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Working for Open Government, Democracy, Constitutionalism, Rule of Law, Justice and Human Rights

## SANCTIONS: THE EU, US AND POST-MUGABE ZIMBABWE

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### Introduction

The Government of Zimbabwe blames the country’s steep economic decline in the decades after 2000, on sanctions imposed on Zimbabwe, particularly those of the EU and US. The Government has framed these measures as an international trade embargo against Zimbabwe and, because they do not have the imprimatur of the United Nations Security Council, maintain that they are illegal.

The measures imposed by the US, EU and other western countries, are neither a trade embargo against Zimbabwe nor purport to bind all countries of the United Nations. The legality of the measures imposed by the EU was upheld in two legal suits brought before the General Court of the Court of Justice of the European Union. The cases were reported as *Tomana and Others v The Council of the*

*European Union and European Commission Case C-330/15 P and Aguy Georgias and Others<sup>1</sup> v The Council of the European Union and European Commission Case T 168/12.* Significantly, the applicants in both cases were only the targeted individuals affected by the measures. The Government of Zimbabwe was not a party to either suit. In the *Tomana* case the applicant was Johannes Tomana (then the Attorney-General) and 120 other individuals on the EU sanctions list. Despite this, the suit was conducted under the auspices of the Attorney-General, leading to the suspicion that legal costs, reported to be “millions of dollars” were met by Zimbabwean taxpayers. The Sunday Mail suggested that the costs, which included the engagement of two local lawyers and top council from the United Kingdom, were paid by “friends of Zimbabwe inside and outside the country”.<sup>2</sup> When reporting on the proceedings, state media incorrectly stated that Mr. Tomana had brought the suit on behalf of the Government of Zimbabwe.<sup>3</sup>

In August, 2019 the SADC summit in Tanzania declared 25 October as the day on which “SADC Member States can collectively voice their disapproval of the sanctions [on Zimbabwe] through various activities and platforms until the sanctions are lifted.” What, then, are the “sanctions” imposed by the EU and US and will lifting them significantly improve Zimbabwe’s economy?

## The European Union

In January 2002, the EU Council, reviewing consultations taking place under article 96 of the Cotonou Agreement, expressed its serious concern about the situation in Zimbabwe, noting the escalation of violence, intimidation of political opponents and the harassment of the independent press. It specifically warned that appropriate measures would be taken if there was any interference with the EU Election Observer Mission for the 11 March, 2002 presidential election in Zimbabwe. In mid-February, the Government of Zimbabwe effectively expelled the head of the EU Mission, Pierre Schori, after “taking exception” to his “political utterances”<sup>4</sup> and “political arrogance”.<sup>5</sup> The EU Council responded two days later, withdrawing the remaining EU election observers from Zimbabwe and, on the 18th, adopting two Common Positions on Zimbabwe under Council Decisions 2002/145/CFSP and EC/148/2002, both binding on EU Treaty state parties. Since the Government of Zimbabwe has tried to cast the punitive measures imposed by the EU, as the EU merely “siding with” the UK in a “bi-lateral dispute with Britain over land redistribution”,<sup>6</sup> it is worth noting that the EU was not the only international body to take action in response to the violent nature and flawed conduct of the 2002 presidential elections and human rights violations. A month after the EU response, Zimbabwe was suspended from the Councils of the Commonwealth.<sup>7</sup>

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<sup>1</sup> The “others” in the Georgias case were two companies owned by him.

<sup>2</sup> UK exposed as AG takes on EU *The Sunday Mail* 19.05.12.

<sup>3</sup> See, for example, Sanctions Lawsuit: EU Lacks Evidence *The Herald* 01.28.14 where the reporter writes that the sanctions are imposed on the Government of Zimbabwe, while the article makes a claim that the EU lacks evidence against the listed individuals. Similarly, the Sunday Mail article indicates that the suit concerns “sanctions against Zimbabwe” and then reports that the basis of the suit is that there is no justification for listing the applicants bringing the suit.

<sup>4</sup> Zimbabwe Expels EU Chief Observer *The Telegraph* 17.02.02 The Government had refused to accredit Mr. Schori as an observer (stating that some EU nationals were unacceptable as observers) and only allowed him to enter the country as a tourist. The expulsion was effected when immigration officials visited Mr. Schori and handed him a new visa with an earlier expiry date.

<sup>5</sup> EU Imposes Sanctions on Zimbabwe *The Guardian (UK)* 18.02.02.

<sup>6</sup> See, for example, a recent iteration of this in ZIDERA: It Was Never about Democracy *The Herald* 23.10.19, where the same reasoning is applied to the measures taken by the US,

<sup>7</sup> Mugabe withdrew Zimbabwe from the Commonwealth in December 2003, after the suspension, initially for a year, had been extended indefinitely in February 2003.

