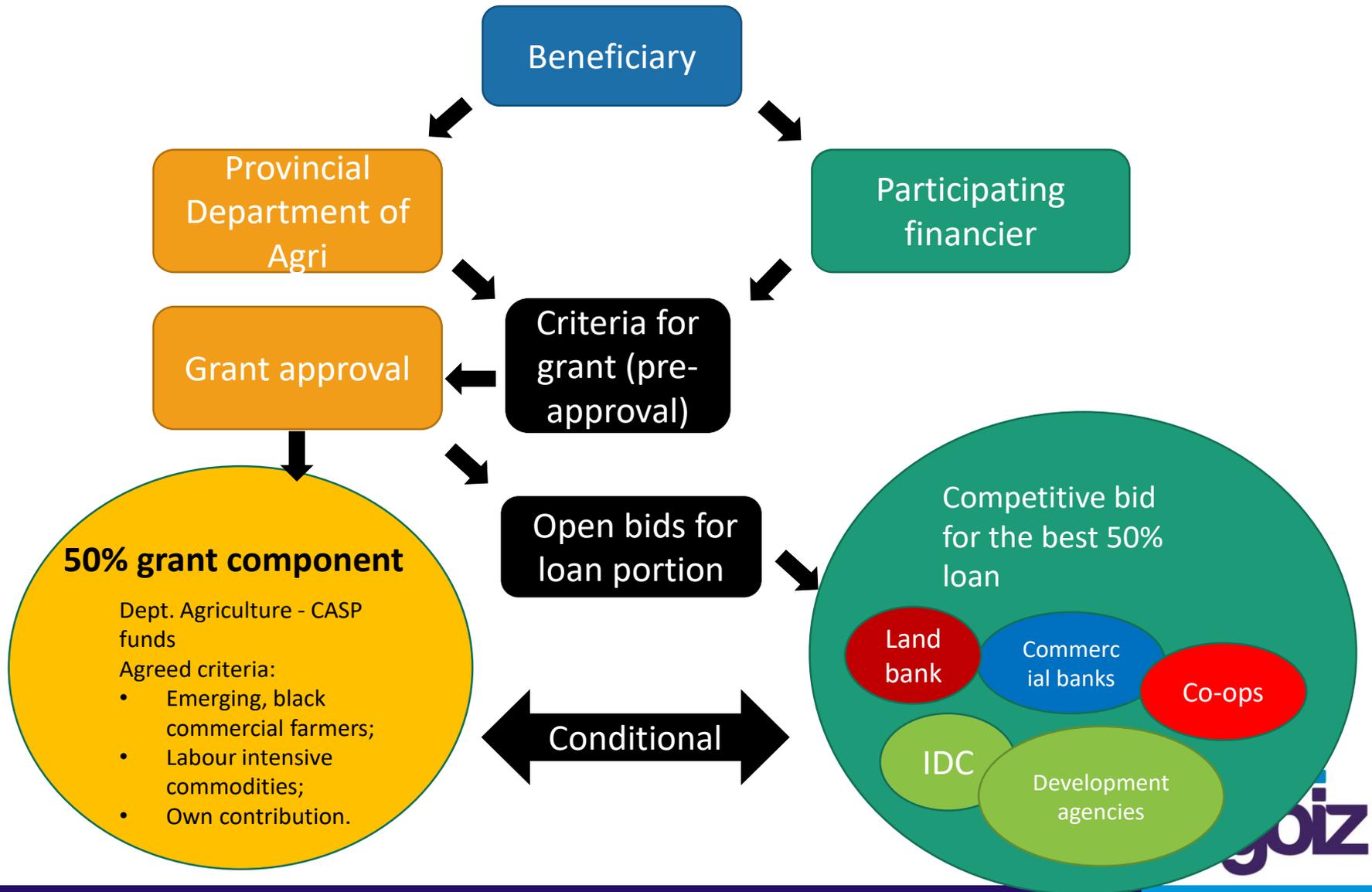
- Agbiz & Banking Association pursuing this since 2015 and finally making real progress through Nedlac;
- Blended finance the #1 intervention for agriculture listed in the Job Summit & PPGI;
- President appointed a Project Office to look into this;

Latest:

- Terms of reference for an open and competitive system being jointly developed by Government & Industry through the Nedlac Job Summit process;



Blended finance concept



Communal land

Presidential panel

- Develop the 'rules of the game' for communal land rights;
- Might not be ownership, but must have certainty regarding tradability, duration etc.
- i.e. build on & formalise traditional, customary tenure rules.

