

THE FREE MARKET FOUNDATION of Southern Africa

progress through freedom

Comment on the Report and Recommendations by the Panel of Experts on the development of policy regarding Land Ownership by Foreigners in South Africa

1. The Free Market Foundation

The Free Market Foundation (Southern Africa) (FMF) is a Public Benefit Organisation (No 930-017-343) and independent non-profit public policy organisation (No 020-056-NPO) founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed primarily by donations, membership subscriptions and sponsorships. The FMF produces a wide range of electronic and other publications, and promotes a legal, monetary and fiscal environment conducive to high economic growth and empowerment of ordinary citizens. (www.freemarketfoundation.com)

2. The scope of this comment

This comment is confined to discussing areas of particular concern that appear to be problematical from a constitutional, economic and practical viewpoint. The constitutional concerns relate to the lack of recognition that the Panel appears to have given to the Preamble to the Constitution, which lies at the heart of what the people of South Africa set out to achieve in establishing our Republic. The Preamble states that the freely elected representatives of the people adopted the Constitution so as to –

- ❖ Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- ❖ Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is protected by law;
- ❖ Improve the quality of life of all citizens and free the potential of each person; and
- ❖ Build a united democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The Constitution is the supreme law of South Africa and the sentiments expressed in its Preamble should act as a guide to everyone who is involved in the formulation of government policy. Those sentiments lay down an approach that is benign, seeking to improve relationships within South Africa and the rest of the world; the “family of nations” to which apartheid South Africa became a pariah because of the manner in which the apartheid government treated black citizens. The nature of the society is to be democratic and open; it is to be based on the will of the people, and every citizen is to be protected by law. Section 9(1) of the Bill of Rights states that “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

The steps proposed in the Report for the treatment of non-South Africans is most unfortunate, given the steps that so many countries took to bring an end to apartheid, the citizens of which the Panel

Johannesburg

1st Floor, Norfolk House, Fedsure Close 2,
cnr Norwich Close & 5th Street, Sandton
PO Box 785121, Sandton 2146
Tel: (011) 884 0270 • Fax: (011) 884 5672 • Email: fmf@mweb.co.za

Cape Town

1st Floor, Equity House,
107 St George's Mall, Cape Town
PO Box 805, Cape Town 8000
Tel: (021) 422 4982 • Fax: (021) 422 4983 • Email: fmf.ct@mweb.co.za

Website: www.freemarketfoundation.com

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suggests should not be treated equally by South African law. It would be extremely churlish if South Africa were to place limitations on the right of foreigners to purchase land. Foreigners who are legally resident in South Africa have the right to the full protection of the Constitution, including the Bill of Rights and government should not take any action to diminish those rights.

3. The Panel's Terms of Reference

The Panel's Terms of Reference (TOR) are repeated in full in view of the startling departure the Panel appears to have made from the TOR. The Panel were to investigate, consider and make recommendations regarding:

- ❖ *The nature, extent, trends and impact of the acquisition and use of, and investment in, land in South Africa by non-South African citizens;*
- ❖ *The extent to which the current lack of a comprehensive policy and legislative framework contributes to the acquisition, use and investment in land by non-South African citizens;*
- ❖ *Whether the government should (and how) monitor and intervene by policy, legislative and other means, in monitoring and preventing any possible negative consequences of land acquisition/ use by non-South African citizens;*
- ❖ *The impact on the property markets on (sic) land acquisition and use by non-South African citizens, distinguishing between land use for residential, commercial, agriculture, eco-tourism/tourism/game lodge and golf course purposes; and*
- ❖ *Comparative international/foreign practices (laws, policies, impact etc) on the issue of land ownership by non-citizens.*

However, the matters stipulated by the Minister appear to have received sparse attention and the Panel seem to have spent a great deal of time delving into matters not included in its terms of reference. It is difficult to comprehend how a Panel that is given the task of looking into the acquisition and use of land by non-South Africans could end up proposing the restructuring of the country's government.

