



LOCAL CONTENT REQUIREMENTS IN THE SOUTH AFRICAN EXTRACTIVES SECTOR

Do South Africa's Local Content Requirements for the Mineral and Mining Sector Promote Foreign Direct Investment?

by

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Abstract

The South African Government has an interest in ensuring that South Africa derives benefit from the exploitation of its natural resources. In the South African mineral and mining industry, this interest extends to the proceeds acquired from participation therein. Participation in the mineral and mining industry, however, is high risk, capital intensive and often has long lead times from exploration to production. Due to these factors, exploiting South Africa's mineral resources with recourse to purely domestic financing, expertise and/or equipment is challenging, if not impossible. Therefore, the industry requires capital, investment, and input from foreign sources, namely by way of Foreign Direct Investment (FDI). To ensure that foreign participation in its mineral and mining industry allows for domestic benefit, and that said benefit is enhanced in accordance with its policy objectives, the South African Government has formulated and imposed Local Content Requirements (LCRs) for the industry.

This dissertation analyses the question of whether the LCRs formulated and imposed in the South African mineral and mining industry promote the attraction of FDI. The argument made is that the overarching factor influencing the decision to invest in the South African mineral and mining industry is certainty. Pursuant thereto, this dissertation argues that, as presently formulated and implemented, the LCRs applicable to the South African mineral and mining industry do not ensure certainty and, accordingly, do not promote the attraction of FDI. In the light of this conclusion, this dissertation offers two recommendations to the South African Government to enhance certainty in respect of the LCRs applicable to the South African mineral and mining industry for the purpose of promoting the attraction of FDI.

Table of Contents

Abstract	iii
Table of Contents	iv
1. Chapter One: Introduction	6
1.1. Background.....	8
1.2 The Research Question	11
1.3 Methodology	11
1.4 Organisation of the Research	11
2. Chapter Two: Foreign Direct Investment	13
2.1. Introduction	13
2.2 Foreign Direct Investment.....	14
2.2.1 Foreign Direct Investment: The Concept	14
2.2.2 Foreign Direct Investment: Motivating Factors	15
2.2.3 Foreign Direct Investment: Determinants.....	17
2.2 Foreign Direct Investment in South Africa	19
2.2.1 South African Economic Policy	20
2.2.2 The Protection of Investment Act.....	22
2.2.3 The South African Mineral and Mining Industry	24
2.3 Conclusion	25
3. Chapter 3: Local Content Requirements	26
3.1 Introduction.....	26
3.2 Local Content Requirements: The Concept.....	26
3.2.1 Local and Content	27
3.2.2 Significance and Impact	29
3.3 Local Content Requirements in South Africa.....	30
3.3.1 The Mineral and Petroleum Resources Development Act	31
3.3.2 The Mining Charter: 2004, 2010 and 2017	33
3.3.3 The Mining Charter 2018.....	35
3.4 Conclusion	39
4. Chapter 4: FDI and LCRs	41
4.1 Introduction.....	41
4.2 The Attraction of FDI	41
4.2.1 The Case for Certainty	42
4.2.2 Achieving Certainty.....	45
4.3 Local Content Requirements in the South African Mineral and Mining Industry.....	46
4.3.1 Local Content Requirements in the South African Mineral and Mining Industry: The Status of Local Content Requirements.....	47
4.3.2 Local Content Requirements in the South African Mineral and Mining Industry: The Content and Imposition of Local Content Requirements	49
4.4 Conclusion	52
5. Chapter 5: Conclusion and Recommendations	53
5.1 Introduction.....	53
5.2 Summary of Main Issues	53
5.3 Concluding Recommendations	55
5.3.1 Legislative Confirmation.....	56
5.3.2 Stabilisation provision.....	57
5.4 Conclusion	58
Bibliography	59
Electronic.....	59

Primary sources.....65
Cases.....65
Legislation.....65
Frameworks.....65

1. Chapter One: Introduction

Local content requirements (LCRs) are policy and/or legislative mechanisms imposed by governments that compel relevant actors in a given industry to utilise domestic goods and/or services in accordance with predetermined participation and procurement thresholds.¹ Compliance with LCRs is often a precondition to acquiring authorisation to access and participate in a specific domestic industry.² When adhered to, LCRs are understood to enhance *inter alia*: employment and job creation; human capital development; productivity; and inclusive wealth generation and distribution in a specific domestic industry or industries.³ The implementation of LCRs is ultimately intended to promote economic transformation, development, and growth domestically.⁴

The imposition of LCRs in a specific industry is a strategy that can be employed by governments to, among other objectives, attract, foster and regulate Foreign Direct Investment (FDI).⁵ FDI is acknowledged as a catalyst for economic development⁶ as it has the potential to increase and stimulate the accumulation of capital and revenue in a domestic market.⁷ In instances wherein this potential is realised, FDI can contribute to increases in: employment generation, productivity, human resource development, skills acquisition, infrastructure development, technology transfer and financial stability,⁸ to name a few.

¹ Sacha Silva 'Local content requirements and the green economy' (2014) United Nations Conference on Trade and Development at 3 available at https://unctad.org/en/PublicationsLibrary/ditcted2013d7_en.pdf, accessed on 23 June 2021; OECD 'Local content requirements impact global economy' (Undated) available at <https://www.oecd.org/trade/topics/local-content-requirements/>, accessed on 23 June 2021.