Council Decision EC/148/2002 related to the “Cotonou Agreement”, a Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States [including Zimbabwe] and the European Community and its Member States signed at Cotonou in Benin on 23 June 2000. The agreement specifically ties measures to enhance trade and co-operation between state parties with “a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law”.<sup>8</sup> The linkage is intended “to promote and expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment.”<sup>9</sup> Where a party has a concern that these objectives are not being met, Article 8 provides for inter-party dialogue in the hope of averting recourse to the Agreement’s non-execution clause. A formal request for Article 8 dialogue was made by the EU in February 2001 and accepted by Zimbabwe in March. However, the five meetings which took place to June concerned only discussions around the agenda. Eventually, the aims of the dialogue were set as:

- an end to political violence,
- an invitation to the EU to observe the 2002 elections
- concrete action to protect the freedom of mass media;
- independence of the judiciary and respect for its decisions; and
- an end to illegal occupation of properties.

When discussion failed to yield any results, in October 2001, Article 96 consultations were initiated, and in view of the pending elections, a short timeframe of two months set to achieve the aims given as a deadline – without which “appropriate measures” would be implemented as provided by the Article (96(2)).<sup>10</sup> The obstruction of the EU Election Observer mission by the expulsion of Mr. Schori led to the Council Decision in February, 2001.

### EC/148/2002

The measures adopted by the Council Decision were:

- The suspension of finance for budgetary support under Zimbabwe's European Development Fund National Indicative Programmes.
- Suspension of financial support for all EU funded projects in Zimbabwe except those in direct support of the population, in particular in the social sectors.

EU contributions to operations of a humanitarian nature were not affected and regional projects were evaluated on a case by case basis and continued where appropriate.

### 2002/145/CFSP

This Council Decision applied an arms embargo against Zimbabwe. An arms embargo by the UK was already in place, from May 2000, on account of Zimbabwe’s entry into the DRC war. The war had also made the UK uncomfortable about the presence of the British Military Advisory Training Team (BMATT), in the country since independence in 1980, which then withdrew from Zimbabwe six weeks after the

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<sup>8</sup> Preamble to the Agreement.

<sup>9</sup> Article 1 of the Agreement.

<sup>10</sup> For details on the Article 96 process in relation to Zimbabwe see Liisa Laakso, University of Jyväskylä, The Difficult Political Dimension of the Cotonou Agreement, paper presented at the 6th Pan-European Conference on International Relations, 12 -15 September 2007, Turin.

Council Decision.<sup>11</sup> The Council Decision also applied an asset freeze and travel ban against 20 listed individuals, increased six months later to 79 (by 2002/754/CFSP). Individual EU members were to enforce the travel bans while the arms embargo and assets freeze formed part of regulations, EC 310/2002. Expanded regulations were introduced as EC 314/2004 pursuant to Council Decision 2004/161/CFSP. The Council Decision of 2011/101/CFSP refined and repealed 2004/161/CFSP and became the reference decision for subsequent Common Foreign and Security Policy (CFSP) decisions which amended and added to it. The arms embargo comprised bans on technical assistance, financing and financial assistance related to military activities, a ban on the export of equipment which might be used for internal repression. Annex 1 to the regulations set out a lengthy list of equipment which falls within the ban

The restrictive measures were renewed annually by the Council, albeit usually with an updated annex of listed individuals and entities. The number of people and entities on the list peaked after the violence of 2008, with 203 individuals and 40 entities listed – Council Decision 2009/68/CFSP. Beginning with that year, the reasons for an individual being on the list were added to the annex.

Over the period of the Inclusive Government (2009 – 2013) the number of the people on the list declined, and derogations allowed for the arms embargo and travel bans. In 2010, nine entities were removed from the list and in 2013 (after what the EU considered a successful constitutional referendum), restrictive measures on the majority of individuals and entities were suspended (with a further eight following in 2014) and travel restrictions eased slightly. By 2016, only President Mugabe and his wife were subjected to a travel ban and asset freeze with restrictive measures against the heads of the five security sectors remaining, but suspended.

The appropriate measures under the Cotonou agreement barring direct aid to the government of Zimbabwe were suspended in August 2012 and, then, by virtue of Council Decision 2014/96/EU expired on 1 November 2014. Due to the violence of 1 August, 2018 and January 2019, Article 8 of the Cotonou agreement providing for political dialogue between the Government of Zimbabwe and the European Union (EU) was re-activated in June. Further changes in 2019 by 2019/284/CFSP and the death of Mugabe mean that the only current restrictive measures by the EU are as follows:

- Robert and Grace Mugabe and Zimbabwe Defence Industries remain subject to the restrictive measures (although Robert Mugabe is now deceased, the asset freeze would still have application to his estate if any part thereof is in the EU);
- Perence (sic) Shiri, Constantino Chiwenga Philip Valerio Sibanda remain on the list but the restrictive measures are suspended.
- The arms embargo against Zimbabwe remains in place.