3. Introduction to report

Under the heading "Introduction and Terms of Reference" on Page 5 of the report the Panel stated that it interpreted its task on the basis of the TOR to be that of providing answers to the questions "Who owns South Africa?" and "How much do they own?" With respect it is submitted that the TOR did no such thing. The task of the Panel was explicit and clear, it was to focus on the acquisition of land in South Africa by non-South Africans and to establish what negative consequences, if any, this might have for the country. It was, for this purpose, to examine comparative international/ foreign practices on the issue of land ownership by non-citizens.

The Panel did not have the right to broaden its brief, or to re-write it as it has done. As a result of overstepping the bounds of its brief the Panel has caused a great deal of confusion and uncertainty, which is not conducive to either foreign or local investment or the economic growth the country so desperately needs to reduce poverty and unemployment.

A careful reading of the TOR leads the reader to the conclusion that the Minister's intention was predominantly to establish whether or not the economic consequences of the purchase or use of land by non-South Africans was, or is likely to be, detrimental to the interests of citizens. The TOR do not appear to request the Panel to conduct an opinion poll but to attempt to measure the economic impact of such purchases and to base its recommendations on the facts of the case. The TOR also do not extend an invitation to the Panel to engage in politics, xenophobia, or racism.

The exact purpose of the second item in the terms of reference, which asks whether the "*current lack of a comprehensive policy and legislative framework contributes to the acquisition, use and*

investment in land by non-South African citizens” is not clear. There are a host of laws dealing with land ownership and the statutes are very comprehensive. If it were to mean, “Are non-South Africans investing in land because the statutes are not preventing them from doing so?” it would not require a Panel of Experts to conclude that the likelihood of such investment is greater than it would have been if there were statutory barriers to investment in land by non-South Africans. The question does not invite the Panel to propose the construction of such barriers.

The third item in the TOR, “*Whether the government should (and how) monitor and intervene by policy, legislative and other means, in monitoring and preventing any possible negative consequences of land acquisition/ use by non-South African citizens,*” on careful reading requires the Panel to advise the government whether it should intervene and if so, how it should intervene, in monitoring and preventing any possible negative consequences. The Panel therefore has the task, not only of identifying whether such “land acquisition/use by non-South Africans” has “any possible negative consequences” but presumably if it concludes that there are, or could be, of identifying precisely what those negative consequences might be. The TOR was not by this question given a mandate to itself create negative consequences for the country by recommending the restriction of acquisition or use of land by non-South Africans.

4. Unavailable documentation

The report is divided into three sections, and Section 3 is described as “*a separate compilation consisting of appendices 1-13 which clarify some of the aspects raised in Section 2.*” In other words, Section 3 was intended to form an integral part of the report. Unfortunately, no clarification was obtained as the appendices were not available. The appendices were not available on the website of the Department of Land Affairs, nor were they available on request from the department. It is therefore not possible for anyone to make a fully informed comment on the Panel’s report. The appendices should therefore be made available with immediate effect, the comment period should be extended to allow interested parties adequate time to study the information, and those who have made comments on the report without the necessary clarification of the aspects raised in Section 2, which is contained in the unavailable appendices, should be invited to revise their comments if they wish to do so after perusal of the appendices.

5. Precautionary Principle

In the first paragraph of the introduction to the Executive Summary the Panel seeks to justify broadening the scope of its terms of reference on the basis that “*the precautionary principle in responding to threats ought to be preferred.*” Are we to assume from this statement that the Panel has concluded that ownership and use of land by non-South Africans constitutes some form of “threat” to citizens of the country? The report itself does not support such a conclusion. However, the suggestion that the precautionary principle should play a dominant role in the issue of acquisition or use of land by foreign nationals is flawed. The precautionary principle is the subject of great contention, some arguing that following the precepts of the principle will save people from harm and others arguing that it is a recipe for stagnation and could, in fact, if it is followed, result in greater harm.

Dr Peter Saunders, Professor of Applied Mathematics at King’s College, London, had this to say about the precautionary principle:

“Too many of those who fail to understand or to accept the precautionary principle are pushing forward with untested, inadequately researched technologies, and insisting that it is up to the rest of us to prove them dangerous before they can be stopped. The perpetrators also refuse to accept liability; so if the technologies turn out to be hazardous, as in many cases they have, someone else will have to pay the penalty.

