

The emerging wave of local content regulations in the African mining sector

OUT-LAW ANALYSIS | 29 Oct 2020 | 1:16 pm | 31 min. read

As the deepest decade-long correction in commodities in 100 years reverses momentum, and miners look to re-invest, governments are likely to be torn between a legitimate desire to maintain effective sovereignty over their natural resources and the need to attract investment to economies scarred by the impact of Covid-19.

As the deepest decade-long correction in commodities in 100 years reverses momentum, and miners look to re-invest, governments are likely to be torn between a legitimate desire to maintain effective sovereignty over their natural resources and the need to attract investment to economies scarred by the impact of Covid-19.

African governments have historically vacillated between periods of liberalism and, more recently, a desire to firm up regulation. Front and centre is a requirement for foreign investors to develop 'local content' by creating jobs, opening equity to local partners and investing in local supply chains.

The national objective is clear: the transfer of knowledge and value to the local economy and to indigenous companies. Meanwhile businesses that can develop talent and procure inputs locally should be able to generate better operating margins and protect their long-term social licence to operate.

In practice, however, local content legislation often seeks to artificially increase levels of local participation in an industry beyond levels that local capacity is currently able to meet. It is therefore, by definition, aspirational and often difficult to comply with.

Investors often see such policy and regulation as inadequate or inappropriate, while businesses, in collaboration with their legal and professional advisors, respond with caution or seek to circumvent or avoid the need for compliance. The result is a complex, varied local content landscape across the African continent which is difficult to navigate.

Local content has, to date, focused on the oil and gas sector where regulations and institutional controls, at least in West Africa, are now entrenched. This is changing, and there are early signs of a wave of local

content regulation in the mining sector, which is likely to coincide with an upturn in the fortunes of both precious and base metals miners.

The most recent examples of African jurisdictions introducing local content legislation include the Democratic Republic of the Congo (DRC), Guinea and Tanzania.

Countries	Laws/regulations/applicable provisions		Regulatory controls on mine ownership by foreigners	Regulatory Restrictions on foreign procurement	Negotiated local content requirements in mining agreements	Local Employment requirements
Angola	Mining Code 2011 and a series of presidential decrees Governance Model for the Mining Sector by means of Presidential Decree No. 143/20, of 26 May 2020	•	•		•	•
Botswana	Mines and Minerals Act of 1999 Competition Act of 2009	•	•		•	•
Burkina Faso	Mining Code 2014	•	•		•	•
Cameroon	Mining Code 2016 which repeals provisions of the Mining Code of 2001 and amendments of 2010.	•	•	•	•	•
Democratic Republic of Congo	Mining Code 2018, amending the Mining Code 2002 Loi N° 17/001 du 08 Février 2017 Fixant les règles applicables a la sous-traitance dans le secteur privé	•	•	•	•	•
Ghana	Minerals and Mining Act, 2006 Minerals and Mining	•	•		•	•

(Amendment) Act,
2015
Minerals Development
Fund Act 2016

Guinea	Mining Code 2013 amending the 2011 (amending the Mining Code of 1986) Décret portant adoption d'un modèle de convention type (2014) Décret Fixant les règles régissant le contenu local dans le cadre de la mise en œuvre des projets publics et privés en République de Guinée D/2019/263/PRG/SGG	•	•	•	•	•
Ivory Coast	Mining Code 2014 amending the Mining Code of 1995	•	•		•	•
Mali	Mining Code 2019 amending the Mining Code 2012		•		•	•
Mozambique	Mining Law 2014 amending the Mining Law 2020 The Policy and Strategy for Mineral Resources (Resolution 2013) and the associated Implementation Plan (2017) The Mining Law 2014	•	•	•	•	
Namibia	Minerals Act of 1992		•	•	•	•
Niger	Mining Code 2007 amending the Mining	•	•	•	•	•

Code 1993

Sierra Leone	The Mines and Mineral Act 2009	•	•	•	•	•
South Africa	Mineral and Petroleum Resource Development Act 2002 (MPRDA), Amended 2008 Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2004 and amended in 2018 (Mining Charter) Codes of Good Practice for the South African Minerals Industry (Codes of Good Practice)	•	•		•	•
Tanzania	Mining Act 2017 (Amending the Mining Act of 2010), supplemented by the Mining (Local Content) Regulations, 2018 (Local Content Regulations) and The Mining (Local Content) (Amendments) Regulations, 2019 (and Amendment Regulations)	•	•	•		•
Zambia	Mines and Minerals Development Act 2015 Mines and Minerals Development Act of 2008 The Citizens Economic Empowerment Act of 2006	•	•	•	•	•
Zimbabwe	Mines and Minerals Act 1961 (minor	•				

Earlier examples include Angola, where certain mining rights may only be granted to Angolan citizens or legal entities having at least two-thirds of their share capital owned by Angolan citizens. Licensed mine operators must train Angolan nationals and there is a mandatory preference on the use of national materials, services and products.