² Hanna Deringer, Fredrick Erixon, Philipp Lamprecht and Erik van der Marel 'The economic impact of local content requirements: A case study of heavy vehicles' (2018) European Centre International Political Economy Occasional Paper 1/2018 at 3; OECD op cit note 1; 'The economic impact of local content requirements' (2016) OECD Trade Policy Note at 1 available at <https://pdfs.semanticscholar.org/3a35/2679507ef47a6c7d49dc1c7058be857ca3e6.pdf>, accessed on 23 June 2021.

³ Tim Grice 'Local content policies in the mining sector: Stimulating direct local employment' (2018) The International Institute for Sustainable Development at 2 available at <https://www.iisd.org/sites/default/files/publications/local-content-policies-mining-direct-local-employment.pdf>, accessed on 23 June 2021; Deringer op cit note 2 at 8. Desmond Tutu Ayentimi, John Burgess and Kerry Brown 'Developing effective local content regulations in sub-Saharan Africa: The need for more effective policy alignment' (2016) 24 *Multinational Business Review* 354 at 357.

⁴ Silva op cit note 1 at 4.

⁵ Ibironke Odumosu-Ayanu 'Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements' (2012) 35 *North Carolina Central Law Review* 65 at 89; Larry Qiu and Zhigang Tao 'Export, foreign direct investment, and local content requirement' (2001) 66 *Journal of Development Economics* 101 at 101-2; Deringer op cit note 2 at 8.

⁶ Holger Gorg and David Greenaway 'Much ado about nothing? Do domestic firms really benefit from foreign direct investment?' (2004) 19(2) *World Bank Research Observer* 171-197 at 189. See also Ayentimi op cit note 3.

⁷ Gorg *ibid*.

⁸ S Ajayi 'FDI and economic development in Africa' (2006) Paper presented at the ADB/AERC International Conference on Accelerating Africa's Development Five years into the Twenty-First Century, Tunis, Tunisia

Given the potential of FDI to improve the growth and development of industries as well as economies, most governments prioritise attracting FDI through their policy and legislative frameworks.⁹ Like many other African countries,¹⁰ South Africa's economic policy has prioritised attracting FDI.¹¹ Accordingly, the South African Government has enacted several pieces of legislation, chief among which being the Protection of Investment Act¹² (PIA), to *inter alia* promote and increase foreign investment in South Africa.¹³

One of South Africa's core economic sectors is its extractives industry, specifically its mineral and mining industry.¹⁴ Historically, South Africa's mineral and mining industry has driven South Africa's economic development.¹⁵ According to InvestSA – a branch of the South African Department of Trade, Industry and Competition¹⁶ – mining is 'an important source of direct and indirect jobs, a vital foreign exchange earner, and generator of tax revenues.'¹⁷ The Minerals Council of South Africa (MCSA) has noted that the minerals and mining industry contributed R361.6 billion to the Gross Domestic Product (GDP) of South Africa in 2020, constituting 8.2 percent of South Africa's total GDP.¹⁸

To regulate its mineral and mining sector, the South African Government has enacted the Mineral and Petroleum Resources Development Act¹⁹ (MPRDA). The MPRDA, in providing a rights and licencing regime, provides the basis upon which participation in South Africa's mineral and mining industry is

November 22-24 at 2-3. See also Galina Hale and Mingzhi Xu 'FDI effects on the labor market of host countries' (2016) *Federal Reserve Bank of San Francisco Working Paper* 2016-25 at 1-2. See also Ayentimi op cit note 3 at 355.

⁹ Gorg op cit note 6.

¹⁰ Op cit note 8 at 2-3.

¹¹ See White Paper on Reconstruction and Development: Cape Town [WPJ/1994] in GN 1954/1994 in GG 16085 of 15 November 1994 (RDP); South African Department of Finance 'Growth, Employment and Redistribution: A Macroeconomic Strategy for South Africa' (1996) available at <https://www.gov.za/documents/growth-employment-and-redistribution-macroeconomic-strategy-south-africa-gear>, accessed on 23 June 2021 (GEAR); South African Department of Economic Development 'The New Growth Path: framework' (2010) available at <https://www.gov.za/about-government/government-programmes/new-growth-path>, accessed on 23 June 2021 (NGP); and

South African National Planning Commission 'National Development Plan 2030: Our future – make it work' (2013) at 24 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf, accessed on 23 June 2021. (NDP).

¹² The Protection of Investment Act 22 of 2015.

¹³ Ibid, see the preamble thereto.

¹⁴ 'Foreign direct investment (FDI) in South Africa' (undated) available at <https://www.nordeatrade.com/dk/explore-new-market/south-africa/investment>, accessed on 23 June 2021.

¹⁵ InvestSA 'Mining'(undated) available at <http://www.investsa.gov.za/investment-opportunities/resource-based-industries/mining/>, accessed on 23 June 2021.

¹⁶ InvestSA 'About InvestSA' (undated) available at <http://www.investsa.gov.za/about-investsa/>, accessed on 23 June 2021.

¹⁷ Op cit note 15.

¹⁸ Minerals Council of South Africa 'Facts and figures pocketbook 2020' (2021) at 8 available at www.mineralscouncil.org.za/industry-news/publications/facts-and-figures/send/17-facts-and-figures/1366-facts-and-figures-2020-pocketbook, accessed on 23 June 2021.

