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NEXT STOP: ZIMBABWE MINING INVESTMENTS IN THE POLITICAL CROSSHAIRS

On February 10, 2010, Zimbabwe published the Indigenisation and Economic Empowerment (General) Regulations (“IEER”).¹ IEER requires that 51 percent of shares of businesses located in Zimbabwe be held by indigenous shareholders.² It has the effect that investors in companies with assets valued at more than \$500,000 must provide the government with a “shareholder status” to establish whether the 51 percent threshold has been met.³ Companies that do not meet the threshold must provide a plan for achieving majority ownership by indigenous shareholders within 45 days after IEER enters into effect on March 1, 2010.⁴ IEER provides a 5 year window within which companies must achieve majority ownership by indigenous shareholders.⁵

Several multinational mining companies may be affected by the new requirements. These companies include Caledonia Mining and Aquarius Platinum Limited, which already have issued press releases regarding the IEER.⁶ Other multinational mining companies with interests in Zimbabwe also may be required to provide plans to migrate equity in their local operations to Zimbabwean nationals.⁷ Similarly, it appears that foreign investors in other sectors, such as banking, will also have to comply with IEER.⁸

Zimbabwe’s publication of IEER is one in a series of moves by President Mugabe and his party affecting the rights of foreign investors. In some instances, similar actions by

¹ See *Zimbabwe: Indigenisation Regulations Gazetted*, The Herald News Report, dated February 10, 2010, available at <http://allafrica.com/stories/201002100052.html> (a publication of the government of Zimbabwe) (hereinafter “*Zimbabwe: Indigenisation Regulations Gazetted*”).

² *Zimbabwe: Indigenisation Regulations Gazetted*.

³ *Zimbabwe: Indigenisation Regulations Gazetted*; compare Lebo Nkatanzo, *Kasukuwere defies Tsvangirai on black quota*, New Zimbabwe News Report, dated February 11, 2010, available at <http://www.newzimbabwe.com/news-1803-Kasukuwere%20to%20defy%20Tsvangirai/news.aspx> (hereinafter “*Kasukuwere defies Tsvangirai on black quota*”).

⁴ *Zimbabwe: Indigenisation Regulations Gazetted*.

⁵ *Zimbabwe: Indigenisation Regulations Gazetted*.

⁶ See *Government of Zimbabwe sets out Regulations for Indigenisation*, Caledonia Mining Corporation Press Release, dated February 12, 2010, available at <http://www.caledoniamining.com/pdfs/02122010.pdf>; compare Chanel Pringle, *Aquarius studying Zimbabwe indigenisation regulations*, Mining Weekly Report, dated February 10, 2010, available at <http://www.miningweekly.com/article/aquarius-studying-zimbabwe-indigenisation-regulations-2010-02-10>.

⁷ See, e.g., Peta Thornycroft, *White-Owned Companies May be Forced to Give Up Majority Stakes in Zimbabwe*, Voice of America News Report, dated February 10, 2010, available at <http://www1.voanews.com/english/news/africa/White-Owned-Companies-May-be-Forced-to-Give-Up-Majority-Stakes-in-Zimbabwe-84020902.html> (stating that “One of the world’s largest mining companies, Rio Tinto, has a small diamond mine in Zimbabwe and has said it hopes to expand operations. Rio Tinto spokesman Nick Cobban in London describes the regulations as ‘draconian and unworkable.’”).

⁸ See, e.g., Peta Thornycroft and Sebastien Berger, *Black Zimbabweans to take control of white-owned companies*, Telegraph News Report, dated February 9, 2010, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/7198580/Black-Zimbabweans-to-take-control-of-white-owned-companies.html> (listing Barclays Bank and Standard Chartered Bank as companies affected by IEER).

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the Mugabe government have violated international treaty rights of foreign investors. For example, Zimbabwe has engaged in a continued nationalization of farm investments since 2000. In 2000, settlers and veterans, enticed by promises of President Mugabe, occupied foreign-owned farmland.⁹ Zimbabwe later formalized the expropriation of foreign-owned farmland through the Land Acquisition Act.¹⁰ Dutch farm investments in Zimbabwe were covered by an international investment treaty between the Netherlands and Zimbabwe, protecting them against expropriation and allowing Dutch investors to bring claims in international arbitration.¹¹ In the *Funnekotter* arbitration, an international investment tribunal agreed with the Dutch farmers who had brought expropriation claims against Zimbabwe,¹² awarding them more than EUR 8 million, or close to 70% of claimed losses.¹³

Investors faced with IEER requirements may have treaty rights similar to those at issue in the *Funnekotter* arbitration. The United Nations Conference on Trade and Development reports that, as of June 1, 2009, Zimbabwe has similar investment protection treaties in force with the People's Republic of China, Denmark, Germany and Switzerland.¹⁴ These treaties protect investors who are nationals of the signatory countries against expropriation, as well as unfair or discriminatory treatment.¹⁵ They further provide investors with recourse to international arbitration against Zimbabwe to claim for violations of those rights.¹⁶

IEER is a further development in a tense relationship between Zimbabwe President Mugabe and Prime Minister Tsvangirai – two rivals in a power sharing agreement after a bitterly contested 2008 Presidential election. Prime Minister Tsvangirai champions an investor-friendly platform.¹⁷ IEER was promulgated and published by a cabinet member supporting President Mugabe who favors more nationalist economic policies.¹⁸ President Mugabe recently defended IEER, whereas Prime Minister Tsvangirai denounced it as null and void.¹⁹

IEER still leaves open the possibility of reducing the quota of required local ownership for mining investments.²⁰ Lower quotas are currently being discussed with the Chamber of Mines of Zimbabwe.²¹ Agreement on substantially lower quotas would be a success for Prime Minister Tsvangirai. A potential negative sign for any such rapprochement between President Mugabe and Prime Minister Tsvangirai is Zimbabwe's cancellation of African Consolidated Resources' mining license around the same time it published IEER.²² In any event, even a lower quota would require nationalization of a likely significant shareholding in the Zimbabwean mining operations of foreign mining companies.