After Brexit, the UK will continue the measures through the Zimbabwe (Sanctions) (EU Exit) Regulations 2019 made under the Sanctions and Anti-Money Laundering Act 2018.

## The United States

The USA has two forms of sanctions relevant to Zimbabwe. The first is imposed by Executive Order, with the President using powers under the International Emergency Economic Powers Act (50 U.S.C. 1701), the second by the Zimbabwe Economic Recovery and Democracy Act.

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<sup>11</sup> The supply of 450 Land Rovers to the Zimbabwe Republic Police was also halted, see – Paul Williams: The Europeanization of British Foreign Policy and the Crisis in Zimbabwe POLSIS, European Research Institute, University of Birmingham p8.

## Presidential Executive Orders

President of the United States may impose sanctions on individuals and entities anywhere in the world using powers under the International Emergency Economic Powers Act. The National Emergencies Act (50 U.S.C. 1601, 1622(d)) permits the annual renewal of the emergency and section 301 of title 3, of the United States Code allows for the delegation of Presidential powers accorded under the emergency. The legislation is clearly broadly interpreted as the provisions can only be invoked “to deal with any unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States” (1701b of the Act). When first invoked in 2003, under Executive Order 13288, it was held that:

*...the actions and policies of certain members of the Government of Zimbabwe and other persons to undermine Zimbabwe’s democratic processes or institutions, [are] contributing to the deliberate breakdown in the rule of law in Zimbabwe, to politically motivated violence and intimidation in that country, and to political and economic instability in the southern African region.*

In 2008, Executive Order 13469, expanded the scope of the national emergency declared in the earlier executive order and authorized “the blocking of the property of certain persons determined to have engaged in actions or policies to undermine democratic processes or institutions in Zimbabwe, to commit acts of violence and other human rights abuses against political opponents, and to engage in public corruption.” The actions these persons were deemed “to continue to pose an unusual and extraordinary threat to the foreign policy of the United States”. It seems, however, that the Global Magnitsky Act of 2016 (Public Law 114-328), would have been used had it then been available as it is more appropriate, being designed to sanction those who have engaged in “gross violations of human rights or significant acts of corruption.” It was recently applied against “the Gupta brothers”, alleged to have been involved in acts of corruption through “state capture” in South Africa.

The Presidential Executive Order in relation to Zimbabwe provides that:

*[a]ny transaction or dealing by a United States person or within the United States in property or interests in property blocked pursuant to this order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of any person listed.*

Only persons and entities on the list are embargoed from trading with “United States Persons” – a defined category which includes juristic persons. The Executive Order is therefore not a trade embargo against Zimbabwe. Individuals on the list are known as Specially Designated Nationals (SDNs). The list is available by following the links here: <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>. The list includes SDNs from every country subject to US sanctions and is difficult to examine but, in relation to Zimbabwe, appears to contain 83 individuals, 21 farm enterprises and 32 entities. Implementation and monitoring falls to the US Treasury Department's Office of Foreign Asset Control (OFAC) and the listing of SDNs, by delegation of presidential authority, is undertaken by the OFAC in consultation with the Secretary of State. OFAC has made regulations to effect the Executive Order (31 CFR Part 541).<sup>12</sup> Unlike the EU Council, however, OFAC has not been assiduous in keeping the list of SDNs updated, and it now contains several people whose malfeasance occurred nearly two

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<sup>12</sup> Details of the “Zimbabwe Sanctions Program” and explanatory notes to the regulations can be found here: <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/zimb.pdf>.

decades ago, have little political relevance or connection with the current ZANU PF government or are since deceased. The Executive Order has been continued, as amended, every year since its introduction.

## ZIDERA

The second form of sanctions are against Zimbabwe itself (rather than individuals and entities) and arise from the Zimbabwe Democracy and Economic Recovery Act (Public law 107-99, ZDERA or ZIDERA) of 21 December 2001<sup>13</sup>. Section 4(c)(1) of the Act requires the Secretary of the Treasury to instruct the United States' executive directors to major and specified international financial institutions<sup>14</sup> (IFIs) to vote against the grant of any loans to the Government of Zimbabwe "except as may be required to meet basic human needs or for good governance." In addition, ZDERA provides that the United States Government will withhold funding for the African Development Fund equivalent to any funding provided to Zimbabwe through Pillar II<sup>15</sup> for arrears clearance."<sup>16</sup> These requirements are only to be removed upon certification by the US President<sup>17</sup> that Zimbabwe has met certain conditions (revised in June 2018) many of which relate specifically to the then pending elections in 2018, and probably require further amendment. The President of the US may waive the requirement of meeting the conditions if he or she believes this to be in the national interest. The general conditions<sup>18</sup> are that:

- a) the rule of law has been restored in Zimbabwe, including respect for ownership and title to property, freedom of speech and association, and an end to the lawlessness, violence, and intimidation;
- b) the Government of Zimbabwe has demonstrated a commitment to an equitable, legal, and transparent land reform;
- c) the government implement the 2013 constitution – particularly by "aligning" all legislation that predated the constitution with its provisions and implementing its devolution requirements;
- d) the Government demonstrates a sustained commitment to reforming Zimbabwe's economy;
- e) the government accounts for diamond revenue in a transparent and credible manner;
- f) the Zimbabwean Armed Forces, the National Police of Zimbabwe,<sup>19</sup> and other state security forces are responsible to and serve the elected civilian government.