The precautionary principle hinges on the concept of the burden of proof, which ordinary people have been expected to understand and accept in the law for many years. It is also the same reasoning that is used in most statistical testing. Indeed, as a lot of work in biology depends on statistics, misuse of the precautionary principle often rests on misunderstanding and abuse of statistics. Both the accepted practice in law and the proper use of statistics are in accord with the common-sense idea that it is incumbent on those introducing a new technology to prove it safe, and not for the rest of us to prove it harmful.”¹

Professor Saunders was writing about the use of the concept in science and not in economics or sociology. Applying the precautionary principle to the matter of acquisition or use of land by non-South Africans, the Panel would have to conclude that the *status quo* should be maintained unless sound evidence is produced that land use and ownership by non-South Africans is causing harm. In fact, acting on the precautionary principle would require the Panel to advise government that it should take no action without solid evidence of general harm, and not merely isolated cases of real harm, caused to South Africans by foreigners owning land in South Africa.

Also applying the precautionary principle, the Panel would necessarily need to advise government that it should not prevent or inhibit the use or acquisition of land by non-South Africans because of the real danger of causing irreparable harm to the economy. Non-South Africans have been purchasing land for many years, often leading to their becoming naturalised citizens.

Halting or even suspending the right of foreigners to purchase land in the country could have severe long-term negative repercussions for the economy and especially for the unemployed and the poor. This has nothing to do with the so-called trickle down effect mentioned in the report but with the harsh realities of the workings of economic life. The authors of the report say on Page 13 of the report that *“it is argued that the extent of foreign ownership in the overall market is relatively small and therefore does not require policy interventions. The Panel still requires a clarification of this argument in view of the fact that, on the one hand it states that the proportion of foreign ownership [of land] is arguably small or even insignificant but on the other hand it is argued that their FDI contribution is an important justification against any policy intervention.”* The words “of land” have been added in the previous sentence, which immediately adds clarity and provides the answer to the Panel’s question.

A foreign investor may own a single house but could have millions of rands invested in machinery, stock and other business assets. However, deny that investor the right to own that house and you risk driving her, with her business and skills, out of the country - that is the concern that should lead the Panel to invoke the precautionary principle.

6. Economic Freedom

A section of the report on Page 13 under the heading **“Free market, investor confidence, job creation and no government intervention”** seeks to dismiss in two paragraphs a considerable body of evidence that shows incontrovertibly that economic freedom provides the best outcomes for everyone in a country, including the poor. Countries worldwide are moving increasingly to freer markets, resulting in higher growth and improvements in all measures of human development. The evidence cannot be easily dismissed.

The FMF is a member of the Economic Freedom Network, which consists of over 70 institutes and foundations in as many countries who are co-publishers of the annual Economic Freedom of the World Reports (EFW) (available at www.freetheworld.com) These reports have been published annually since 1996 and have become increasingly influential in guiding policies of governments

¹ See <http://www.i-sis.org.uk/prec.php> Use and Abuse of the Precautionary Principle

wishing to increase the welfare of their citizens. The purpose of the reports is to measure economic freedom in an accurate, comprehensive, and objective manner.

The key ingredients of economic freedom are:

- ❖ personal choice
- ❖ voluntary exchange co-ordinated by markets
- ❖ freedom to enter and compete in markets
- ❖ protection of persons and their property from aggression by others

7. The Panel of Experts has not taken account of the effects of eroding economic freedom

7.1 Human welfare is greater in countries with more economic freedom

Researchers, using the results of the EFW measurements, have established that there is a direct correlation between increased levels of economic freedom and greater human welfare. Countries that increase their levels of economic freedom show improvements in their levels of human welfare and reductions in economic freedom have the opposite effect; human welfare declines. This is not a matter of opinion; it is now well-established fact and cannot be ignored by governments in their policy decisions.