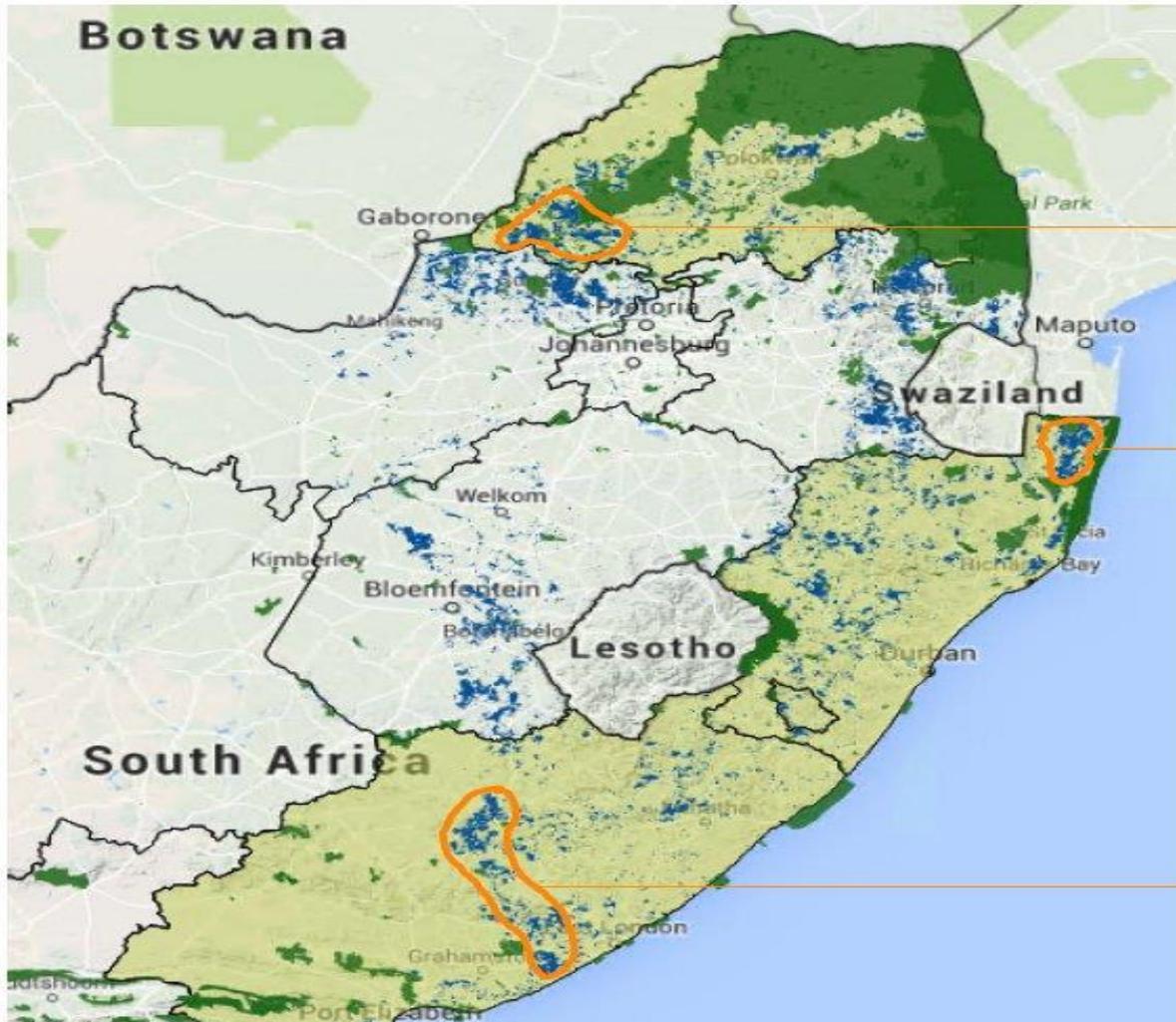
Job Summit

- Develop a platform to prioritise Private-Public-Community Partnerships;
- Cut through red-tape like lease agreements & water rights to get projects going.

All three focus provinces have unused land suitable for agriculture

Suitable, unused land: Limpopo, KwaZulu-Natal, and Eastern Cape Provinces

- Protected area
- Suitable, unused land



Limpopo

Over 300,000 hectares of high-potential land concentrated near the southwest corner of the province

KwaZulu-Natal

The highest concentration is in the northeast, surrounded by several protected areas (including the Tembe National Elephant Park), with nearby water access from lakes Sibhayi and Jozini

Eastern Cape

The bulk of the opportunity resides in a single ~250-kilometre band, which stretches from East London on the coast past Queenstown to the north. Steep areas increase the difficulty of establishing large, continuous development zones

SOURCE: McKinsey ACRE tool; ConScience; McKinsey & Company Geospatial Analytics; The World Database on Protected Areas; McKinsey Global Institute analysis

Water rights...

New direction required for water rights

- Minister's budget speech: 95% of water in white hands;
- Master plan seeks to address this by:
 - Prohibiting all trading of water rights;
 - Use-it or lose-it; and
 - Doing away with all Existing Lawful Use (ELU) rights.
- A hard transition = unintended consequences;
- Minister looking for a negotiated solution of some sort but the atmosphere is tense;
- Reference made to a 'transformation charter' like mining but the water sector is much more complicated;
- The Minister is looking for a "Social Compact" on water, but are unsure of how to do this;

Key challenges that need to be resolved

1. Perceived lack of transformation / water reform;
2. Poor capacity to implement, monitor and enforce the law;
3. Polarised and confusing institutional arrangements;
4. Reduce non-revenue / illegal water use;
5. Improve ease of doing business;
6. Promote water use efficiency.

