LOCAL CONTENT

South Africa – Mining & Petroleum

February, 2015

Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

The project[1] - background

Resource-rich countries are increasingly inserting requirements for local content ("local content provisions") into their legal framework, through legislation, regulations, contracts, and bidding practices. If successful, a policy to increase local content can lead to job creation, boost the domestic private sector, facilitate technology transfer and build a competitive local workforce. However, local content goals are often unfulfilled and the opportunities are not captured. For example, local content provisions typically require investors to meet targets measured as a percentage of investment, hours worked, equipment supplied, or jobs created. If targets are too high, they may either scare away investment or remain unmet as investors accept the fines or find loopholes. If they are too low, the country will not maximize potential linkages. This shows the importance of the framing of local content provisions. Targets, and other local content objectives, need to be carefully quantified, adapted to the local context and collaborative. Because local content provisions can be key to translating resource investments into sustainable benefits for the local population, this project examines the detail of the existing legal frameworks for local content in a number of countries.

CCSI has conducted a survey of the local content frameworks of a number of countries – identifying the key legislation, regulations, contracts and non-binding policies and frameworks dealing with local content issues in the mining and petroleum sectors[2]. A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses[3] – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country's local content[4]. The profiles examine provisions dealing with local employment, training, procurement, technology transfer, local content plans as well as local ownership, depending on the country's approach to and definition of local content. In addition, as key to translating provisions into action, the profiles look at implementation, monitoring and enforcement provisions as well as the government's role in expanding local involvement. Aside from emphasizing the strong clauses, which may be adaptable across countries, the profiles summarize the provisions but do not provide commentary, because local content is so context specific. The profiles are intended as a tool for policy makers, researchers and citizens seeking to understand and compare how local content is dealt with in other countries, and to provide some examples of language that might be adopted in a framework to achieve local content goals. Hyperlinks are provided to the source legislation, regulations, policies and contracts where available.

[1] The project is managed by Perrine Toledano and Sophie Thomashausen. Research was conducted by David Kienzler.

[2] General legislation with provisions that relate to local content (for example, tax laws with incentives for local procurement or employment in any industry), was not included in the review. The review included dedicated mining or petroleum sector or specific local content legislation, regulations, policy and contracts.

[3] Those clauses are framed and singled out by a "thumb up".

[4] Our criteria for assessment of the quality of the provisions were language that is less likely to present a loophole, i.e. less likely to be subject to interpretation due to vagueness and more likely to lead to enforcement because of its clarity in terms of rights and obligations of both parties (state and investor), and reasonable in its obligations on the company. In addition, as mentioned above, we looked for clauses that encourage collaboration between the company and the government in defining local content targets and goals, and those where the government has a role, as well as clauses enabling implementation and monitoring of the requirements and those giving the government strong remedies to enforce companies' compliance.

The impact of international law

The World Trade Organization (WTO)'s agreements and investment treaties can present an obstacle to the realization of local content goals by prohibiting some types of local content requirements (a sub-category of “performance requirements”[1]). CCSI therefore surveyed the relevant WTO agreements and investment treaties in each country profiled to identify the provisions that may prevent, counsel against and/or shield local content standards. These provisions are quoted in the profile in order to show the potential barriers to implementation of local content so that they can be kept in mind when countries enter into these international investment treaties[2]. Free Trade Agreements other than the WTO agreements, some of which may contain investment chapters, are not included in the scope of the review, but may also be relevant and should be similarly kept in mind.

[1]Performance requirements are measures in law, regulation or contract that require investors to meet specified goals when entering, operating or expanding in, or leaving a host country. Some are strictly mandatory; others are imposed as a condition for receiving some sort of added benefit or advantage.

[2]Countries implementing local content requirements should be aware of the possibility of a challenge to those provisions either through the WTO (state-to-state dispute settlement) or arbitration under the bilateral investment treaties (which is investor-state dispute settlement). While the potential for such actions may be low, they remain a risk depending on the circumstances, and particularly should relations between the state and the investor sour over the course of the investment.

Synopsis

Highlights

- Mining Charter targets were required to be met by 2014. In 2015, companies are being reviewed for compliance and the future of the Charter is unclear. It is also unclear whether the BBB-EE Amendment Bill, which takes effect in October 2015, will apply to the mining and petroleum sectors.
- Mining Charter and the Liquid Fuels Charter seek to substantially expand opportunities for historically disadvantaged South Africans to enter the mining industry.
- Companies are required to procure certain percentages of capital and consumer goods as well as services locally.
- Mining Charter required certain levels of demographic representation at management levels.
- The Charters allow for broad ministerial discretion.
- The Mining Charter and Codes of Good Conduct include scorecards to monitor and assess compliance levels.
- The government publishes little to no information about its mining contracts or its licensing practices.
- One bilateral treaty limits the ability of the country to impose local content; however, South Africa is in the process of revisiting and potentially revising its bilateral treaties.