Those countries with the highest levels of economic freedom have higher per capita incomes, higher growth rates, higher levels of foreign direct investment, longer life expectancies, lower levels of infant mortality, reduced incidence of tuberculosis, greater access to improved water sources and sanitation facilities, less corruption, greater political and civil liberties, and cleaner environments. Most importantly, the poor in more economically freer countries are markedly better off than in countries with less economic freedom.

7.2 Reductions in economic freedom have disastrous consequences for the poor

Some commentators, such as the Panel of Experts that produced this report, attempt to contend that curtailing the economic freedoms of some citizens, especially the more affluent members of a society, will benefit the poor. This contention is fallacious; the opposite is true.

Limiting the activities of the citizens of a country by placing untoward restrictions on their freedom of exchange, their freedom to compete in markets, and the choices available to them; reducing the security of their property rights, including their right to freely buy and sell property; burdening them with costly regulation, all have negative consequences, not only for those who are restricted but also for everyone else in the economy. Restrictions and untoward costs that are imposed, for instance, on the wealthier and more productive members of a society, reduce economic growth and the knock-on effects impose welfare costs on the poor.

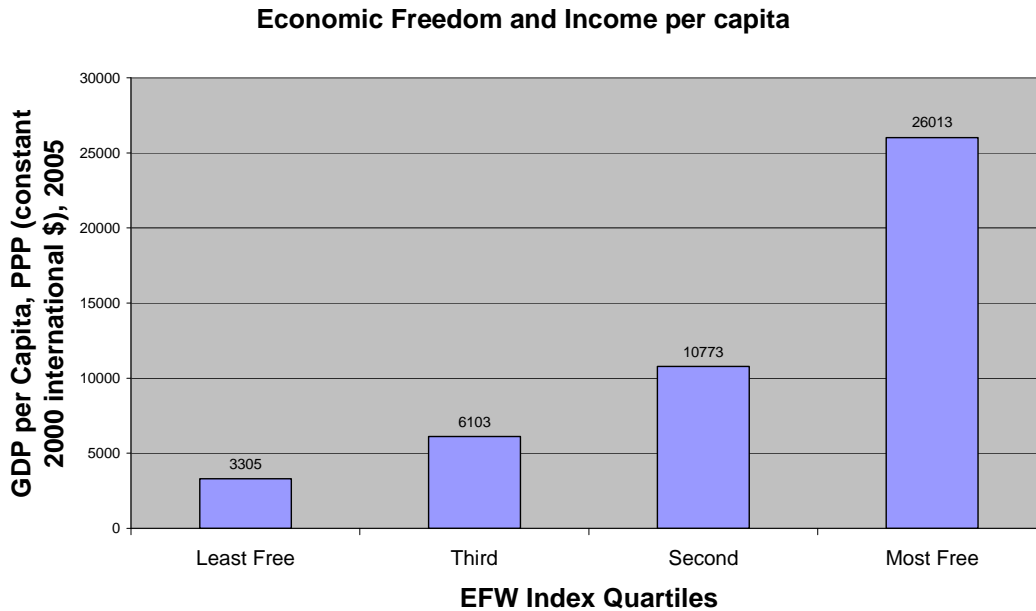
A decision to place limitations on investments by foreign nationals is a decision to reduce the economic growth and prosperity of the country's citizens. It is also a decision to reduce the potential to alleviate poverty and improve the lives of the poorest members of society. All human progress is dependent on increasing the amount of capital invested in productive enterprise, the efficiency with which that capital is utilised, and the innovation that increases that efficiency.

