KING & SPALDING

Client Alert

International Arbitration Group

August 13, 2013

Recent Developments: Zimbabwe—What Legal Options are Available to Mining Companies?

President Robert Mugabe of Zimbabwe, who has been in power since 1980, was re-elected to another term on July 31, 2013. On August 6, 2013, the government announced plans to seize control of foreign-owned mining interests, with no compensation in return, as part of a program to accumulate assets worth US$ 7 billion.[1] Zimbabwe has a high concentration of foreign-investment in platinum, gold, diamond and aluminum businesses. The program aims to force foreign companies to cede 51% of their assets to local investors or to the government.[2] On August 7, 2013, Mugabe's Zanu-PF party announced it will launch a new stock exchange "in which only blacks [would] be able to trade shares in foreign owned companies it plans to seize."[3] Zimbabwe is no stranger to such large-scale expropriations. In 2000, President Mugabe launched the controversial fast-track land reforms, seizing the majority of the country's 4,500 commercial farms without providing compensation. Faced with this new wave of State-sponsored expropriations, what legal options are available to international mining investors active in Zimbabwe?

Foreign mining companies with investments in Zimbabwe whose assets are seized as a result of Zimbabwe's actions may be able to bring compensation claims against Zimbabwe before international investment arbitration tribunals. Compensation claims are not restricted to active mining properties as exploration and development properties may also have significant value that can be determined by expert means on an independent basis. Zimbabwe has entered into a number of bilateral investment treaties ("BITs") and the treaties that are in force may be relied upon by investors to bring claims against Zimbabwe. The bilateral investment treaties that are currently in force include those between Zimbabwe and China, Czech Republic, Denmark, Germany, the Netherlands and Switzerland, respectively.[4] Bilateral investment treaties entitle investors from one State party to submit claims against the other State party to international arbitration.[5] Even if no treaty exists between an investor's home State and Zimbabwe, the investor may be able to bring claims under a treaty between Zimbabwe and a third country if its investment is held through a subsidiary incorporated in that country.[6]

While the language of each bilateral investment treaty must be carefully examined, most treaties mandate that an investor's investments shall enjoy "fair and equitable treatment,"[7] "full protection and security,"[8] and treatment no less favorable than that granted to the host State's own investors of any

For more information, contact:

James Berger
+1 212 556 2202
jberger@kslaw.com

Harry Burnett
+1 212 556 2201
hburnett@kslaw.com

Wade Coriell
+1 713 751 3272
wcoriell@kslaw.com

Jan Schäfer
+49 69 257 811 200
jshaefer@kslaw.com

Tom Sprange
+44 20 7551 7529
tsprange@kslaw.com

King & Spalding
Frankfurt
Taunusanlage 1
Frankfurt am Main 60329
Tel: +49 69 257 811 000
Fax: +49 69 257 811 100

Houston
1100 Louisiana Street, Suite 4000
Houston, TX 77002-5213
Tel: +1 713 751 3200
Fax: +1 713 751 3290

London
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500
Fax: +44 20 7551 7575

New York
1185 Avenue of the Americas
New York, NY 10036-4003
Tel: +1 212 556 2100
Fax: +1 212 556 2222

other State.[9] Most treaties also entitle the investor to "adequate and effective compensation" if the host State expropriates or nationalizes its investment,[10] and some also protect the investment from "unreasonable and discriminatory treatment."[11]

Bilateral investment treaties also contain dispute resolution clauses that, as noted above, allow investors to submit disputes with the host State to international arbitration, in particular to the International Centre for Settlement of Investment Disputes (ICSID) or by way of *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[12] Here too, it is important to carefully examine the language of each bilateral investment treaty.[13]

Zimbabwe signed the ICSID Convention on March 25, 1991, and became a Contracting State on June 19, 1994.[14] As a result, international investment arbitrations may be brought against Zimbabwe before ICSID, as has already happened. In *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, a group of Dutch landowners and farmers initiated ICSID arbitration proceedings against Zimbabwe after being deprived of their property, in violation of the Netherlands-Zimbabwe BIT, as a result of the State's fast-track land reforms referred to above.[15] The Arbitral Tribunal in that case found in favor of the investors and awarded compensation.[16] Two other ICSID cases against Zimbabwe are currently pending, also involving the expropriation of commercial farms and of forestry and timber processing enterprises.[17]