¹⁹ Act 28 of 2002.

permitted and authorised.²⁰ Further, the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter), 2018²¹ (Mining Charter) developed, and published, in terms of the MPRDA²² stipulates the LCRs that interested entities must comply with to access, and participate in, the South African mineral and mining sector.²³

Neither the MPRDA nor the Mining Charter directly address FDI. However, in regulating participation in the South African mineral and mining industry in general, and through the provision of LCRs specifically, these legal instruments directly impact the prospects of, and potential for, new and continued FDI in the South African minerals and mining industry. This research is intended to discuss the impact of South Africa's present mineral and mining local content regime, as provided in the MPRDA and Mining Charter, on the South African mineral and mining sector's ability and potential to attract FDI. Specifically, this dissertation will evaluate whether South Africa's present LCRs regime promotes or hinders FDI in the South African minerals and mining industry.

1.1. Background

The attraction of FDI in South Africa is noted to be a 'cornerstone policy' of South Africa's post-apartheid economic policy regime.²⁴ The 1994 White Paper on Reconstruction and Development²⁵ confirmed, among other things, the first post-apartheid South African Government's desire to attract FDI²⁶ and create an enabling socio-economic environment that would encourage foreign investment and thus spur economic growth.²⁷ Thereafter, in 1996 the South African Government introduced a macro-economic policy framework referred to as the Growth, Employment and Redistribution (GEAR) strategy.²⁸ The GEAR was intended to facilitate 'a broad liberalisation of the [South African] economy'²⁹ to, amongst other objectives, accelerate economic growth, increase job creation and improve the distribution of economic opportunities and wealth.³⁰ The GEAR recognised that increased economic

²⁰ See section 5 of the Mineral and Petroleum Resources Development Act 28 of 2002.

²¹ Published under GN 1002 in GG 41934 of 27 September 2018.

²² Supra note 20 section 100(2).

²³ See paragraph 2 of the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter), 2018.

²⁴ 'FAQs on Foreign Direct Investment' (2015) South African Institute of International Affairs available at <https://saiaa.org.za/news/faqs-on-foreign-direct-investment/>, accessed on 23 June 2021.

²⁵ RDP op cit note 11.

²⁶ Ibid paragraph 3.5.3.

²⁷ See RDP op cit note 11 paragraph 3.5 in general.

²⁸ GEAR op cit note 11.

²⁹ Christopher Wood and Lesley Wentworth 'FDI in South Africa: Promotion and Protection of Investors...and the Public Interest' (2014) South African Institute of International Affairs available at <https://saiaa.org.za/research/fdi-in-south-africa-promotion-and-protection-of-investors-and-the-public-interest/>, accessed on 23 June 2021.

³⁰ GEAR op cit note 11 at 22.

growth and development in South Africa ‘depends in part on attracting [FDI].’³¹ In 2010 the New Growth Path Framework (NGP) was introduced in South Africa to facilitate ‘strong and sustained, inclusive economic growth.’³² The NGP confirmed that, to meet its economic goals, investment, such as FDI, would need to be attracted.³³ In 2013 the National Development Plan 2030: Our Future – Make it Work (NDP) was adopted.³⁴ The NDP, in providing South Africa’s socio-economic development strategy until 2030, is intended to provide the national blueprint for the elimination of poverty and the reduction of inequality in South Africa.³⁵ The NDP acknowledges the significance of foreign investment and its ability to increase ‘output, income and employment growth.’³⁶ The NDP confirms the South African Government’s desire to achieve higher rates of investment³⁷ whilst simultaneously maximising the domestic benefit thereof.³⁸

In 2018, the South African Government brought the PIA into effect.³⁹ By doing so, the South African Government: (i) recognised the ‘importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa’;⁴⁰ and (ii) enacted a means through which its intention to promote investment could be facilitated.⁴¹ The PIA is intended to *inter alia* ‘codify standard bilateral investment treaty (BIT) provisions and provide domestic legislation that deals with investor-state relations.’⁴² The PIA offers ‘various protections [to both domestic and foreign] investors, while allowing [South Africa] to institute policies to redress economic inequality and meet [its] domestic policy objectives.’⁴³

The desire to attract FDI notwithstanding, section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution) confirms the South African Government’s obligation, in the context of land and related reform,⁴⁴ to ‘redress the results of past racial discrimination’⁴⁵ by means of legislative and other

³¹ GEAR op cit note 11 at 22, see also Appendix 12.

³² NGP op cit note 11.

³³ Ibid at 20.

³⁴ Ibid.

³⁵ NDP op cit note 11 at 24.

³⁶ Ibid at 127.

³⁷ Ibid at 27 and 34.

³⁸ NDP op cit note 11 at 24 and 166. See also op cit note 29.

³⁹ See GN 395 in GG 41766 on 13 July 2013.

⁴⁰ Supra note 13 the Preamble.

⁴¹ Ibid.

⁴² Lungelo Magubane ‘Investment protection legislation in South Africa’ (2018) available at <https://www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in-africa/#:~:text=Introduction,that%20apply%20to%20all%20investors>, accessed on 23 June 2021.

⁴³ Op cit note 29.

⁴⁴ Section 25(8) the Constitution of the Republic of South Africa, 1996.