Prohibitions on purchases by foreigners include a prohibition by citizens to freely enter into voluntary exchanges relating to their property. What tends to be forgotten about a focus on the purchase by foreign nationals of land, or mineral rights, or shares in companies, is that curtailing the rights of foreign nationals to carry out such purchases simultaneously curtails the rights of citizens to freely sell their assets and put the proceeds towards more productive uses. Such an incursion into the rights of the citizens of the country is a serious infringement of their rights. The Panel of

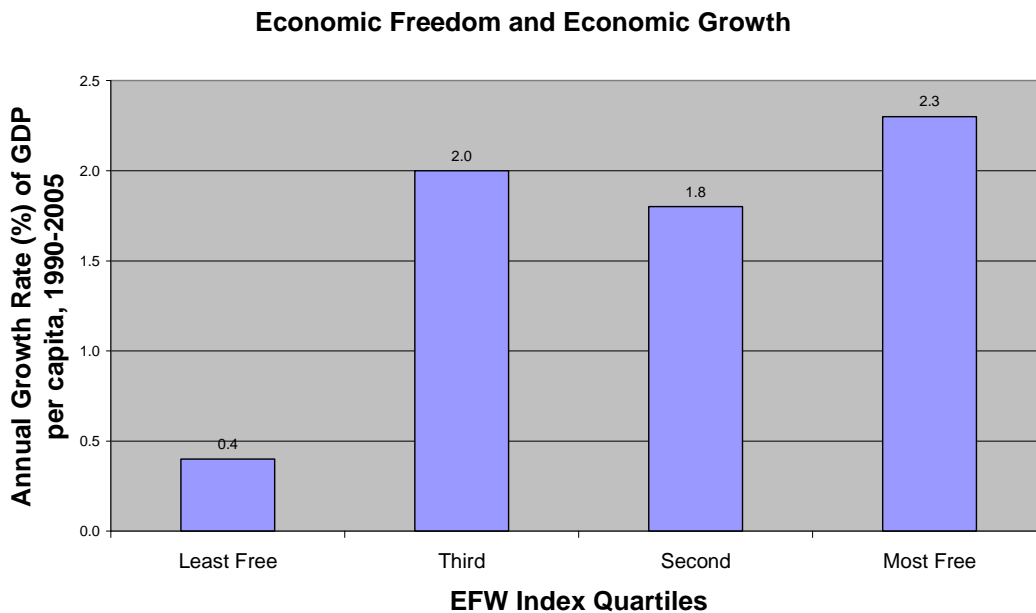
Experts have neglected to discuss this aspect of the matter they were asked to address, which constitutes a serious oversight.

8. Graphic illustration of the benefits of economic freedom

The following exhibits show graphically the benefits of economic freedom. The *Economic Freedom of the World: 2007 Annual Report* analysed the economies of 141 countries, rated them using 40 independent measures, and then ranked them from most free to least free economically. They then divided the countries into quartiles and examined each quartile to determine various economic and social outcomes achieved by the countries in the quartiles.

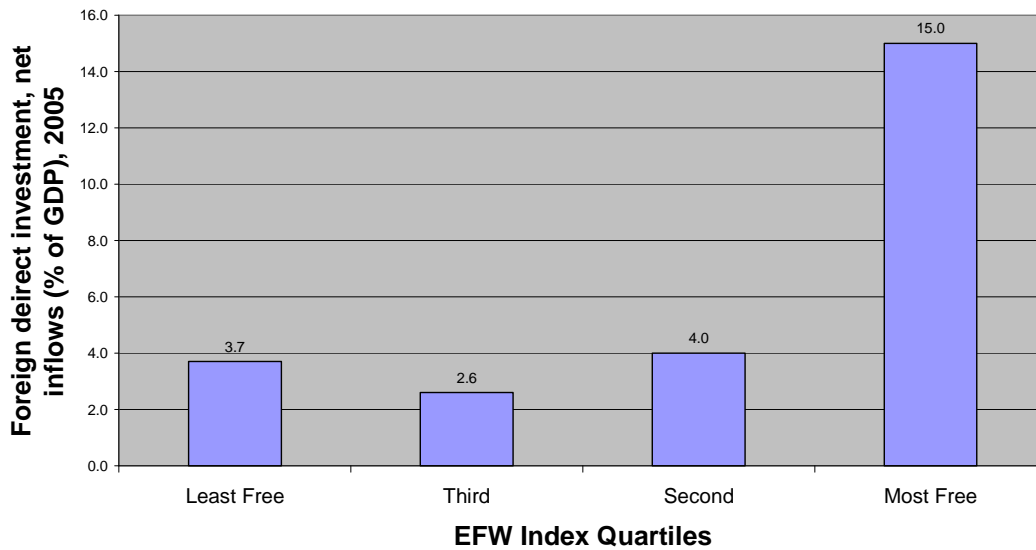


Countries with more economic freedom have substantially higher per capita incomes.