✓	Employment Requirements
✓	Procurement Requirements
✓	Training Requirements
✗	Technology Transfer Requirements
✓	Monitoring and Enforcement Mechanisms
✓	Government Obligations in Support of the Companies' Program

Synopsis

International Law

Legislation

Mineral and Petroleum Resource Development Act 2002 ("MPRDA") – Amended in 2008 and a further proposed amendment was sent back to the National Assembly in January 2015.

Codes of Good Practice for the South African Minerals Industry ("Codes of Good Practice") – mandated by the MPRDA, it facilitates the effective implementation of the MPRDA and the Mining Charter .

Policy

Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2004 ("Mining Charter") – A requirement of the MPRDA it was amended in 2010.

Charter for the South African Petroleum and Liquid Fuels Industry 2000 ("LFC") – Applies to the oil and gas sector. First charter for South Africa. Given effect through the Petroleum Products Amendment Act of 2003.

Contract

Licenses and Contracts
The government does not publish mining contracts and publishes little to no information about its licensing practices .

Key definitions

- **Historically Disadvantaged South Africans (HDSA)**: "refers to South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation which should be representative of the demographics of the country."
- **BEE entity**: "means an entity of which a minimum of 25% + 1 vote of share capital is directly owned by HDSA [...]"
- **Broad-Based Socio-Economic Empowerment**: means "a socio-economic strategy, plan, principle, approach or act, which is aimed at: (a) Redressing the results of past or present discrimination based on race, sex and disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and (b) Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the:

  - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;

  - Participation in or control of management of such operations;

  - Development of management, scientific, engineering or other skills of HDSA's;

  - Involvement of or participation in the procurement chains of operations;

  - Integrated socio-economic development for mine workers, host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilizing all stakeholder resources,"
- **Meaningful economic participation**: includes:

  "- BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers …and communities;

  - Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment […] Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested interest over the life of the transaction in order to facilitate sustainable growth of BEE entities.

  - BEE shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;

  Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions" (Mining Charter)

Overview

Rights application

- The Minister of Minerals and Energy may facilitate assistance to any HDSA to conduct prospecting or mining operations.
- The Mining Charter and Scorecard required that within five years HDSAs must own 15% of mining companies with mineral rights converted from old order rights and 26% of companies applying under the new order.
- When the Minister receives more than one application for the same prospecting, or mining right, or a mining permit on the same date, he or she must give preference to applications from HDSA.

Training and Employment

- All mining companies must achieve a minimum percentage of HDSA demographic representation at executive management, senior management, core and critical skills, middle management, and junior management levels.
- Mining companies must invest a percentage of annual payroll in essential skills development activities of HDSA.

Procuring goods and services

- Mining companies are required to procure certain percentages of capital and consumer goods as well as services from BEE entities.
- Participants in the petroleum industry must adopt procurement policies that facilitate and leverage the growth of HDSA companies.

Implementa-tion

- The MPRDA required the development of a broad-based socio-economic empowerment Mining Charter and a code of good practice for the minerals industry.
- The government endeavors to secure training opportunities for HDSA companies' staff in its bi-lateral relations with relevant countries.

Monitoring and enforcement

- Companies were required to report annually on their levels of compliance with the Mining Charter which included a scorecard to assess their progress.
- Non-compliance with the Mining Charter could result in suspension or cancellation of prospecting rights, mining rights or mining permits.

Applications for rights and permits

- The Minister has broad authority to facilitate assistance to HDSA to engage in prospecting or mining operations. Factors the Minister must take into account when considering providing assistance include the need to change the ownership structure of the mining industry, the need to improve equitable access to mineral resources, the applicants' finances, and the extent to which the proposed project furthers the objectives of the MPRDA. The Minister is also authorized to request assistance in the development of the applicant's project from any relevant State organ (MPRDA, Art. 12).

- During the ten year period of South Africa's transition from the old-order rights system of private ownership of mineral rights to a new-order rights system of government custodianship of mineral rights (2004-2014), compliance with the Mining Charter scorecard was a requirement for mining companies to obtain conversions of their rights (Mining Charter 2004).