Specific conditions relating to elections are:

- a) the voters roll is released in printed and digital format;
- b) ZEC is permitted to carry out its functions in an entirely independent manner;
- c) the Defence Forces of Zimbabwe are neither permitted to actively participate in campaigning for any candidate nor to intimidate voters, and must verifiably and credibly uphold their

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<sup>13</sup> <http://www.veritaszim.net/node/3753> .

<sup>14</sup> International Monetary Fund; International Bank for Reconstruction and Development, the International Development Association (together called the "World Bank"); the International Finance Corporation, the Inter-American Development Bank; the Asian Development Bank; the Inter-American Investment Corporation; the African Development Bank, the African Development Fund; the European Bank for Reconstruction and Development; and the Multilateral Investment Guaranty Agency (section 3 of ZDERA).

<sup>15</sup> The African Development Fund provides support through three pillars: Pillar I – funding for state-building; Pillar II arrears clearance for loans contracted with the international community; Pillar III capacity building and technical assistance.

<sup>16</sup> Section 4(c)(2).

<sup>17</sup> Section 4(c)(1) of ZDERA.

<sup>18</sup> Set out in section 4(d) as amended.

<sup>19</sup> This is the nomenclature for these services used by ZDERA.

constitutionally mandated duty to respect the fundamental rights and freedoms of all persons and be non-partisan in character;

- d) international observers, including from the United States, and European Union are permitted to observe the entire electoral process;
- e) candidates are allowed free and full access to state media, which must afford equal time and coverage to all registered parties, in an impartial manner, and must be able to campaign in an environment that is free from intimidation and violence;
- f) civil society organizations must freely and independently be able to carry out voter and civic education, and to monitor the entire electoral process.
- g) the president-elect is free to assume the duties of the office;

In two sections 9 & 10 added to ZDERA in June 2018 <sup>20</sup>, Congress also provides guidance as to what it considers the Government of Zimbabwe should do to meet the conditions. These considerations are sometimes wrongly regarded as additional conditions. They are that the Government:

- 1) seeks to unify the people of Zimbabwe by:
  - a) acknowledging that human rights have been abused, including during Operation Murambatsvina, and in the wake of the 2008 elections;
  - b) undertaking a genuine process of national reconciliation up to and including acknowledging and apologizing for the Gukurahundi atrocities;
  - c) taking steps to offer redress or compensation to victims of the above abuses; and
  - d) ordering an immediate inquiry into the disappearance of prominent human rights activists, including Patrick Nabanyama, Itai Dzamara, and Paul Chizuze.
- 2) (and SADC) should enforce the SADC tribunal rulings from 2007 to 2010, including 18 disputes involving employment, commercial, and human rights cases surrounding dispossessed Zimbabwean commercial farmers and agricultural companies.

It is often forgotten that ZDERA adopts a carrot and stick approach and not just the latter. If the conditionalities are met, ZDERA requires the United States executive director of each IFI to take proactive steps for the “restructuring, rescheduling, or eliminating the sovereign debt of Zimbabwe” held by the institutions and to propose that the IFIs “undertake financial and technical support for Zimbabwe, especially support that is intended to promote Zimbabwe’s economic recovery and development, the stabilization of the Zimbabwean dollar, and the viability of Zimbabwe’s democratic institutions”.

Like the EU measures, ZDERA is thus not a trade embargo against the country, but applies conditionalities before the US will vote in favour of loans by IFIs to Zimbabwe, when these come up for consideration. The Government of Zimbabwe has, through the Transitional Stabilisation Programme (TSP), indicated that it will implement political reforms that will have the effect of meeting the requirements of ZIDERA, so it is unclear why it finds them objectionable. Paragraph 4 of the TSP, for example, lists among its objectives for “Vision 2030”:

- Improved Governance and the Rule of Law.
- Re-orientation of the country towards Democracy.
- Upholding Freedoms of Expression and Association.
- Peace and National Unity.
- Respect for Human and Property Rights.

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<sup>20</sup> <http://www.veritaszim.net/node/3753> .

- Attainment of Responsive Public Institutions.
- Broad based Citizenry Participation in national and socio-economic development programmes.
- Political and Economic Re-engagement with the global community.
- Creation of a Competitive and Friendly Business Environment.