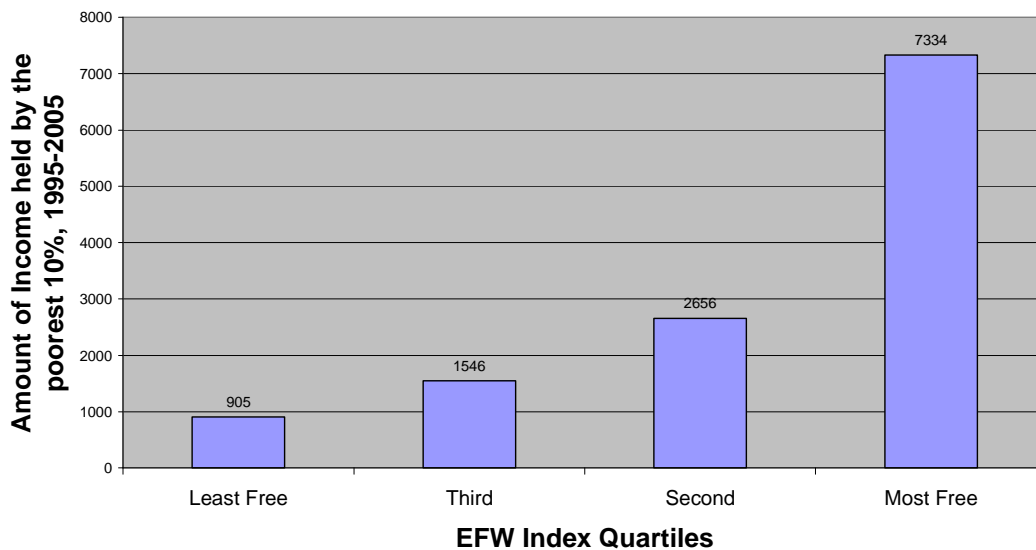
Countries with more economic freedom have higher growth rates.

Economic Freedom and Foreign Direct Investment



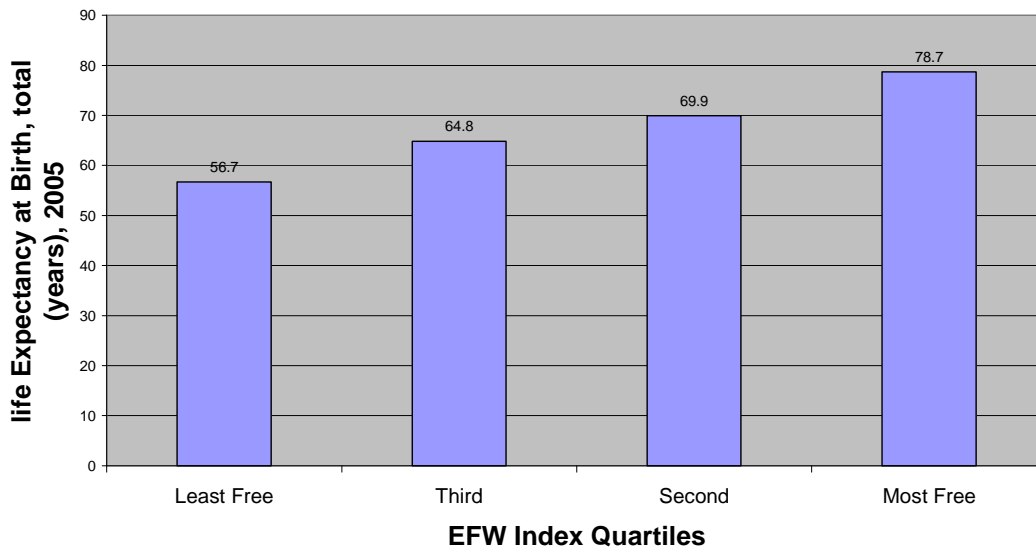
Countries with more economic freedom attract more foreign investment.