⁴⁵ Ibid.

measures.⁴⁶ In 2004 the MPRDA was brought into effect to regulate the South African mineral and petroleum extractives industry.⁴⁷ In acknowledging the South African mineral and petroleum extractives industry's legacy of '[racial] inequality and exploitation,'⁴⁸ the MPRDA enshrines several socio-economic objectives for the reform thereof. These include: (i) the eradication of discriminatory practices;⁴⁹ (ii) the promotion of gainful employment and employment opportunities;⁵⁰ (iii) the advancement and enhancement of the socio-economic wellbeing of all South African citizens;⁵¹ and (iv) significantly expanding opportunities for historically disadvantaged South African people and groups to gain access to, actively participate in, and benefit from, the South African mineral and mining industry.⁵²

To achieve these socio-economic objectives, the MPRDA obliges the Minister of Minerals and Energy to develop and implement a broad-based socio-economic empowerment framework.⁵³ Specifically, this framework is required to establish the path 'for effecting the entry into and active participation of historically disadvantaged South Africans into the [mineral and] mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.'⁵⁴ In fulfilment of this obligation, several frameworks, otherwise referred to as 'charters', have been formulated since 2004,⁵⁵ culminating in the formulation and implementation of the most recent iteration of the Mining Charter in 2018.⁵⁶

In addition to the requirements for participation in the South African mineral and mining industry provided in the MPRDA, the Mining Charter provides several LCRs⁵⁷ aimed at facilitating *inter alia* the sustainable transformation, growth and development of the South African mineral and mining industry.⁵⁸ Neither the MPRDA nor the Mining Charter, however, discuss how the attainment of the MPRDA's

⁴⁶ Supra note 44.

⁴⁷ Supra note 20 section 2.

⁴⁸ 'Mining Charter' (undated) available at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/mining-charter/#:~:text=The%20Mining%20Charter%20is%20one,needed%20transformation%20in%20the%20sector.&text=These%20include%20ensuring%20mine%20workers,the%20areas%20where%20they%20operate.,> accessed on 23 June 2021.

⁴⁹ Supra note 20 the preamble.

⁵⁰ Ibid section 2(f).

⁵¹ Ibid.

⁵² Ibid section 2(d).

⁵³ Ibid section 100(2)(a).

⁵⁴ Ibid.

⁵⁵ See the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry published in 2004, as amended in 2010; and the Broad-Based Socio- Economic empowerment Charter for the Mining and Minerals Industry published in 2017.

⁵⁶ Supra note 23 see the 'Mission'.

⁵⁷ Ibid see paragraph 2.

⁵⁸ Ibid see the 'Vision'.

socio-economic objectives, or the implementation of the Mining Charter's LCRs, impact FDI, or how these concepts are intended to interact with each other.

1.2 The Research Question

This research aims to address the following research questions –

Do South Africa's LCRs for participation in the South African mineral and mining industry, as presently formulated in the MPRDA and the Mining Charter, promote the attraction of FDI in the South African mineral and mining industry?

Do South Africa's LCRs for participation in the South African mineral and mining industry strike an adequate balance between facilitating South Africa's redress and transformation objectives for the industry and ensuring that new and continued FDI in the industry is promoted and attractive to investors?

Does the prevailing LCRs regime for the mineral and mining industry require amendment to ensure that FDI is promoted and remains attractive? If so, what form could these amendments take?

In the light of the questions that the research seeks to address, the purpose of the research is two-fold. Namely, it seeks to address whether South Africa's LCRs for participation in, and access to, the South African mineral and mining industry strikes an adequate balance between: (a) facilitating South Africa's redress and transformation objectives for the mineral and mining industry (and the country in general); and (b) ensuring that new and continued FDI in the South African mineral and mining industry is promoted and attractive to investors.

1.3 Methodology

This dissertation will use a doctrinal method of research. Specifically, research will be conducted with reference to primary sources (i.e. case law, legislation and policy documents) and secondary sources (i.e. books, journal articles, website articles and internet publications). Given the impact of the novel coronavirus (COVID-19), and the limitations imposed on movement in public spaces in South Africa, further reference will be made to e-books as opposed to the hardcopy versions thereof.

1.4 Organisation of the Research

The research is organized into five chapters. The following is an outline of the structure of these chapters that will be followed in the course of the research. The aim of the proposed structure is to address and respond to each research question, together with the underlying issues identified therein.

The current chapter provides a general overview of the research. Specifically, it provides the introduction, background and rationale for conducting the research.

Chapter 2 discusses the concept of FDI, with emphasis on its significance and perceived impact. The chapter commences with a general overview of the concept. Thereafter, the chapter will emphasise what factors / variables are required to exist for an environment that is conducive for the attraction of FDI to be established. The chapter then discusses the history and importance of FDI in South Africa's post-Apartheid economic policy. Thereafter, the South African legislative framework / the legislative provisions specifically intended to attract FDI to South Africa in general, and the South African mineral and mining industry specifically, will be discussed. The chapter will culminate in establishing why FDI, and specifically why attracting FDI, is crucial to South Africa in general and South Africa's mineral and mining sector specifically.

Chapter 3 will provide a brief overview of the concept of local content. The chapter will then discuss the impact LCRs are perceived to have in jurisdictions wherein they are imposed. The chapter will then culminate in an overview and discussion of the legal framework according to which LCRs in the South African mineral and mining industry are imposed.