The command & control scenario

- Based on strict law enforcement;
- Abolish all ELU & WULs reviewed every 5 years;
- Compulsory metering + progressive restrictions applied to force agri sector to use less water;
- Abandon CMAs and channel all WUL applications through the National Department;
- Prohibit water trading & use-it or lose-it applied – all water management centralised;
- Transformation plays a more prominent role in WUL allocation;
- High water tariffs increased to build capacity for the state;
- ‘Throw the book’ at unlawful water use.

The command & control scenario

Pro's

- This can be done without amending the Act;
- In line with current policy trajectory.

Con's

- Requires resources = higher water tariffs;
- No incentive for efficient water use;
- My not speed up transformation – can you redistribute water if land reform lags behind?
- High costs of doing business;
- Continued polarisation – WUAs v Regulator.

An outsourced approach

- DWS looks to outsource functions to create capacity;
- An Independent Water Regulator gives licences to private entities to manage water in areas (much like NERSA does with electricity);
- Regulator can 'outsource' WUL allocation to institutions such as WUAs or private entities;
- DWS's role limited to giving policy direction, monitoring and enforcement;
- Assignees responsible for V & V on ELU.

An outsourced approach

Pro's

- Can alleviate the capacity constraints in the Department & harness capacity where they exist at the local level;
- Self-policing system can also put pressure on unlawful use;
- Minimal interruption of supply;

Con's

- Regulator could place same strain on the fiscus;
- Inconsistent application between areas?
- Only 52% of water users are part of WUAs;
- Conflict of interest within WUAs? – interests of members v enforcing the Act + transformation imperative?
- Unclear where water for transformation will come from if all ELU is retained.

A social compact scenario

- Capacity built through Public-Private-Partnerships;
- ‘Sunset clause’ negotiated for a transition from ELU to WULs;
- Key functions can be delegated to WUAs where they exist, but subject to performance criteria;
 - The authority to grant WULs on irrigation schemes, monitoring and enforcement can be delegated to WUAs; but
 - Subject to targets for transformation (i.e. similar to the land reform targets of 20% transformation by 2030);
 - Only WUAs that are sufficiently inclusive will qualify;
- Increase limits for General Authorisations to assist smallholders;
- “operation Khanyisa” approach for unlawful water use;
 - Window period for voluntary disclosures – amnesty + undertaking to comply with the law.

A social compact scenario

Pro's

- Harness capacity of WUAs, ensure inclusivity and direct efforts to meet transformation targets;
- Sunset clause = Afford bona fide water users the chance to secure continued supply whilst making water available for reallocation;
- Build goodwill in the sector;
- Increase the ease of doing business for emerging farmers; and
- Offer non-tariff water users the chance to make arrangements for repayment but avoid criminal sanction.

Con's

- Requires broad commitment from all stakeholders;
- Increase in GA threshold = developing farmers do not contribute to infrastructure maintenance costs;
- May require limited legal amendments.

Movement on water issues at job summit

- Business part of comprehensive policy review;
- Draft regulations for WUL applications to be published in November that improves ease of applications;
- Quarterly meetings with DWS to resolve:
 - Cumbersome licence conditions;
 - Applications that exceed the time limits;
 - Specific challenges experienced in various regions.

Carbon Tax Act & GHG Reporting

- Indirect effect: 8c levy per litre of Diesel;
- Direct effect: Tax liability commenced on the 1st of June but only payable in June 2020;
- Liability for direct emissions based on annual GHG reporting (commenced March 2017);
- The staggered commencement as well as the outstanding regulations to the Carbon Tax Act will have a significant effect on agribusinesses

Implications

Carbon Tax Act

Direct emissions

- Annual liability paid in June based on GHG reported;
- Act allows for multiple deductions based on sequestration, trade exposure, benchmarking and compliance with carbon budget; but
- No regulations in place yet, hence these rebates not available yet;
- **Effect: tax liability based on general rebate only – prepare for tax rate without multiple rebates in the first year (budget for worst-case).**

GHG Reporting Regulations

Direct emissions

- GHG emission reports due in March annually
- **Effect: Tax liability uncertainty for first year – could be based on projections from first 7 month's GHG reported?**
- Based on 'installed capacity' at entity level (10 MW Thermal)
- **Companies with back-up generators may have to register & report but no tax payable if generators not used.**

Other processes underway

For noting

- Preservation and Development of Agricultural Land Bill;
- National Credit Act & Regulations;
- Road to Rail initiative;
- PPPs for biosecurity, plant health, veterinary services etc.
- Plant breeder's rights & farmer's privilege;
- Climate change adaptation;
- Labour legislation & National Minimum Wage;
- OHS inspectorate for agriculture.

Thank you

Questions and comments?