Therefore, if the government of Zimbabwe successfully forces foreign mining companies to cede 51% of their assets to local investors or to the government itself without compensation, foreign mining companies that are protected by bilateral investment treaties that are in force may be able to claim against Zimbabwe for breach of the treaties' provision prohibiting expropriation without adequate and effective compensation.[18]

Other legal options may be available to foreign investors to bring claims against Zimbabwe before international arbitration tribunals if they are unable to rely on bilateral investment treaties that are currently in force. First, companies may have entered into a concession contract or a joint venture agreement with a governmental authority which may contain its own dispute resolution clause. These clauses need to be carefully reviewed, and may provide for disputes to be resolved through international commercial arbitration before an internationally recognized body such as the International Chamber of Commerce in Paris, or the London Court of International Arbitration.[19]

Second, if there are no contract-specific dispute resolution clauses, it may be possible for foreign investors to bring claims against Zimbabwe before international arbitration tribunals by way of Zimbabwe's own laws. The relevant laws of Zimbabwe in the context of mining disputes appear to be the Mines and Minerals Act,[20] and the Zimbabwe Investment Authority Act.[21] There are no general dispute resolution provisions in either of these two Acts that would allow foreign investors to bring claims against Zimbabwe before international arbitration tribunals.

However, the Mines and Minerals Act refers in several places to arbitration as a way of determining the appropriate level of compensation in a given situation.[22] In particular, Article 401(1) provides that "the holder of any registered mining location may apply in writing to the Board for the issue of an order authorizing the transfer to him of a registered mining location held by any other person, hereinafter referred to as the other location."[23] Article 401(9) further provides that "[a]ny person who may be adversely affected by the exercise of the rights granted under an order shall be entitled to be paid such compensation by the person in whose favour the order has been made as may be agreed upon or, failing agreement, as may be determined by arbitration."[24] In other words, if a foreign mining company's registered mining

location is transferred in accordance with these above-cited provisions, recourse to arbitration may theoretically be possible. In that case, the arbitration procedure would take place in accordance with Zimbabwe's Arbitration Act, which is based on the UNCITRAL's 1985 Model Law on International Commercial Arbitration.[25] Notwithstanding the above, it appears unlikely that the government-announced plan to seize control of foreign-owned mining interests would abide by the requirements of Article 401 of the Mines and Minerals Act, and thus allow affected foreign investors to have recourse to the arbitration provisions under Article 401(9) of the Mines and Minerals Act.

In conclusion, if the Government of Zimbabwe does implement its plan to seize control of foreign-owned mining interests without paying compensation in return, these investors would be well-advised to ensure that they can rely on bilateral investment treaties entered into by Zimbabwe. In these circumstances, and as compared to other options that may be available, there is no doubt that the protection provided by bilateral investment treaties is the most effective form of protection for foreign investments, including mining concessions, given that foreign investors are granted access to independent and effective international investment arbitration tribunals for the resolution of their disputes.

* * * * *

---

[1] *See, e.g.*, http://www.bloomberg.com/news/2013-08-06/zimbabwe-to-seize-mines-while-compensating-banks-ministe.html.

[2] *Id.*

[3] *See, e.g.*, http://www.iol.co.za/dailynews/news/zim-wants-exclusive-black-stock-exchange-1.1559049.

[4] It is always worthwhile to check with the relevant government authority whether the BIT in question has or has not entered into force. For example, in the case of the United Kingdom-Zimbabwe BIT, which does not appear to be in force, that government authority would most likely be the Foreign & Commonwealth Office.

[5] Chinese BITs do not cover Hong Kong investors where the investor is a company.