Chapter 4 discusses the relationship between FDI and the LCRs imposed in the South African mineral and mining industry. Specifically, it discusses whether, in the light of the factors accepted to be required to promote the attraction of FDI, the content of the LCRs imposed in the South African mineral and mining industry create an environment conducive to attracting, and promoting the attraction of, FDI to South Africa and its mineral and mining industry.

Chapter 5 provides an analysis and summary of the earlier chapters. Thereafter the chapter provides recommendations for legal reform in South Africa, specifically in relation to the LCRs provided in the South African mineral and mining industry and their relationship to South Africa's FDI objectives. Finally, the chapter will conclude the research.

2. Chapter Two: Foreign Direct Investment

2.1. Introduction

Foreign Direct Investment (FDI) is widely viewed as a key source of external finance and knowledge.⁵⁹ FDI is understood to be a potential catalyst for economic growth and development in a given country when paired with an appropriate policy and/or legal framework.⁶⁰ Clark and Bogran specifically note that FDI can create substantial profits for multinational entities, on the one hand, and can create jobs, generate capital, and provide access to technology and expertise for host countries, on the other.⁶¹

Accordingly, attracting FDI has been viewed by some as a 'cornerstone policy' of the South African post-apartheid government's approach to economic development.⁶² Pursuant to the achievement of its economic objectives, the South African Government has enacted legislation aimed at attracting increased and sustained foreign investment into the South African economy.⁶³ Mineral extraction specifically has facilitated increased foreign investment in sub-Saharan Africa.⁶⁴ The Minerals Council of South Africa (MCSA) notes that the South African mineral and mining industry has over the course of several years attracted valuable FDI to South Africa.⁶⁵ The MCSA has noted that the minerals and mining industry contributed R361.6 billion to South Africa's Gross Domestic Product (GDP) in 2020, constituting 8.2 percent of South Africa's total GDP.⁶⁶ Further, despite the impact of the Covid-19 pandemic, the South African mineral and mining industry: (i) employed 451,427 people; (ii) paid employees R148.5 billion; (iii) paid R34.7 billion in value added taxes and R11.8 billion in royalties; (iv) sold R608 billion in primary mineral sales; and (v) exported R575.1 billion in sales.⁶⁷

⁵⁹ Patricia Makoni 'Foreign direct investment in Africa – Does human capital development matter?' (2019) 2 *EuroEconomica* 33 at 33. See also Padma Mallampally and Karl Sauvart 'Foreign direct investment in developing countries' (1999) 36 *Finance and Development* 34 at 35.

⁶⁰ OECD *Benchmark Definition of Foreign Direct Investment* (2008) 4ed Organisation for Economic Cooperation and Development at 3 (OECD); 'Foreign direct investment' (undated) PWC South Africa available at <https://www.pwc.co.za/en/press-room/foreign-direct-investment.html>, accessed on 23 June 2021.

⁶¹ Hunter Clark and Amy Bogran 'Foreign direct investment in South Africa' (1999) 27 *Denver Journal of International Law and Policy* 337 at 337 (Clark).

⁶² Op cit note 61 at 348.

⁶³ Supra note 12 see in general.

⁶⁴ Patricia Ackah-Baidoo 'Implementing local content under the Africa Mining Vision: an achievable outcome?' (2020) 41 *Canadian Journal of Development Studies / Revue canadienne d'études du développement* 486 at 488.

⁶⁵ Minerals Council of South Africa 'Mining in SA' (undated) available at <https://www.mineralscouncil.org.za/sa-mining>, accessed on 23 June 2021.

⁶⁶ Op cit note 18.

⁶⁷ Ibid.

This chapter will broadly outline what FDI is, as well as discuss its significance in general. This chapter will also discuss the importance and place of FDI in South Africa's economic policy regime. Finally, this chapter will explain the relevance of FDI in the South African mineral and mining industry.

2.2 Foreign Direct Investment

FDI is acknowledged as having the potential to facilitate economic development in the economy wherein it is secured.⁶⁸ This is achieved through, for example: (a) capital injections facilitated by means of share purchases and/or re-investment of earnings;⁶⁹ (b) catalysing the creation of jobs; and/or (c) improving competencies through technology and skills transfer,⁷⁰ to name a few. The concept, form, motivating factors and significance of FDI are discussed below.

2.2.1 Foreign Direct Investment: The Concept

The International Monetary Fund (IMF) explains that FDI is a form of international investment.⁷¹ Specifically, the IMF explains that FDI is an investment made by an entity located in an economy or market (direct investor) into an enterprise located in a separate economy or market (direct investment enterprise) for the purpose of establishing a 'lasting interest'.⁷² A direct investor may be a natural or juristic entity, a government or an association of said entities.⁷³ A direct investment enterprise is widely understood to be an entity in which a direct investor has voting power of 10 percent or more therein⁷⁴ (10 percent ownership rule). Although the 10 percent ownership rule is widely accepted as essential to establish a direct investment relationship,⁷⁵ countries may however have differing legal / policy requirements to establish such relationship.⁷⁶ Further, a 'lasting interest' is understood to imply two things.⁷⁷ First, it is understood to imply the presence of a prolonged association between the direct investment enterprise, on the one hand, and the direct investor, on the other;⁷⁸ and second, that

⁶⁸ OECD op cit note 60 at 3. See also Ayentimi op cit note 3 at 355.

