

CLIENT UPDATE

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THE ZIMBABWE ELECTIONS AND THE CURRENT STATE OF SANCTIONS

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While the mining industry is accustomed to monitoring Zimbabwean elections, the elections on 31 July, won by Robert Mugabe, may have more significance than usual to stakeholders with an eye on the market. Depending on the international community's ultimate verdict, they may well lead to the removal of EU sanctions, enabling much of the world to re-engage with the Zimbabwean diamond mining industry.

Before the election, Roeland van de Geer, the EU ambassador to South Africa, was quoted in newspaper sources as saying: "If the elections are internationally recognised, we will simply do what we have to do and lift our restrictive measures. Who are we as the EU to say, 'No, we know better than SADC [the Southern African Development Community]'?". It should be noted that Van de Geer's statement was not made in an official context, but such a move would be in line with EU policy of lifting sanctions in return for good governance and democratic outcomes – as happened recently in Burma/Myanmar – and might give hope to other African states whose extractive industries are constrained by international restrictions, such as the Democratic Republic of Congo.

Signs so far are mixed. Both the SADC and an African Union observer mission have declared the elections to be "fair and peaceful", creating some basis for considering the elections legitimate

and, in Van de Geer's words, "internationally recognised". The SADC has also called for "all forms of sanctions" against Zimbabwe to be lifted. But the EU, while not yet definitively stating whether it recognises the results or not, has stated that it "is concerned about alleged irregularities and reports of incomplete participation, as well as the identified weaknesses in the electoral process and a lack of transparency". Others have not been as reticent: US Secretary of State John Kerry, for example, has said the outcome of the election did not "represent a credible expression of the will of the people".

So those wishing to engage with the Zimbabwean mining industry, particularly its diamond sector, need to remain strongly aware of the applicable sanctions regimes.

The EU sanctions against Zimbabwe are governed by a number of instruments, most pertinently Council Regulation No. 314/2004. The Regulation binds every EU national, including both individual citizens and companies registered in an EU state. It also affects actions by a non-EU national within the EU. Some countries have their own implementing legislation – such as the UK's Zimbabwe (Financial Sanctions) Regulation 2009 and Zimbabwe (Financial Sanctions) (Suspension) Regulation 2013 – which may go even further than the EU Regulation.

The sanctions affect dealings with a number of listed individuals and entities, as set out in Annex III to the Regulation. This is frequently updated, most recently on 27 March 2013, and currently includes 10 individuals and two entities. The individuals are mainly members of the government of Zimbabwe or arms of the state. President Mugabe and his wife Grace are listed, as are the Commander of the Zimbabwe Defence Forces and seven others.

One of the two entities on the list is the Zimbabwe Mining Development Corporation ("ZMDC") (the other is Zimbabwe Defence Industries). ZMDC is the state-owned mining company with responsibilities for the mining and development of diamonds, gold and emeralds. It owns part or all of most of Zimbabwe's large diamond mines

The size of the EU list already reflects a softening of the EU's restrictive measures, in a process that is clearly designed to incentivise the country's government to move closer to true democracy. In the year to March, 102 individuals and eight entities were removed from the list: 21 individuals were removed in February 2012 following President Mugabe's announcement of a constitutional referendum; a further 81 individuals and eight entities were removed in March 2013 following the successful completion of the referendum. (The referendum limited the Presidential term to five years, removed the President's power to veto legislation and created an independent prosecuting authority.)

As to those remaining on the list, there should in theory be no financial dealings between them and EU nationals. If someone appears on this list, EU nationals (and those operating in the EU) may not:

- deal with funds or economic resources owned, held or controlled, directly or indirectly, by a restricted person or entity, or a person acting on their behalf;
- make available, directly or indirectly, funds or economic resources to or for the benefit of restricted persons or entities; or
- participate, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to promote the transactions referred to above.

“Funds and economic resources” are defined broadly and include cash and assets of any kind, whether tangible or intangible, movable or immovable.

In other words, an EU person cannot buy diamonds from ZMDC or invest in/partner with it. Removing the sanctions altogether would be a real sea change for the diamond mining industry, which has the potential to be a world leader. The discovery of the Marange diamond field in 2006 confirmed Zimbabwe’s place as a serious player. The field, which is owned by ZMDC and operated by ZMDC and partners, is thought to be one of the largest in the world. It is also controversial – diamonds from it are allowed to be sold under the Kimberley Process, a decision which was criticized by NGO Global Witness.

The effect of the sanctions regime on the diamonds industry is complex, as non-EU persons can still remain involved, but some estimates of its effect posit that Zimbabwe diamonds are priced at up to 25% below market value because of it. The lifting by the EU of the restrictive measures against ZMDC, allowing EU persons and others with a connection to the EU to buy diamonds, sell equipment, issue loans, provide insurance and otherwise engage with ZMDC and the industry, would surely provide a fillip to the prices. It could also increase investor confidence generally, lead to greater diversity and competition in the market, and perhaps help modernize the industry and raise the standards of the mines and the processes used within them.

At the same time, though, even if the EU sanctions regime is lifted in its entirety, the industry will continue to suffer constraints in international business, as the United States also has in place a sanctions regime against Zimbabwe. It is possible that a lifting of restrictions by the EU may convince the US that its own measures are no longer necessary to encourage democracy, but both parts of that equation remain speculative.

Under the relevant US laws, US individuals or entities, wherever located (and including foreign branches and representative offices of US companies as well as US branches and representative offices of foreign companies), may not, amongst other things:

- enter into a contract with a “blocked person or entity”, or supply goods or services to a blocked person or entity, the definition of which includes any company in which a blocked person or entity has 50% or more equity ownership;
- transfer funds to or through a bank that is a blocked person or entity;
- provide services, such as legal advice, in furtherance of a transaction with a blocked person or entity; or
- otherwise engage in a transaction or transfer in which a blocked person or entity has a direct or indirect interest.

The list of blocked entities can be found on the US Treasury website. As is the case under the EU restrictive measures, ZMDC is a blocked entity. But the US sanctions go much further than the current EU regime. There are, by way of example, well over 200 Zimbabwe-related entries on the US list, compared to the EU’s 12, including a variety of mining companies, government ministers, arms of the state (such as the Industrial Development Corporation of Zimbabwe) and state-owned banks. As a result, US individuals and entities will continue to find it very difficult to mine or work with the mining industry in Zimbabwe in a lawful manner. Even non-US individuals will need to bear in mind both the possibility of inadvertently breaching US sanctions, and the likelihood that US companies will be wary of getting into any business deals with even a tangential connection to Zimbabwe.

For now, both the EU and US sanctions regimes remain in place and all entities subject to them must continue to monitor the regulatory framework closely before engaging with Zimbabwe’s mining industry. They may continue to watch competitors who are not constrained by EU and US regulations with some consternation. The leading global companies will need to keep their powder dry and expend their resources on developing diamonds and other minerals in countries that remain blessed (or at least not condemned) by the international community.

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Please do not hesitate to contact us with any questions.

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