[6] Some BITs provide that their scope of protection extends beyond the continental borders of the State in question. Thus, for example, the Netherlands-Zimbabwe BIT protects investments made by investors based in the Netherlands Antilles, Aruba, as well as in the Netherlands itself (Art. 11).

[7] *See, e.g.*, China-Zimbabwe BIT, Art. 3(1); Czech Republic-Zimbabwe BIT, Art. 2(2); Denmark-Zimbabwe BIT, Art. 3; Germany-Zimbabwe BIT, Art. 2(1); Netherlands-Zimbabwe BIT, Art. 3(1); Switzerland-Zimbabwe BIT, Art. 4(1).

[8] *See, e.g.*, China-Zimbabwe BIT, Art. 3(1); Czech Republic-Zimbabwe BIT, Art. 2(2); Denmark-Zimbabwe BIT, Art. 2(2); Germany-Zimbabwe BIT, Art. 4(1); Netherlands-Zimbabwe BIT, Art. 3(1); Switzerland-Zimbabwe BIT, Art. 4(1).

[9] *See, e.g.*, China-Zimbabwe BIT, Art. 3(2); Czech Republic-Zimbabwe BIT, Art. 3; Denmark-Zimbabwe BIT, Art. 3; Germany-Zimbabwe BIT, Art. 3; Netherlands-Zimbabwe BIT, Art. 3(2); Switzerland-Zimbabwe BIT, Arts. 4(2) and 4(3).

[10] *See, e.g.*, China-Zimbabwe BIT, Art. 4; Czech Republic-Zimbabwe BIT, Art. 5; Denmark-Zimbabwe BIT, Art. 4; Germany-Zimbabwe BIT, Art. 4(2); Netherlands-Zimbabwe BIT, Art. 6; Switzerland-Zimbabwe BIT, Art. 6.

[11] *See, e.g.*, Denmark-Zimbabwe BIT, Art. 2(2); Germany-Zimbabwe BIT, Art. 2(2); Netherlands-Zimbabwe BIT, Art. 3(1); Switzerland-Zimbabwe BIT, Art. 4(1).

[12] Of the Zimbabwe BITs that appear to be in force, the China BIT provides for *ad hoc* arbitration (Art. 9); the Germany (Art. 11), Netherlands (Art. 9) and Switerland (Art. 10) BITs provide for ICSID arbitration only; and the Czech Republic (Art. 8) and Denmark (Art. 9) BITs provide for either ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

[13] Thus, for example, the China-Zimbabwe BIT limits the types of disputes that can be brought to international arbitration to disputes "involving the amount of compensation for expropriation" (Art. 9(3)).

[14] *See* https://icsid.worldbank.org.

[15] *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, April 22, 2009, ¶¶ 19, 26, available at http://www.italaw.com/sites/default/files/case-documents/ita0349.pdf.

[16] Id., ¶ 148.

[17] *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15); and *Border Timbers Limited et al. v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25). These cases were brought under the Germany-Zimbabwe and Switzerland-Zimbabwe BITs.

[18] Moreover, under customary international law, a state must pay compensation to a foreign national if the state expropriates its property. *See, e.g.*, Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2009) 322, § 7.2.

[19] It is also possible, although less likely, that these dispute resolution clauses also provide for the possibility of resorting to ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

[20] Available at http://www.osall.org.za/docs/2011/03/Zimbabwe_Mines_and_Minerals_Act_Chap_21_05.pdf.

[21] Available at http://www.cfuzim.org/index.php?option=com_content&view=article&id=367:zimbabwe-investment-authority-act-chapter-1430&catid=63:legal-the-law&Itemid=90.

[22] *See, e.g.*, Mines and Minerals Act, Arts. 114 ("Compensation for interference with registered mining location"), 115 ("Concession holder may expropriate dormant location"), 177 ("Priority of mining rights"), 337 ("Procedure and powers of judge") and 401 ("Minister may order holder of mining location to transfer it").

[23] *Id.*, Art. 401(1).

[24] *Id.*, Art. 401(9).

[25] Available at http://www.parlzim.gov.zw/attachments/article/92/ARBITRATION_ACT_7_15.pdf.