⁹ See *Profile: War Veterans' leader 'Hitler' Hunzvi*, BBC News Report, dated April 20, 2000, available at <http://news.bbc.co.uk/2/hi/africa/699951.stm>.

¹⁰ *Bernardus Henricus Funnekotter and ors v Zimbabwe*, ICSID Case No ARB/05/6, Award, dated April 15, 2009, at para. 97 (Zimbabwe conceding that "Land Acquisition Act and the Constitution of Zimbabwe ... is tantamount to expropriation") (hereinafter "Funnekotter").

¹¹ Agreement on the Encouragement and Reciprocal Protection of Investments Between the Republic of Zimbabwe and the Kingdom of the Netherlands of December 11, 1996, Arts. 6, 9 (hereinafter "Netherlands-Zimbabwe BIT").

¹² Funnekotter, at paras. 39, 46 (further alleging violations of the fair and equitable treatment obligations as well as the full protection and security provisions).

¹³ Funnekotter, at paras. 107, 126, 133, 148.

¹⁴ UNCTAD, Zimbabwe, Total Number of Bilateral Investment Treaties Concluded, 1 June 2009, available at http://www.unctad.org/sections/dite_pccb/docs/bits_zimbabwe.pdf.

¹⁵ See, e.g., Agreement between the Government of the People's Republic of China and the Government of the Republic of Zimbabwe on the Encouragement and Reciprocal Protection of Investments of May 21, 1996, Arts. 3, 4 (hereinafter "PRC-Zimbabwe BIT"); Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of October 25, 1996, Arts. 3, 5 (hereinafter "Denmark-Zimbabwe BIT"); Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments of September 29, 1995, Arts. 2, 3, 4 (hereinafter "Germany-Zimbabwe BIT"); Agreement between the Swiss Confederation and the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments of August 15, 1996, Arts. 4, 6 (hereinafter "Switzerland-Zimbabwe BIT").

¹⁶ PRC-Zimbabwe BIT, Art. 9(3) (providing for international arbitration with regard to limited claims involving the amount of compensation for expropriation); Denmark-Zimbabwe BIT, Art. 9; Germany-Zimbabwe BIT, Art. 11; Switzerland-Zimbabwe BIT, Art. 10.

¹⁷ Tafadzwa Mutasa, *Power struggle threatens Zim reforms*, ZimOnline Report, dated February 12, 2010, available at <http://www.zimonline.co.za/Article.aspx?ArticleId=5705>.

¹⁸ *Kasukwere defies Tsvangirai on black quota*.

¹⁹ Tafadzwa Mutasa, *Power struggle threatens Zim reforms*, ZimOnline Report, dated February 12, 2010, available at <http://www.zimonline.co.za/Article.aspx?ArticleId=5705>; compare Nelson Banya, *Mugabe defends local takeover of Zimbabwean firms*, Reuters News Report, dated February 17, 2010, available at <http://af.reuters.com/articlePrint?articleId=AFJ0E61G0IT20100217>.

²⁰ MacDonald Dzirutwe, Zim releases shock foreign ownership rules, Moneyweb News Report, dated February 10, 2010, available at <http://www.moneyweb.co.za/mw/view/mw/en/page295023?oid=346035&sn=2009+Detail&pid=287226>.

²¹ MacDonald Dzirutwe, Zim releases shock foreign ownership rules, Moneyweb News Report, dated February 10, 2010, available at <http://www.moneyweb.co.za/mw/view/mw/en/page295023?oid=346035&sn=2009+Detail&pid=287226>.

²² Govt cancels ACR's diamond licence, Zimbabwe Guardian News Report, dated February 16, 2010, available at <http://www.talkzimbabwe.com/news/117/ARTICLE/6030/2010-02-16.html>.

Zimbabwe's pressure on the mining industry is consistent with a broader, global pattern of nationalization of mining investments. A well known example of such a program is the Venezuelan migration of mining interests, moving foreign held equity in mining ventures into joint venture companies with the Venezuelan government.²³ Several investment arbitrations against the Venezuelan government concerning mining investments are currently pending.²⁴ In the current economic environment, natural resource investments may come under increasing pressure from host states. Zimbabwe's recent actions are a reminder of the need for careful political risk planning.

²³ See, e.g., *Venezuela targets migration of mining firms to joint ventures*, CONAPRI News Report, dated October 4, 2007, available at <http://www.conapri.org/english/ArticleDetailV.asp?articleid=294574&CategoryId2=15048>.

²⁴ See, e.g., *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB(AF)/04/6); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1).

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