⁶⁹ Tatyana Soubbtina *Beyond economic growth: An introduction to sustainable development 2ed* (2004) *The International Bank for Reconstruction and Development / The World Bank* at 134.

⁷⁰ Op cit note 61 at 337. See also Ayentimi op cit note 3 at 355.

⁷¹ IMF *Balance of Payments Manual 5ed* (1993) International Monetary Fund para 359 (IMF).

⁷² *Ibid.*

⁷³ IMF, OECD 'Report on the survey of implementation of methodological standards for direct investment' (2000) para 48 available at <https://www.imf.org/external/bopage/pdf/mar2000.pdf>, accessed on 23 June 2021 (IMF); See also op cit note 71 para 362; OECD op cit note 60 at 234; and UNCTAD 'UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs – FDI Flows and Stocks' (2009) 2 *United Nations Publication* para II.20 at 15-6.

⁷⁴ IMF op cit note 73; See also op cit note 71 para 362 and OECD op cit note 60 at 234.

⁷⁵ IMF op cit note 73; See also op cit note 71 para 363 and OECD op cit note 60 at 233-4.

⁷⁶ Patricia Makoni 'An extensive exploration of theories of foreign direct investment' (2015) 5 *Risk governance & control: Financial markets & institutions* 77 at 77. See also op cit note 69; and OECD op cit note 60 at 234.

⁷⁷ IMF op cit note 73 para 47.

⁷⁸ *Ibid.*

substantial control is exercised by the direct investor on, and over, the administration of the direct investment enterprise.⁷⁹ The World Trade Organisation (WTO) further explains that FDI occurs when the direct investor acquires an asset in a different country for the purpose of managing said asset.⁸⁰

The World Bank, the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development Division on Investment and Enterprise (UNCTAD) provide explanations for FDI consistent with the above. According to the World Bank, FDI is a 'foreign investment that establishes a lasting interest in or effective management control over an enterprise'.⁸¹ Similarly, the OECD explains that FDI is a form of international investment made by a direct investor for the purpose of establishing a prolonged interest in a direct investment enterprise.⁸² Likewise, the UNCTAD explains that FDI is a form of investment whereby a prolonged interest in a direct investment enterprise is established by a direct investor.⁸³ The World Bank, the OECD and the UNCTAD accept that a 'lasting interest' is most often evidenced through adherence to the 10 percent ownership rule.⁸⁴

2.2.2 Foreign Direct Investment: Motivating Factors

The introduction of FDI into the economy of a host country can play a crucial role in enhancing the welfare of said host country through the economic, developmental, and social benefits it may catalyse and yield.⁸⁵ Accordingly, it is clear why countries, and specifically developing countries, are eager to attract FDI.⁸⁶ However, what must be considered is what motivates foreign investors to invest in foreign markets/countries.⁸⁷

Faeth notes that over the past few decades several theories and models have been formulated to explain the motivation underlying the decision to invest in a foreign market.⁸⁸ Understanding the underlying motivation for the decision to invest also provides insight into the chosen location of FDI.⁸⁹ Naturally, the range of theories, as well as the number of variables that such theories respectively

⁷⁹ Op cit note 73 para 47.

⁸⁰ World Trade Organisation 'Trade and foreign direct investment' (1996) Press/57 available at https://www.wto.org/english/news_e/pres96_e/pr057_e.htm, accessed on 23 June 2021.

⁸¹ Op cit note 69 at 134.

⁸² OECD op cit note 60 para 11 at 17.

⁸³ UNCTAD 'UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs – FDI Flows and Stocks' (2009) Vol 2 *United Nations Publication* para II.20 at 15-6.

⁸⁴ Op cit note 69 at 134-5; OECD op cit note 60 para 11 at 17.

⁸⁵ Kavita Wadhwa and Sudhakara Reddy 'Foreign Direct Investment into developing Asian countries: the role of market seeking, resource seeking and efficiency seeking factors' (2011) 6 *International Journal of Business and Management* 219 at 219. See also Ayentimi op cit note 3 at 355.

⁸⁶ Op cit note 85 at 219. See also Ayentimi op cit note 3 at 355-6.

⁸⁷ *Ibid.*

⁸⁸ Isabel Faeth 'Determinants of foreign direct investment – A tale of nine theoretical models' (2009) 23 *Journal of Economic Surveys* 165 at 166-87 (Faeth).

⁸⁹ Emmanuel Cleeve 'How Effective Are Fiscal Incentives to Attract FDI to Sub-Saharan Africa?' (2008) 42 *The Journal of Developing Areas* 135 at 136.

consider, provide a plethora motives for, as well as the determinants and locations of, FDI. For the purposes of this research, however, it is not possible to consider each of these theories. This notwithstanding, the work of Dunning is referred to.⁹⁰ This is because Dunning's work is widely accepted, and often referred to, by most scholars when discussing FDI.⁹¹ According to Dunning, there are four broad categories of FDI motives,⁹² these being FDI that is: (a) market seeking; (b) resource seeking; (c) efficiency seeking; and (d) strategic-asset seeking.⁹³ These motives are outlined briefly below.