Economic Freedom and the Income Level of the Poorest 10%



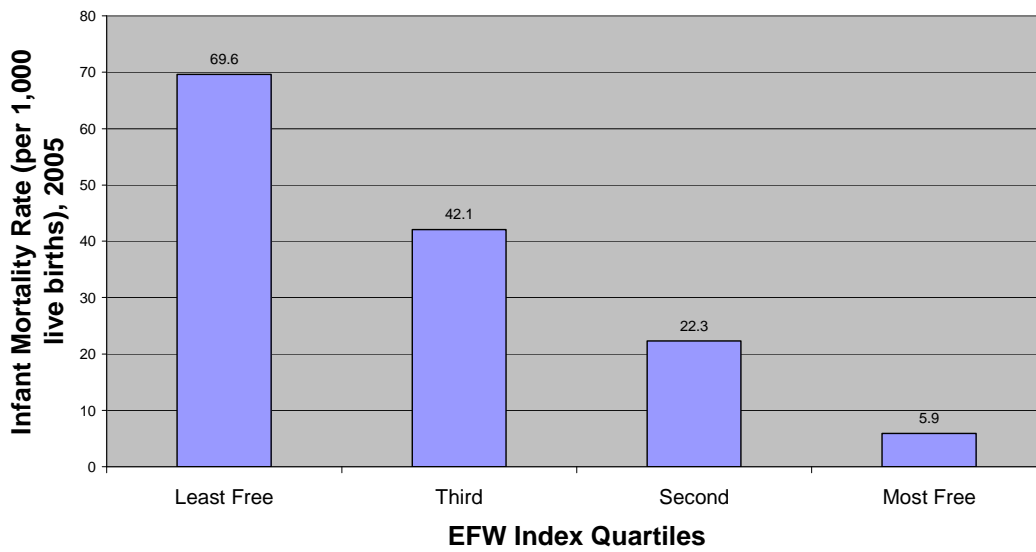
The amount per capita, as opposed to the share, of the income going to the poorest 10% of the population is much greater in countries with the most economic freedom than it is in those with the least. The share of income of the poorest 10% of the population is unrelated to the degree of economic freedom. The figures for the quartiles were: Least free 2.2%, Third 2.4%, Second 2.3%, and Most free 2.5%.

Economic Freedom and Life Expectancy



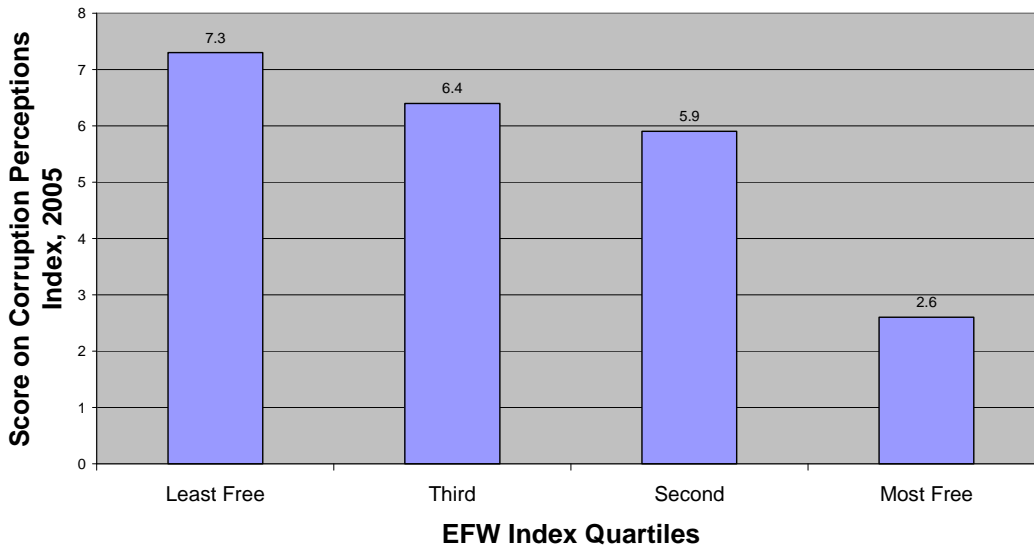
Life expectancy is over 20 years longer in countries with the most economic freedom than it is in those with the least.