Guinea's exploration permits for semi-industrial operations are granted exclusively to individuals of Guinean nationality, companies wholly owned by Guinean nationals and to foreign nationals of countries which grant reciprocity to Guinean nationals.

In Mozambique, preference must be given to goods and services purchased or obtained from Mozambican individuals or entities. Foreign entities that provide services to mining operations in Mozambique are required under the Mining Law to "associate with" Mozambican entities.

Local content provisions are part of the terms and conditions for obtaining and holding mineral and mining licences in countries including Namibia and Sierra Leone, while entities applying for a mining exploitation title in most Sub-Saharan countries, must be domiciled locally.

South Africa's Mining Charter includes a complex set of participation thresholds to satisfy Black Economic Empowerment (BEE) requirements: new mining rights applicants, for example, must have a minimum of 30% BEE shareholding.

The future of local content regulations in mining

Local content regulation is sometimes misused to provide preferential treatment and support to local businesses with direct ties to political elites, creating unbridgeable disparities between policy requirements and domestic capabilities.

While many of these flaws can be papered over by expert legal counsel, the risk of rent-seeking behaviour by unscrupulous officials is invariably heightened.

It is yet unclear whether the mining sector will experience the same issues as the oil and gas sector as local content regulation develops.

Recent DRC regulations are an instructive example of how reality and regulation may diverge in the mineral space. In 2017 DRC authorities announced a subcontracting law applicable to mining activities which came into effect in late 2019 and requires subcontracting activities to be "reserved for Congolese-owned companies promoted by Congolese".

There remains considerable uncertainty as to how the legislation will be implemented in practice, including, for example, whether foreign-controlled joint ventures are consistent with Congolese capital requirements, whether sub-contractors of sub-contractors need also comply with the legislation, and whether the economic relationship can diverge from ratio of shares owned by the joint venture partners. It is hoped that recent industry dialogue with the government may offer flexibility, but the risk of legal uncertainty remains.

As reforms to mining legislation continue, greater emphasis is likely to be placed on creating links between the mining sector and the rest of the economy. In addition to adopting provisions which require the training of a local workforce, procurement of local goods and the opening-up of capital to nationals, several jurisdictions require companies to submit a local content plan and abide by it.

These reforms coincide with the need for mining companies to subscribe to the principles advocated in the current push for corporates to reflect environmental, social and governmental (ESG) considerations in the way they work.

Industry engagement

Mining companies should take time to understand the thrust of regulatory reforms. In particular, they should observe the political environment in which local content provisions operate and the concerns raised by local populations when designing a local content plan.

The local population – especially those people living in the neighbourhood of the mine – will demand fair access to the benefits derived from extractive industries within their own neighbourhood and country.

Such empowerment may come through training programmes, transfer of knowledge, sharing of information with respect to sourcing and supply of goods and services.

Mining companies can gain tangible benefits from participating in this kind of local empowerment and at the same time also develop a social licence to operate, linked to ESG efforts.

Mining companies should also design structures which take into account the aspirational nature of local content regulations and recognise that it is not always possible to act in the spirit of the regulations at the outset. However, these structures should provide a progressive roadmap towards compliance-in-spirit which governments and regulators are comfortable with, and which will at all times operate within the boundaries of the law.

Where this is impossible, companies can maintain a dialogue with policymakers to ensure that requirements and local capabilities are aligned. If there is misalignment, steps should be taken to adjust the need for compliance or for legislation to be amended.

While some provisions may be drafted in aspirational terms, it will be necessary to understand the expectations governments will place on mining companies and the level of flexibility or exemptions which might be required in some instances in order to reach the threshold required, without exposing the mining company to regulatory uncertainty.

Co-written by mining regulation expert Bianca Depres of Pinsent Masons, the law firm behind Out-Law

WRITTEN BY

Akshai Fofaria

Partner

☎ +44 (0)207 054 2700

akshai.fofaria@pinsentmasons.com



2021 Copyright Pinsent Masons LLP