- The Mining Charter and scorecard required that within five years of the Charter coming into force HDSAs must have 15% ownership of mining companies with mineral rights converted from the old-order system and 26% ownership of companies applying for new mineral rights.[1]

- The Minister is only required to give preference to historically disadvantaged South Africans (HDSA) over other applicants in instances where applications for the same prospecting or mining right or mining permit are received on the same day (MPRDA, Art. 9.2).

- In 2015, company compliance with the Mining Charter is being evaluated and there appears to be the possibility that some companies could lose their licenses as a result of failing to have met the levels on the scorecard.

[1] According to Meghan Van, "Codes of Good Practice Clash with Mining Charter," Mining Weekly, 13 Nov. 2009.

Training and employment

- By 2014 all mining companies were required to be 40% owned by HDSA and have HDSA occupy 40% of executive management (board), senior management (EXCO), core and critical skills, middle management, and junior management positions (Mining Charter, Art. 2.4)

- Article 2.5 of the Mining Charter required the mining industry to invest in skills development activities:

> "Invest a percentage of annual payroll…in essential skills development activities reflective of the demographics…including support for South African-based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows:
>
> -- Target for 2010 = 3%
> -- Target for 2011 = 3.5%
> -- Target for 2012 = 4%
> -- Target for 2013 = 4.5%
> -- Target for 2014 = 5%".

- The liquid fuels industry is required to involve government bodies for skills development activities (Liquid Fuels Charter, p.5):

> "The industry, through the standing consultative arrangements, interfaces with statutory bodies such as SETA (Sectoral Education and Training Authority), in the development of skills development strategies".

- The Liquid Fuels Charter (p.6) mandates all licenses to contribute to a training fund :

> "All licensees contribute funds toward the 'Upstream Training Trust' to fund skills development at various levels. As discoveries are made, further skills development strategies are devised to empower historically disadvantaged South Africans in this sector".

Training and employment

- The Liquid Fuels Charter requires companies to subscribe to:

"South African subsidiaries of multinational companies and South African companies focus their overseas placement and/or training programmes on historically disadvantaged South Africans;
– identifying a talent pool and fast tracking it;
– ensuring inclusiveness of gender;
– implementing mentorship programmes; and
– setting and publishing "stretch" (i.e. demanding) targets and their achievement".

- The Codes of Good Practice requires companies to establish and fund a human resource development system that offers all employees the opportunity to become functionally literate and numerate and that develops priority skills for HDSA that are value adding to the companies' core business (Codes of Good Practice, Art. 2.4).

Procuring goods and services

- The mining industry was required to procure 40% of its capital goods, 50% of its consumer goods, and 70% of its services from BEE entities by 2014. Multinational companies supplying capital goods to the industry was required to make an annual contribution of no less than 0.5% of the income they generated from local mining companies towards a social development fund for the socio-economic development of local communities. (Mining Charter, Art. 2.2).

- The Codes of Good Practice creates more specific procurement targets for the period between 2015-2019 designed to give preference to suppliers that are more than 30% owned by black women as well as small, medium and micro enterprises in order to develop new and sustainable businesses (Code of Good Practices, Art. 2.5).

- When procuring supplies, participants in the petroleum industry are required to give preference to companies owned or controlled by HDSA and adopt procurement policies that will contribute to and leverage the growth of such companies. (Liquid Fuels Charter).

- The Codes of Good Practice addresses the issue of “fronting” (Definition):

> “any practices or initiatives which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to black economic empowerment under the Codes”.

Procuring goods and services

- Fronting practices include Window-dressing in which (Codes of Good Practice, Art. 4.1.1):

"black people are appointed or introduced to an Enterprise on the basis of tokenism and may be:
(a) Discouraged or inhibited from substantially participating in the core activities of an Enterprise; and
(b) Discouraged or inhibited from substantially participating in the stated areas and/or levels of their participation".

- Section 4.1.4 of the Codes of Good Practice also outlines indicators of fronting which:

"include, but are not limited to:

5.1.4.1 The black people which an Enterprise claims are its shareholders, executives or Management are unaware or uncertain of their role or participation within an Enterprise

5.1.4.2 The black people who serve in executive or management positions in an Enterprise is paid significantly lower than the market norm, unless all executives or management of an Enterprise are paid at a similar level

5.1.4.3 The black people identified by an Enterprise as its shareholders, executives or management have limited knowledge of an Enterprise;

5.1.4.4 There is no significant indication of active participation by black people identified as top management at strategic decision making level".

Implementation

- Within six months of the effective date of the MPRDA the Minister was required to develop a broad-based socio-economic empowerment charter that addressed historical, social and economic inequalities. Within five years of the 2004 effective date of the MPRDA the Minister had to develop a code of good practice for the minerals industry (MPRDA, Art. 100).

