

LOCAL CONTENT



Botswana- Mining



Columbia Center
on Sustainable Investment

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

The project¹ - 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 sectors². A profile was created for each country, summarizing the provisions in the legal instruments dealing with local content and highlighting examples of high impact clauses³ – those containing precise language which might be useful as an example to those looking to draft policies to enhance a country’s local content⁴. 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 was managed by Perrine Toledano. Research was conducted by Rachel MacDonald.
 - 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 treaties². FTAs 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.

¹Performance 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.

²Countries 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.

Highlights

- There is no single primary mechanism for regulating local content in the mining sector in Botswana.
- The Mines and Minerals Act of 1999 includes soft local content requirements and grants exploitation permits for industrial minerals only to citizens of Botswana, unless exception is given by the Minister.
- The Competition Law of 2009 provides competition incentives for enterprises to train and employ Botswana citizens and use Botswana goods.
- The Economic Diversification Drive is the 5 year government strategy for economic diversification. It considers local content as an engine for long-term and sustainable economic growth.

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

International law

Legislation

Mines and Minerals Act of 1999: regulates the laws relating to mines and minerals and includes some local content requirements.

Competition Law of 2009: regulates competition of mining and other industries, and the contribution to the local economy is a criteria used in the regulation.

Regulation

Policy

Economic Diversification Drive, Medium to Long Term Strategy (2011-2016) ("*EDD*"): puts forth the government's strategy for economic diversification and includes local content- related measures.

Key definitions

"Citizen of Botswana means

- (a) in relation to an individual, an individual who is a citizen of Botswana;
- (b) in relation to a partnership or association of individuals, a partnership or association which is composed exclusively of individuals who are citizens of Botswana; and
- c) in relation to a corporate body, a corporate body which is incorporated under the Companies Act—
 - (i). which is certified by the Minister to be controlled by the Government, or
 - (ii). whose directors and beneficial shareholders are all citizens of Botswana"

(Mines and Minerals Act, 1999, Art. 53.3)

Rights and Applications

- The Mines and Minerals Act, 1999 allows for only citizens of Botswana to be granted permits to exploit industrial minerals. This restriction is subject to exemption by the Minister.
- Under the Competition Law of 2009, proposed mergers are to be evaluated, in part, by whether the merger is likely to promote citizen empowerment initiatives and citizen-owned enterprises.
- The Competition of Act of 2009 asks the Minister to consider the contribution to the local economy when assessing the abuse of a dominant position.

Employment

- The Mines and Minerals Act, 1999 requires that holders of mineral concessions employ Botswana citizens to the maximum extent possible, and to provide training to Botswana citizens for purposes of advancement in the mining industry.

Procurement

- Preferential treatment should be given to materials and products made in Botswana as well as to services located in Botswana and owned by Botswana citizens.

Implementation

- The Economic Diversification Drive provides for the creation and funding of a Council intended to implement EDD's Long Term Strategy.

Monitoring and Enforcement

- The Mines and Minerals Act, 1999 allows for the Minister to terminate any industrial mineral exploitation concession should he discover its holder is no longer a citizen of Botswana.
- The Economic Diversification Drive outlines the method by which its Council should meet and evaluate the progress of the Long Term Strategy.

- The Mines and Minerals Act, 1999 requires that minerals permits to exploit industrial minerals to be granted to Botswana citizens, or groups of only Botswana citizens, exclusively (Art. 53.1).
- However, the Mines and Minerals Act, 1999 also gives the Minister the discretion to otherwise issue permits if he determines that “it is in the public interest that a minerals permit to exploit industrial minerals should be granted to such person; or the permit applied for is in respect of industrial minerals required for specific works and the applicant has given an undertaking that the minerals concerned will not be sold or otherwise disposed of for profit.” (Art. 53.2)
- Proposed mergers of any private business in Botswana are to be evaluated, in part, based upon: whether the proposed merger is likely to promote exports or employment and whether the proposed merger would promote citizen empowerment initiatives or citizen owned enterprises (Competition Law of 2009 Art. 59.2).
- In determining whether the abuse of a dominant position has occurred, the Competition Law of 2009 allows for the Minister to consider if an enterprise, “maintains or promotes exports from Botswana or employment in Botswana,” if an enterprise “provides social benefits which outweigh the effects on competition,” “occurs within the context of a citizen empowerment initiative of Government, or otherwise enhances the competitiveness of small and medium sized enterprises” or contributes in any other way to the effectiveness of development programs of industrial development (Art. 30.2).

Training and Employment

- The Mines and Minerals Act requires holders of mineral concessions to employ Botswana citizens to the “maximum extent possible consistent with safety, efficiency and economy” (Art. 12.2).
- The Act also requires holders to conduct training programs for citizens (Art. 12.3):



“The holder of a mining licence shall, in his operations, conduct training programmes in consultation with the Minister for the benefit of employees so that such employees may qualify for advancement.”