However, the rules of IFIs require that Zimbabwe repay prior loans before accessing further funding. Zimbabwe is indebted to all relevant IFIs except the IMF, and therefore has not been eligible for loans over the more than two decades that it has been in arrears. Zimbabwe cleared its US\$107,9 million debt with the IMF in October 2016. However, the *pari passu* rule requires that arrears are cleared with all IFIs to meet the condition. This entails Zimbabwe clearing the nearly 2.3 billion outstanding to the World Bank (U1.3bn), the African Development Bank (US\$680m) and the European Investment Bank (US\$308m).<sup>21</sup> For this reason, ZDERA has never been implemented and the US has never voted against any loans to Zimbabwe. Loans to Zimbabwe had been suspended by the IMF and World Bank in September and October 1999 respectively, (i.e. before the land invasions in 2000 that are often cited as the initial catalyst<sup>22</sup>) according to ZDERA, because of “economic mismanagement, undemocratic practices, and the costly deployment of troops to the Democratic Republic of the Congo”.<sup>23</sup>

## Implementation and effects

Through ZDERA, Congress “has the sense” (i.e. suggests but does not require) that the US President should consult with the governments of European Union member states, Canada, the United Kingdom and Australia and other appropriate foreign countries when listing SDNs and locating their assets held outside Zimbabwe; to implement travel and economic sanctions against those individuals and their associates and families; and provide for the eventual removal or amendment of the sanctions.<sup>24</sup> This does not appear to have happened and, as noted, the US SDN list has not been regularly updated and revised in the manner of that of the EU. The lists of Canada, Switzerland, New Zealand and Australia generally named the same key individuals and entities as the EU.

## EU Sanctions Post-Mugabe

As noted, only Grace Mugabe effectively remains subject to the EU’s assets and travel ban, with the commanders of the defence forces remaining on the list, but with the measures against them suspended. The arms embargo and measures against Zimbabwe Defence Industries remains. The EU’s National Indicative Programme funding has resumed and dialogue under Article 8 of Cotonou is again taking place (following concerns around the violence in mid-January 2019), launched on 5 June 2019 “to create greater understanding between Zimbabwe and the EU.”

## US Sanctions Post Mugabe

The number of people and entities currently on the US SDN list is variously reported, as often the same people or entities are listed more than once with different names, or holding companies and

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<sup>21</sup> These are debts to multilateral lenders only bilateral debt to Paris Club and non-Paris club members amounts to another US\$3.4 billion.

<sup>22</sup> The Government of Zimbabwe often presents that the suspension of loans began as a response to its “Fast Track Land reform programme”. However, after the land invasions of February 2000, in May 2000, the IDA (read World Bank) suspended all other new lending to the Government of Zimbabwe and in September 2000, the IDA suspended disbursement of funds for ongoing projects under previously-approved loans, credits, and guarantees to the Government of Zimbabwe.

<sup>23</sup> Section 4 of ZDERA.

<sup>24</sup> Section 6 of ZDERA.



subsidiaries are both listed, causing some difficulty. Controversial Chinese businessperson Sam Pa, for example, is listed more than a dozen times under each of his aliases. However, there appears to be 53 entities presently on the SDN list. Of these, 21 are farms held by companies whose beneficial owners are some of the listed individuals. 17 of the remaining 32 companies are linked to John Bredencamp and were probably listed on account of the Zimbabwean entrepreneur's involvement in controversial and government/military linked mining deals in the Democratic Republic of Congo and arms dealing.

Gécamines's DRC based Kababankola Mining Company and Operation Sovereign Legitimacy (Osleg) Pvt Ltd are also part of the last 15 listed, for similar reasons.

Four of these 15 are companies where the beneficial owner is a SDN – Comoil (Pvt) Ltd (Saviour Kasukuwere); Famba Safaris (Webster Shamu) and Divine Homes (Pvt) Ltd (Edmore Veterai) and Sino-Zim, believed to be a joint venture between Sam Pa and the C.I.O. and involved in exploiting Marange diamonds.<sup>25</sup>

Similarly, three companies are listed probably on account of human rights abuses and corrupt practices linked to the Zimbabwe military's involvement in the exploitation of Marange diamonds – Block Wood Mining (a.k.a. Marange Resources) Condurango Investments Pvt Ltd a.k.a. Mbada Diamond Mining and Zimbabwe Defence Industries (Pvt) Ltd. The last is listed by all countries with designated Zimbabwean entities on account of the arms embargo.

Two ZANU PF party Companies are listed – M & S Syndicate (Pvt) Ltd and ZIDCO Holdings (Pvt) Ltd. Companies in the ZIDCO stable are FBC Bank; Jongwe Printing & Publishing Company; Treger Holdings; Catercraft; Zidlee Enterprises; Ottawa (a property management firm); Oryx Diamonds; Southern Africa Reinsurance (Sare) and NDH Holdings (Pvt) Ltd. These companies only fall under the OFAC regulations if 50% or more of the beneficial ownership is that of ZIDCO.<sup>26</sup> Jongwe Printing is listed separately as a designated entity but this is unnecessary if ZIDCO has a 50% or more holding in the company.