- The MPRDA required the development of a Mining Charter to set the framework for targets and time tables for facilitating the entry into and active participation of HDSA in the mining industry, and for allowing HDSA to benefit from the exploitation and beneficiation of mineral resources. The Mining Charter as amended in 2010 included a scorecard that provided quantification of progress against the objectives (see next slides).

- The Codes of Good Practice developed under the MPRDA created a sector specific version of the generally applicable codes of good practice promulgated under South Africa's Broad-Based Black Economic Empowerment Act. Though conceptually similar it is distinguishable which has created uncertainty for companies over the codes with which they must be in compliance.

- To facilitate skills development the Liquid Fuels Charter states that:

> "In its bi-lateral relations with relevant countries, government endeavors to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with oil companies operating outside of South Africa".

- The government promotes local beneficiation by allowing it to offset a percentage of the minimum HDSA ownership requirements of mining companies (Mining Charter, Art. 2.1).

Monitoring and enforcement

- Mining companies were required to report their levels of compliance with the Mining Charter on an annual basis. In monitoring and evaluating compliance, government will take into account material constraints which may prevent the achievement of set targets (Mining Charter, Art. 2.9).

- The Mining Charter includes a scorecard to facilitate compliance with the Mining Charter. The scorecard measures progress on nine empowerment elements: reporting, ownership, housing and living conditions, procurement and enterprise development and beneficiation. Two of these elements, human resources development, employment equity, human resource development, mine community development, sustainable development and beneficiation. The scorecard lays out what is to be measured and the targeted levels of compliance and assigns a weight to each element. Compliance takes into account the entirety of the scorecard.

  - However, three of the elements require a “yes/no” response. How that is weighted is undefined and the implications of a “no” response are unknown. Additionally, the scorecard is not referenced in Article 2.9 Reporting (Monitoring and Evaluation), nor at any other point in the Mining Charter. Similarly, while public statements indicate the scorecard is an enforcement tool, there is no reference in the Mining Charter as to how it is to be used and there is no information in the Mining Charter on the consequences if a company’s weighted score does not reach a level considered in compliance.

- As mandated in Art. 100 of the MPRDA, the Codes of Good Practice for the South African Minerals Industry is intended to facilitate the effective implementation of the MPRDA and the Mining Charter. The Codes of Good Practice details the general principles for measuring similar empowerment elements as those of the Mining Charter. It also addresses the dangers of “fronting practices” and how to identify such efforts by mining companies to misrepresent their empowerment levels to win contracts. However, the empowerment elements are not weighted in the Codes of Good Practice scorecards and the timetables and percentages required to be in compliance are sometimes in variance with those of the Mining Charter. (Codes of Good Practice).

Monitoring and enforcement

- Parties to the Liquid Fuels Charter will meet in an annual forum for the purpose of:

  – “monitoring progress in the implementation of plans;
  – developing new strategies as needs are identified;
  – ongoing government/industry interaction in respect of these objectives;
  – developing strategies for intervention where hurdles are encountered;
  – exchanging experiences, problems and creative solutions;
  – arriving at joint decisions;
  – reviewing this Charter if required; and giving notice of withdrawal”.

- Non-compliance with the provisions of the Mining Charter and the MPRDA render the mining company in breach of the MPRDA and subject to the possibility of suspension or cancellation of rights, permits or permissions (Mining Charter, Art. 3).

International law – WTO agreements

- South Africa has been member of the WTO since January 1, 1995.

- All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs.[1] This can impact a country's ability to impose certain local content requirements (referred to as "investment measures"), to the extent they affect trade in *goods.*

- The following types of local content requirements are covered by TRIMS[2]:
    - requiring a company to purchase or use products of domestic origin – TRIMs prohibits discrimination between goods of domestic and imported origin;
    - limiting the amount of imported products that an enterprise may purchase or use depending on the volume or value of local products that the enterprise exports;
    - restricting foreign exchange necessary to import (e.g., restricting the importation by an enterprise of products used in local production by restricting its access to foreign exchange); and
    - restricting exports.

- [1] The TRIMs Agreement clarifies existing rules contained in Articles III (National Treatment Obligation (NTO)) and XI (Prohibition on Quantitative Restrictions) of the General Agreement on Tariffs and Trade (GATT), 1994.
- [2] It is important to be aware of the types of measures prohibited under the TRIMs Agreement, in order to avoid the potential for dispute settlement under the WTO - a state can bring an action against another state for an alleged violation of the TRIMs Agreement (i.e. "state-to-state action").