Market-seeking FDI is investment motivated by an investor's desire to enter, and participate in, the local market(s) of a given host country and/or region.⁹⁴ The purpose of this investment is to capitalise on the market-specific benefits and advantages occasioned by participating in a specific local market.⁹⁵ Such benefits and advantages often relate to the local market's size, growth and structure, as well as consumer preferences and per capita income.⁹⁶ Resource-seeking FDI is investment motivated by an investor's desire to seek and secure resources available in a host country that may not be readily available, if at all, in the home country of said investor.⁹⁷ Such resources may include: (a) physical resources i.e. raw, unrefined materials and agricultural products; (b) human resources i.e. cheap unskilled and/or semiskilled labour; (c) infrastructure i.e. ports, roads and telecommunication networks; and/or (d) technological capacity and/or rare, desirable skills and expertise.⁹⁸

Efficiency-seeking FDI is motivated by an investor's desire to enhance the competitiveness of its operational enterprise(s).⁹⁹ Specifically, investors seek to 'rationalise their production, distribution and

⁹⁰ See John Dunning 'Location and the multinational enterprise: A neglected factor?' (1998) 29 *Journal of International Business Studies* 46 at 53. See also Marian Gorynia, Jan Howak and Radoslaw Wolniak 'Motives and modes of FDI in Poland: An exploratory qualitative study' (2007) 1 *Journal for East European Management Studies* 132 at 135 (Gorynia).

⁹¹ See for example Alina Kudina and Malgorzata Jakubiak 'The motives and impediments to FDI in the CIS' (2008) OECD Global Forum on International Investment at 3 available at <https://www.oecd.org/investment/globalforum/40401047.pdf>, accessed on 23 June 2021; Op cit note 90 at 135; Dinkar Nayak and Rahul Choudhury 'A selective review of foreign direct investment theories' (2014) Working Paper Series, No. 143 *Asia-Pacific Research and Training Network on Trade ARTNeT* at 9 – 11 available at <https://www.econstor.eu/bitstream/10419/103862/1/782793517.pdf>, accessed on 23 June 2021.

⁹² Op cit note 90; Op cit note 91 at 3.

⁹³ Op cit note 85 at 220. See also John Dunning 'The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions' (1988) 19 *Journal of International Business Studies* 1 at 13 and John Dunning and Rajneesh Narula 'The R&D activities of foreign firms in the United States' (1995) 25(1-2) *International Studies of Management and Organisation* 39 at 39. See also Tshepo Masipa 'The relationship between foreign direct investment and economic growth in South Africa: Vector error correction analysis' (2018) 18 *Acta Commercii* 1 at 3 (Masipa).

⁹⁴ Op cit note 88 at 171-2. See also op cit note 89 at 136. See also Masipa *ibid*.

⁹⁵ Gorynia op cit note 90 at 135. See also Masipa *ibid*.

⁹⁶ Faeth op cit note 88 at 171-2. See also Masipa *ibid*.

⁹⁷ Faeth *ibid*. See also op cit note 89 at 136. See also Masipa *ibid*.

⁹⁸ Faeth *ibid*. Gorynia op cit note 90 at 135. See also Masipa *ibid*.

⁹⁹ Faeth *ibid*. See also op cit note 89 at 136. See also Masipa *ibid*.

marketing activities¹⁰⁰ so that the cost of production is significantly reduced, on the one hand, and the potential profit generated is increased, on the other.¹⁰¹ This is done through taking advantage of differences in the cost of factor endowments between the investor's home country and the host country, as well as the economies of scale and scope made available in the host country.¹⁰² Finally, strategic asset-seeking FDI is motivated by an investor's desire to advance its operational enterprise's international and/or regional strategic objectives – a common objective being to enhance and/or sustain competitiveness¹⁰³ – into foreign networks and capitalise on the advantages occasioned by the investment.¹⁰⁴ In this way, strategic asset-seeking FDI is similar to efficiency-seeking FDI.¹⁰⁵

In summary, the motivation underlying an investor's decision to engage in FDI in a foreign market, and likewise the primary attracting factor for FDI in general, is directly linked to the incentives that exist, or could come into existence, to potentially enhance investment outcomes in the locality of the direct investment enterprise.¹⁰⁶

2.2.3 Foreign Direct Investment: Determinants

In broadly understanding what FDI means, its potential impact and the motives underlying the decision to invest, what then needs to be considered are the specific factors / determinants that impact the attraction of FDI to a given host country. Tocar notes several potential factors impacting the decision to engage in FDI.¹⁰⁷ These factors include: (i) economic factors; (ii) available infrastructure; (iii) available technology / technological requirements; (iv) institutional / political factors; (v) industry risk(s); (vi) human factor(s); (vii) legal integration / considerations; and (viii) cultural factors.¹⁰⁸ For the purposes of this research, however, a consideration of the aforementioned determinants will be limited to the economic, infrastructural, political and legal determinants. These are briefly canvassed below.

Economic factors are often identified as playing a primary role in the attraction of FDI.¹⁰⁹ Frequently, macroeconomic concepts, such as market size and GDP, are viewed as having the ability to attract

¹⁰⁰ Gorynia op cit note 90 at 136. See also Masipa op cit note 93.

¹⁰¹ Op cit note 88 at 171-2. See also Masipa ibid.

¹⁰² Gorynia op cit note 90 at 136. See also Masipa ibid.

¹⁰³ Gorynia Ibid. See also Masipa ibid.

¹⁰⁴ Op cit note 88 at 171-2. See also op cit note 89 at 136. See also Masipa ibid.