The last three entities are the moribund (and plundered<sup>27</sup>) Zimbabwe Iron and Steel Company (ZISCO) Zimbabwe Mining Development Corporation (ZMDC) Minerals Marketing Corporation of Zimbabwe (MMCZ).

The inclusion of the MMCZ as an SDN is sometimes presented by government officials as evidence<sup>28</sup> that sanctions apply against Zimbabwe itself and not merely individuals and specified entities. The basis of the argument arises from the fact that section 42 of the Minerals Marketing Corporation of Zimbabwe Act<sup>29</sup> requires that all minerals (except silver and gold) are marketed and sold through the MMCZ. The MMCZ must be paid a commission of 0.875% sales. It is thus suggested that no Zimbabwean minerals can be exported to American buyers and non-American buyers are also placed in a difficult position as sanctions prohibit the payment of the commission to the MMCZ. This claim does not withstand scrutiny. Under section 43 of the MMCZ Act, the MMCZ may grant exporters permission to deal directly with buyers, which may then include buyers in the United States. This system appears to be in place with regard most of Zimbabwe's major exporters, such as those exporting platinum group metals. Buyers pay for these exports directly into sellers' Zimbabwean nostro accounts, and the MMCZ commission is then paid from these accounts. They are thus unaffected by the listing of MMCZ as a SDN.

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<sup>25</sup> An Inside Job Zimbabwe: The State, The Security Forces, and a Decade of Disappearing Diamonds *Global Witness* September 2017.

<sup>26</sup> Revised Guidance on Entities Owned By Persons Whose Property and Interests in Property are Blocked Department of the Treasury August 2014.

<sup>27</sup> Ministers Lead Zisco Looters *The Independent* 20.05.05.

<sup>28</sup> Recently, at an Extractive Industries Transparency Initiative Conference in Harare on 02.10.19.

<sup>29</sup> Chapter 21:04.

In any event the obvious solution to the problem, if it were such, would be to remove the MMCZ's monopoly over mineral marketing, which may be of dubious constitutionality in any event.

The claim that the SDN list imposes sanctions against Zimbabwe has some cogency in relation to the Zimbabwe Mining Development Corporation. This 100% state owned entity does not merely develop mining in Zimbabwe, as the name of the Act<sup>30</sup> implies, but conducts its own mining activities. A complete list of ZMDC mines and the extent of its ownership in these mines is difficult to determine. The ZMDC website has not been updated since 2015 and the last annual report appearing there is from 2012. Nonetheless, ZMDC has, or previously had mines, in the following areas: Gold – Bar-20 Mine, Kimberworth Investments (Pvt) Ltd trading as Sabi Gold Mine; Jena Gold Mines and Elvington Gold Mine, (all 100% ZMDC owned); Emeralds – Sandawana Mines (Pvt) Ltd (90%); Tin – Kamtivi Tin Mines (40%); Copper – Copper Queen, Lomagundi Smelting and Mining (Alaska Mine), Sanyati Copper Mines and Mhangura Copper Mine (all 100%?); Zimbabwe Germany Graphite Mines (Pvt) Limited (50%); Platinum – ZMDC has been linked in reports<sup>31</sup> to joint ventures in platinum mining on the Great Dyke with Global Platinum Resources, Todal Mining and Sino-Zim Global. ZMDC's share in these proposed joint ventures appears to be less than 50%; Diamonds – Marange Resources (Pvt) Ltd (100%), Mbada Diamonds (Pvt) Ltd (50% - with Grandwell Holdings), Diamond Mining Corporation (Pvt) Ltd (50%); Anjin Investments (Pvt) Ltd (10%).

However, most of these ZMDC mines are dormant or have been shut down. In 2016 most diamond mining in Marange (including Mbada and Marange Resources) was consolidated under the Government's Zimbabwe Consolidated Diamond Company (Pvt) Ltd leading to protracted litigation and then unbundling/demergers in the post-Mugabe era. Of all 23 wholly owned government mines nationally, only three are running. Government's attempts to sell off its mines under the Mnangagwa administration has failed to date, mainly due to the indebtedness of the companies.<sup>32</sup>

In order to demonstrate a loss of revenue to the state on account of sanctions against the ZMDC, it is necessary to show either that mining operations were affected by the inability to obtain capital equipment and inputs due to sanctions or that this could only be obtained at a significantly higher price from countries that had not imposed sanctions on these entities and/or the inability to sell outputs to sanctioning countries meant that the product could not be sold at all, or only at significantly reduced prices elsewhere. There do not appear to be any studies which have undertaken analysis of this nature. ZANU PF's 2013 election manifesto stated that sanctions had cost the country US\$42 billion in lost revenue of which US\$3,4 billion was held to be reduced GDP.<sup>33</sup> In 2017 government awarded a \$150 000 tender to a group of academics for research to be conducted to show how the supposed \$42 billion loss had arisen.<sup>34</sup> The subsequent report, has never been published.<sup>35</sup> There appears to have been only one genuine attempt to analyze the effect of the measures, undertaken by a South African based NGO, IDASA, in 2010.<sup>36</sup> The study found that "the primary blame for the downward spiral of the national

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<sup>30</sup> Chapter 21:08.