International law – WTO agreements

General Agreement on Trade in Services (GATS)

- A separate WTO agreement, the General Agreement on Trade in Services ("GATS"), covers investment measures related to services (in Article XVI), including the following which are relevant to local content:
  - Requirements to use domestic service suppliers
  - Limits on the number of service suppliers
  - Limits on the total value of service transactions or assets
  - Limits on the total number of service operations or quantity of service output
  - Limits on the total number of natural persons permitted
  - Restrictions on or requirements for certain types of legal entities (e.g., joint venture requirements)
  - Imposition of domestic equity

- GATS only applies to those service sectors that the country chooses to include in its Schedule of Commitments. South Africa's commitments are unlikely to affect the implementation of South Africa's local content framework.

International law – bilateral investment treaties

- As of 22 January 2015, South Africa has entered into **42 bilateral investment treaties** (BITs) and 17 are in force.[1]

- In 2010, South Africa began a review of its BiTs. It is in the process of cancelling all its first-generation BiTs and will as a general policy refrain from entering into BiTs in the future.[2]

- Investment treaties are international agreements between two or more countries which establish the terms and conditions of foreign investment within each country and provide rights directly to the investors of each country which is party to the treaty. The treaties can contain restrictions on local content requirements.[3]

- Investment treaties can contain the following types of provisions, each of which affects a country's ability to impose local content requirements:
  - non-discrimination provisions ("national treatment" and "most-favored nation" obligations), which are relevant in the context of local content when:
    1. host countries require some foreign investors to source from certain goods and service providers but don't impose similar requirements on other investors; and
    2. host countries give an advantage to some domestic or foreign goods and services providers, but not to a foreign provider whose state has a relevant treaty with the host country. (Note that this is relevant only where the foreign provider of goods or services has or, intends to have[4], a presence in the host country);
  - restrictions on capital transfers;
  - "pre-establishment" protections, which prevent a state from imposing conditions on foreign investors that are not imposed on domestic investors, such as requirements to transfer technology to local firms, to establish the firm through a joint venture, or to reinvest a certain amount of capital in the host country;
  - incorporation of the TRIMs agreement; and
  - explicit prohibition of performance requirements that go beyond what is restricted by the TRIMs Agreement.

[1] According to UNCTAD's country specific list of bilateral investment treaties

[2] "Bilateral investment treaties in South Africa," Norton Rose Fulbright, July 2014.

[3] It is important to be aware of the BITs a country has signed and the types of requirements prohibited under it, in order to avoid the potential for arbitration against the country - the majority of investment treaties allow investors to bring arbitration claims directly against the country in which they have invested ("investor-state arbitration).

[4] I.e., the conditions under which an investor may enter into the territory of a party, not only the conditions once the investment is made.

International law – bilateral investment treaties

- Among the 42 BITS signed by South Africa, 13 were reviewed (and are available on UNCTAD database).

- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses, which are included in most BITs, only Canada prohibits or limits performance requirements. On the contrary, 3 BITS signed with Czech Republic, Mauritius and Zimbabwe (not in force) specifically allow special incentives to protect or advance disadvantaged persons to the extent that the investor's activity is not affected. Clauses are quoted below.

South Africa – Czech Republic[1]

Article 3: National and Most Favoured-Nation Treatment

"1. Each Party shall in its territory accord to investments and returns of investors of the other Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State.

2. Each Party shall in its territory accord to investors of the other Party, as regards management, maintenance, use, enjoyment or disposal of their investment, treatment which is fair and equitable and not less favourable than that which it accords to its own investors or to investors of any third State.

3. The provisions of paragraph 1 and 2 of this Article shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment, preference or privilege which may be extended by the former Party by virtue of (…) any law or other measure the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination."

[1] The language of the relevant Mauritius and Zimbabwe BiT provisions are substantially similar to that of Czech Republic and so are not reproduced here.

South Africa - Canada

Article V: Other Measures

“1.a. A Contracting Party **may not require** that an enterprise of that Contracting Party, that is an investment under this Agreement, **appoint to senior management positions individuals of any particular nationality**.

b. A Contracting Party **may require that a majority of the board of directors, or any committee** thereof, of an enterprise that is an investment under this Agreement **be of a particular nationality, or resident in the territory of the Contracting Party**, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

2. **Neither Contracting Party may impose any of the following requirements** in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

a. to export a given level or percentage of goods;

b. to achieve a given level or percentage of domestic content;

c. to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

d. to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

e. to transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.”