- Throughout the EDD document, the necessity for foreign businesses in Botswana to provide training and expertise to citizen entrepreneurs is emphasized.

- The Mines and Minerals Act, 1999 requires that holders of mineral concessions give preferential treatment to “materials and products made in Botswana; and service agencies located in Botswana and owned by Botswana citizens or bodies corporate established under the Companies Act” (Art. 12.1).
- The EDD seeks to improve local procurement in the mining industry through its Private Sector Development Strategy. In part, the EDD plans to harness private sector “purchasing and investment power (business to business procurement opportunities) to develop local supply chains and business linkages between and among small and large companies” and to empower citizens by “facilitating the development of local capacity of enterprises in Botswana” (Art. 6.5, pg. 91).
- The EDD explains that encouraging multi-layered business linkages has many advantages for Botswana, including “maximization of local content in goods and services; promotion of technology transfer and innovation; promotion of transfer of modern management know-how; promotion of the development of a robust SMME sector and attraction of foreign direct investment (FDI) into Botswana.” The EDD finds that these “potential business opportunities may be leveraged from cross-border business linkages between foreign companies established in these regional integration arrangements” (Art. 3.1, pg. 18).

Implementation (1)

- The Mines and Minerals Act, 1999 allows the Minister to terminate a permit issued for the exploitation of industrial minerals should he find that the holder of the permit has ceased to be a citizen of Botswana, or has entered into an arrangement with a non-citizen (Art. 55.2).
- The EDD is engaging the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) in the pursuit of its plan and in particular asks the BOCCIM to maintain a database (Art. 6.5, pg. 91):



“(vi) Maintaining an up-to-date database of the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) membership, showing, among others: the goods and services they produce; their production technology and capacity; and where they are located”

- The EDD additionally provides for the formation of a Council charged with implementing the strategies and monitoring the achievements of the Long Term Strategy (Art. 5.1, pg. 72):



“The Council will be chaired by the Minister of Trade and Industry, assisted by a Vice Chairperson chosen from the Private Sector. The Economic Diversification Drive Unit will be the Secretariat for the Council and will be empowered and resourced to ensure full implementation of the Strategy. Council Membership will be drawn from Government Ministries, Independent Departments, Parastatals, the Private Sector, and Civil Society to ensure full representation of stakeholders in accordance with the Strategy thematic areas. The Council will meet four times in a year and will be informed by the Thematic Teams representing the Strategy Thematic areas. The Team’s mandates will be defined by the strategic objectives of each thematic area as presented in the Strategy.”

- The EDD contains a mechanism for monitoring the progress of its goals, which include increased local procurement and citizen employment (Art. 5.6, pg 78).



“The Council achievements will be reviewed quarterly. The Council will put in place objective measures to monitor and evaluate the indicators and outcomes of the various Thematic Areas on a continuous basis and to effect adjustments where necessary. [SEP] The actual evaluation process will be done as follows:

- i) Each objective is guided by specific quantifiable measures; [L] [SEP]
 - ii) An appropriate evaluation system will be developed and agreed upon by stakeholders; [L] [SEP]
 - iii) Ministries will submit data for purposes of measuring and evaluation; [L] [SEP]
 - iv) The Council will determine the desired target to measure achievement; [L] [SEP]
 - v) Quarterly progress report of the EDD Strategy will be submitted to the Council. [L] [SEP]
- This strategy will run from 2011-2016, and will be reviewed during its mid-term in 2013, unless the situation dictates otherwise.”

Agreement on Trade-Related Investment Measures (TRIMs)¹

- Botswana has been a member of the WTO since May 31, 1995.
- All World Trade Organization (WTO) Members must adopt and abide by the obligations of TRIMs. 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 TRIMS²:
 - 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 3} 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").

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. It is improbable that [Botswana's commitments](#) will affect the implementation of Botswana's local content framework.

- As of July 22 2016, Botswana has entered into 10 bilateral investment treaties (BITs), but only 2 are in force as of July 2016.¹
- 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.²
- 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 have³, 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 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").

³ 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.

- Of the 10 BITs signed by Botswana, 5 were located and reviewed.
- Aside from the inclusion of National Treatment Obligations and Most Favored Nation clauses that limit performance requirements, two international investment agreements actually encourage performance requirements:

Botswana - BLEU (Belgium-Luxembourg-EU)

Article 4.2: “Each Contracting Party may, in order with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its nationals only for the purpose promoting small and medium-sized enterprises and infant industries, persons or areas in its territory subject to the condition that these shall not significantly affect the investments and activities of the investors of one of the other Contracting Party.”

Botswana - Ghana

Article 5.2: “Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its nationals only for the purpose of promoting small and medium- sized enterprises and infant industries, persons or areas in its territory subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.”