<sup>31</sup> Including its own annual report for 2012, the last published report on its website, which does not appear to have been updated in any respect since 2015.

<sup>32</sup> Why Zim's Big Mine Sale is Failing? *Newsday* 02.04.19.

<sup>33</sup> ZANU PF 2013 Election Manifesto Table 1 p50. How the figures are arrived at is not stated.

<sup>34</sup> UZ Wins Bid For 'Sanctions' Impact Study *Daily News* 26.01.17.

<sup>35</sup> Ahead of the "anti-sanctions day march Foreign Affairs and International Trade Minister, Dr Sibusiso Moyo, presented a paper to Cabinet, indicating Zimbabwe lost US\$98 billion due to sanctions of which US\$21 billion was reduced GDP. This may be the report by the UZ academics, apparently to be published after cabinet approval – see 'Zim loses US\$98 billion due to sanctions' *The Sunday Mail* 11.09.19.

<sup>36</sup> The date does not appear on the paper and is deduced. The paper is available here: [https://www.academia.edu/1861567/Restrictive\\_Measures\\_and\\_Zimbabwe\\_Political\\_Implications\\_Economic\\_Impact\\_and\\_a\\_Way\\_Forward](https://www.academia.edu/1861567/Restrictive_Measures_and_Zimbabwe_Political_Implications_Economic_Impact_and_a_Way_Forward).

economy undoubtedly has more to do with Zanu-PF's misgovernance and its penchant for self-destructive economic policies",<sup>37</sup> giving the post-2000 land policies and resource nationalism through an attempted forced "indigenisation" of business, industry and mining, as examples. In any event, it appears likely that the impact of sanctions on the ZMDC and Zimbabwe's economy is inconsequential and can in no way be used to explain Zimbabwe's dramatic economic collapse after 2000.

## Spillover effects

### *Pariah status*

The sanctions regime of the US does, however, have some spill-over effects. Disapprobative measures highlight Zimbabwe's democratic deficits to the investor community and particularly past failures to respect property rights, which will be of considerable concern. The result is that Zimbabwe obtains something of a pariah status such that, all else being equal, investors may prefer a different investment destination.

### *Ease of doing business*

The extent to which this obtains in practice is unknown as all else is not equal and other factors render Zimbabwe a singularly unattractive investment destination. Despite frequent claims that Zimbabwe is "blessed with abundant mineral sources" viable investment opportunities in mining (and anywhere else) are far from obvious. Furthermore, Zimbabwe remains low on the ease of doing business index,<sup>38</sup> but perhaps the greatest disincentive for potential investors in Zimbabwe is the economic crisis itself. This means that investors are unable (despite Government assurances to the contrary) to remit dividends to offshore shareholders or repay loans to those who may otherwise have provided the capital for the venture in Zimbabwe.

### *International Banking*

A major spillover effect related to the ease of doing business arises from the need for those sending US dollars to and from Zimbabwe to use US-based correspondent banks to effect the transfers. These banks cannot make transfers to or on behalf of SDNs and doing so attracts a hefty fine equivalent to the greater of \$250,000 or twice the amount of the underlying transaction.<sup>39</sup> Some banks have fallen foul of these provisions and money in transit to Zimbabwean entities confiscated en route.<sup>40</sup> The consequence is that many more people and entities are affected than just SDNs. A correspondent bank asked to process a transfer to Zimbabwe will rarely be prepared to peel away the sometimes onion-like layers of the receiving entity to determine the ultimate beneficial shareholder of the entity, determine whether that owner is a SDN, and whether the OFAC regulations apply, which may require legal counsel. It is easier and less risky to simply decline to deal with Zimbabwe related transactions. In some ways this problem is self-inflicted as it would not arise if there was more transparency around beneficial

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<sup>37</sup> At p11.

<sup>38</sup> 155 out of 190 economies.

<sup>39</sup> OFAC Guide Zimbabwe Sanctions Program December 2013 p5.

<sup>40</sup> For example, in 2013 OFAC reportedly intercepted a US\$2.1 million loan granted to Olivine Industries by the PTA Bank as the Industrial Development Corporation held a 51% shareholding in Olivine as was a SDN. Standard Chartered Bank agreed a settlement of an 18 million payment to OFAC for transactions related to Zimbabwean SDNs – see [https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408\\_scb\\_webpost.pdf](https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408_scb_webpost.pdf) (in 2019). There are also reports (in 2017) that a fine of US\$385 million was levelled against CBZ Holdings on account of dealings on behalf of SDN, ZB Bank, though it is unclear how the fine applies to a non-US person. The fine was challenged by CBZ, and it seems the matter remains unresolved.

ownership. However, at present, because of this, very few banks are still prepared to act as correspondent banks for transfers to Zimbabwe. Apparently, only six such banks remain, and one may be sure that the cost of their services is not competitive. Nonetheless, this is ultimately an inconvenience rather than economically debilitating.