Economic Freedom and Infant Mortality



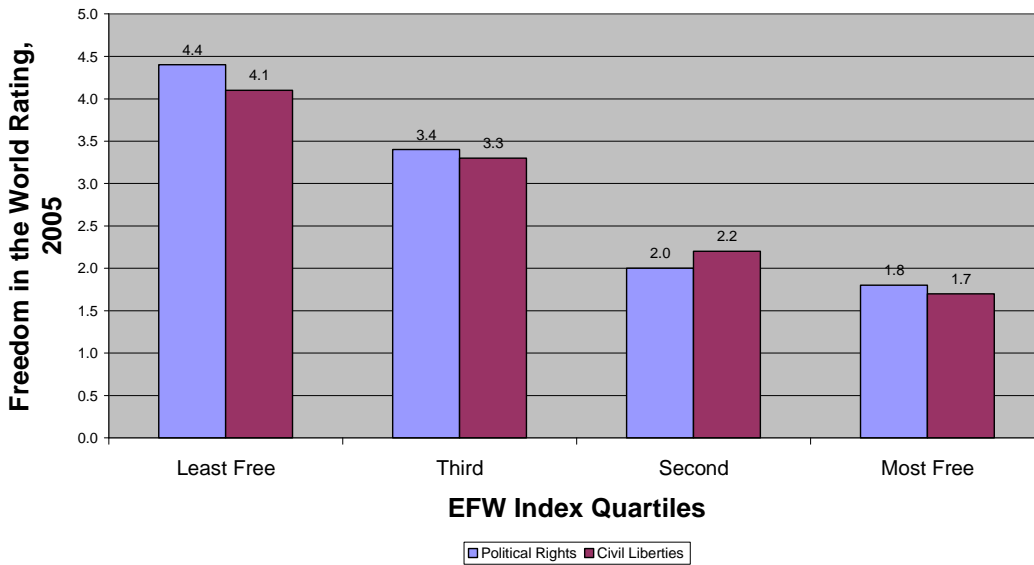
Infant mortality is much lower in countries with high levels of economic freedom.

Economic Freedom and Corruption



With fewer regulations, taxes and tariffs, economic freedom reduces the opportunities for corruption on the part of public officials.

Economic Freedom and Political Rights and Civil Liberties



Political rights and civil liberties are measured on a scale from one to seven; one = the highest degree of political rights/civil liberties; seven = the lowest.

Political rights (e.g. free and fair elections) and civil liberties (e.g. freedom of speech) go hand in hand with economic freedom.

9. Conclusion

The negative view adopted by the Panel of experts on the issue of acquisition of land in South Africa by foreigners, especially in view of the Panels' own statements regarding the inadequacy of the information at their disposal is a matter of grave concern. The matter they were requested to investigate is too important to have been dealt with in such a cursory manner.

There is a total lack of information on the economics of the issue such as the possible economic consequences of creating friction with economic partners.

Recklessness is displayed in the proposals put forward by the Panel. Under the heading “assessment and conclusion” the Panel makes the following extraordinary proposal: “*The Panel is of the opinion that during the process of rationalization and harmonization the President might be able to invoke the presidential proclamation powers under Section 97 of the Constitution to assign (as a transitional measure while new legislation is prepared) the administration of the multitude of legislation that currently reside (sic) with different ministries, to the Minister of Agriculture and Land Affairs.*” Does the Panel rate the question they are dealing with as akin to an enemy invasion that the President should be asked to contemplate such a far-reaching and ill-considered action?

It is to be hoped that the Minister and her government will reject this report in the interests of the economy and of the country’s international relations.

Prepared by:

Eustace G Davie

Director

Free Market Foundation

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