

# Local content in Mining Charter could be a double-edged sword

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South Africa has recognised that, except for encouraging beneficiation in the minerals sector, policy tools and regulatory frameworks must be implemented to ensure that the extractive industry provides broader benefits to society.

The draft Reviewed Mining Charter reaffirms the South African government's commitment to ensure that, from a "local content" perspective, any holder of a mining right will be obliged to source a certain percentage of its capital and consumable goods from South African businesses.



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To achieve this, a mining right holder must ensure that procurement policies and actual procurement is aligned to the following:

## Capital goods

- A mining right holder must procure a minimum of 60% locally manufactured capital goods from BEE-compliant manufacturing companies.
- 30% of the above 60% must preferably be given to small business development which are BEE compliant, a minimum of 10% of the 30% must be reserved for BEE-compliant enterprise development.

## Consumables

- A mining right holder must procure a minimum of 70% of locally manufactured consumables from BEE compliant manufacturing companies.
- A minimum of 30% of the 70% must be given to small business development which are BEE compliant, a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development.

## Rationale

The rationale behind the use of local content requirements by South Africa in the mining sector is motivated by the need to address the following developmental imperatives:

- to gradually reduce the over-reliance on natural resources with respect to their contributions to national income, foreign exchange, and exports;
- the paradox of plenty, that is, the unacceptably high prevalence of poverty and inequality amid an abundance of resource riches;
- to mitigate and manage social and political risks due to rising expectations domestically for a better and more equitable distribution of wealth; and
- the need to create more job opportunities, given the capital-intensiveness of the extractive sector.

As a sovereign state, South Africa has the right to adopt any policy or regulatory framework which has the objective of achieving the developmental imperatives.

## **Conflict with trade agreements**

However, policy documents such as a mining charter sets out local content requirements to achieve economic objectives may well be subject to challenge for failing to comply with international investment and trade law obligations.

The existing international World Trade Organisation rules on certain forms of local content requirements are very clear in either prohibiting, allowing or restricting the grounds for any form of quantitative restrictions.

The draft Reviewed Mining Charter suggests 60% of all capital goods and 70% of all consumable goods required by holders of mining rights must be procured from BEE-compliant local manufacturers, which may contravene international trade agreements.

In addition, it should be remembered that despite the termination of certain bilateral investment agreements (BITs), most of these contain sunset provisions which apply for 15 to 20 more years. This implies that any adverse policy changes that come after could be considered in breach of the agreement.

The Southern African Development Community Protocol on Finance and Investment also provides further recourse to international arbitration to existing investors.

## **Public interest**

There is accordingly a fine line between a state's regulating what is deemed to be in the "public interest" and the rights foreign investor could enforce on the basis that the state has breached certain trade agreements.

From a broad-based economic developmental perspective, it is understandable that the South African government must ensure the meaningful economic participation for historically marginalised people in the mining industry.

In that regard the South African government must be unapologetic. However in doing so it must ensure that the policies and legal framework adopted do not expose it to legal challenge due to inconsistency with international trade or investment law obligations.

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