### *Undue Caution*

There is anecdotal evidence that some companies, particularly those based in the US, aware that there is some sort of sanctions programme against Zimbabwe, but without bothering to determine what it is, have declined to do business with Zimbabwean companies to avoid any risk of falling foul of OFAC regulations. There are suggestion that this has included lines of credit to some Zimbabwean manufacturers, previously reliant on US offshore loans for operations. However, there is no firm evidence or reports on this available and it is not known how extensive this is or the exact impact. Furthermore, some financial platforms are unable to control specific payees. Thus Paypal, for example, suspended any transactions involving Zimbabwean IP addresses.

### The Government Narratives

The Government of Zimbabwe maintains that the sanctions were imposed as a response to its redistributive land policies and not as a result of misgovernance, state engendered violence and human rights violations. It has also consistently stated that the sanctions are against Zimbabwe and not against targeted individuals. The sanctions, it is claimed, hurts “ordinary Zimbabweans” the most, causing “untold misery”. Rather than this misery being untold, it has been frequently recounted in the state media and in articles by ZANU PF apologists.

Numerous such articles were published immediately before the SADC “anti-sanctions march”. Many articles of this ilk take the view that not only do US sanctions hurt ordinary Zimbabweans, rather than the targeted individuals and entities, but that this is their intent – and successfully achieved. Almost invariably, a supposed quote from Chester Crocker, former US Assistant Secretary of State for African Affairs, to the following effect is deployed for this purpose:

*[t]o separate the Zimbabwean people from Zanu-PF, we are going to have to make their economy scream, and I hope you, Senators, have the stomach for what you have to do.*<sup>41</sup>

The quote is fabricated. As was cogently demonstrated several years ago<sup>42</sup> through the presentation of the transcript<sup>43</sup> of the hearing before the Subcommittee on Africa of the Committee on International Relations House of Representatives in June, 2000 where the statement was allegedly made, Crocker said nothing of the sort or even words that could be construed to mean this.<sup>44</sup>

Furthermore, almost all these articles fail to show how sanctions are “effecting ordinary Zimbabweans”. Instead they show the hardships experienced by ordinary Zimbabweans on account of Zimbabwe’s difficult economic circumstances and economic decline over the last two decades. This is

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<sup>41</sup> See, as a recent example of this ZIDERA: It was Never about Democracy *The Herald* 23.10.19.

<sup>42</sup> By Ambassador Charles Ray (February 2012) Putting Urban Legends to Rest: What Chester Crocker Actually Said about Zimbabwe in 2001 (sic – the statement is from 2000).

<sup>43</sup> Available here <https://www.govinfo.gov/content/pkg/CHRG-106hhrg66616/pdf/CHRG-106hhrg66616.pdf>.

<sup>44</sup> The legend has not been put to rest. A recent publication by Munoda Mararike, Zimbabwe Will Never be a Colony Again!: Sanctions and Anti-Imperialist Struggles in Zimbabwe Langaa Research and Publishing Common Initiative Group 2019 Bamenda Cameroon also cites the Crocker quote and then, ironically, references the Charles Ray article (fn 2) as a source.

not in dispute. There is rarely any attempt to show the economic decline as attributable to sanctions. The few articles that do so are usually disingenuous and little short of fatuous. For example, one such article claimed that Zimbabwe's 300 000 new farmers were unable to obtain financing because Agribank, as an SDN which provided finance for farming, was unable to obtain lines of credit on account of sanctions. The article points out that Zimbabwe was then an agro-based economy and 60% of the inputs for local manufacturing came from agriculture. The notion that Zimbabwe ceased to be an agro based economy because Agribank could not obtain lines of credit (the previous extent of which, if any, is not stated) from US banks seems fanciful.<sup>45</sup>

However, the point that Zimbabwe used to be an agro-based economy is well made. At the height of the land redistribution exercise ZANU PF's own slogan was that "Land is the economy and the economy is land". The economy was then dependent on large scale commercial agricultural production. That Zimbabwe's steep economic decline after 2000 was mainly due to the loss of its agro-base seems obvious to all except those ideologically opposed to attributing the fall to Zimbabwe's land policies. Zimbabwe has never recovered from this. SADC's anti-sanctions day seems little more than an opportunity to parade the sanctions scapegoat for misgovernance, where economic rationality was sacrificed on the altar of political expediency. To date, the Mnangagwa government has been unable to climb out of the economic hole dug for it – a hole dug by President Robert Mugabe and successive ZANU PF administrations, and not by "illegal western sanctions."

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<sup>45</sup> Unpacking the 'targeted sanctions' Farce *The Herald* 24.10.19.