¹⁰⁵ Gorynia op cit note 90 at 136. See also Masipa ibid.

¹⁰⁶ Gorynia Ibid. See also Masipa ibid.

¹⁰⁷ Sebastian Tocar 'Determinants of Foreign Direct Investment: A review' (2018) 11 *Review of Economic and Business Studies* 165 at 166 (Tocar). See also for example Simplice Asongu, Uduak Akpan and Salisu Isihak 'Determinants of foreign direct investment in fast-growing economies: evidence from the BRICS and MINT countries' (2018) 4 *Financial Innovation* (Simplice); James Walsh and Jiangyan Yu 'Determinants of foreign direct investment: A sectoral and institutional approach' Working Paper 10/187 *International Monetary Fund* (Walsh).

¹⁰⁸ Tocar ibid at 167. See also for example Simplice ibid; Walsh ibid.

¹⁰⁹ Tocar ibid. See also Simplice ibid; Walsh ibid.

larger volumes of FDI.¹¹⁰ Tocar explains that larger markets often attract a higher volume of FDI as a result of the influence of the economies of scale¹¹¹ i.e. cost savings and competitive advantages occasioned by efficient production.¹¹² Further, market-size growth – accepted as an indicator of high productivity in an economy – can stimulate the attraction of FDI.¹¹³

The availability of infrastructure, such as power, communication and transportation facilities influence *inter alia* operational and production costs.¹¹⁴ This in turn influences the attraction of FDI into a foreign market as infrastructure availability directly impacts the capability of FDI to be employed efficiently and effectively for the purpose of meeting the interests of investors.¹¹⁵

The political environment in a given country or market directly influences the existence or level of ‘uncertainty in the process of making decisions about foreign investment.’¹¹⁶ One catalyst of this uncertainty is political instability often occasioned by corruption.¹¹⁷ An uncertain or unstable political environment can adversely impact the expenses incurred by investors and the level of protection their interests may receive.¹¹⁸ This, in turn, influences the decision to engage in FDI.¹¹⁹

The legal requirements applicable to a foreign market are an important consideration for investors.¹²⁰ Differences in the legal requirements imposed by an investor’s home country, on the one hand, and the host country that the investor wishes to participate in, on the other, may lead to increased costs.¹²¹ Specifically, legal and/or regulatory requirements that stipulate certain rules for investment, capital repatriation and taxation are important determinants influencing the decision to invest.¹²²

Economic factors, the availability of infrastructure, the political environment, and the legal requirements that exist in a given host country, among a broad array of other interrelated and ancillary factors,¹²³ are important determinants potentially impacting the decision by an investor to invest in a particular market. This is because these factors each impact the potential for an investor to yield a return on their

¹¹⁰ Tocar op cit note 107 at 167. See also Simplice op cit note 107; Walsh op cit note 107.

¹¹¹ Tocar ibid. See also Simplice ibid; Walsh ibid.

¹¹² Will Kenton ‘Economies of scale’ (2020) Investopedia available at www.investopedia.com/terms/e/economiesofscale.asp, accessed on 23 June 2021.

¹¹³ Tocar op cit note 107 at 168. See also for example Simplice op cit note 107; Walsh op cit note 107.

¹¹⁴ Tocar ibid at 172. See also for example Simplice ibid; Walsh ibid.

¹¹⁵ Tocar ibid. See also for example Simplice ibid; Walsh ibid.

¹¹⁶ Tocar ibid at 173. See also for example Simplice ibid; Walsh ibid.

¹¹⁷ Tocar ibid at 174. See also for example Simplice ibid; Walsh ibid.

¹¹⁸ Tocar ibid. See also for example Simplice ibid; Walsh ibid.

¹¹⁹ Tocar ibid. See also for example Simplice ibid; Walsh ibid.

¹²⁰ Tocar ibid at 180.

¹²¹ Tocar ibid. See also for example Simplice op cit note 107; Walsh op cit note 107.

¹²² Tocar ibid. See also for example Simplice ibid; Walsh ibid.

¹²³ Tocar ibid at 167. See also for example Simplice ibid; Walsh ibid.

investment.¹²⁴ As outlined above, the determinants of FDI or, more simply, what must be considered by investors when making the decision to invest, are broad and varied. Each determinant provides potential for both profit as well as losses and, therefore, must be considered in depth by investors prior to investment. These determinants therefore directly impact the attraction of FDI. In understanding what is meant by the term 'FDI', as well as what considerations may potentially underly the decision to invest, what needs to be considered is the role that FDI plays in the South African context, more specifically, the South African mineral and mining space.

2.2 Foreign Direct Investment in South Africa

In broadly understanding what FDI is, why it is generally perceived to be significant and desirable, as well as what its motivating factors and determinants are, what must then necessarily be considered is the place of FDI in the South African context. The history and impact of FDI in South Africa spans several centuries.¹²⁵ From as early as 1652, foreign capital from European companies has largely spurred South Africa's industrial development.¹²⁶ After the discovery of diamonds and gold in the 1800s, increasing numbers of foreign investors were drawn to South Africa to commercially exploit its natural resources.¹²⁷ This accordingly resulted in vast economic growth that stimulated further substantial FDI in South Africa well into the 1950s.¹²⁸

Increasing and sustained civil unrest attributed to the human rights violations committed under the South African Apartheid regime, coupled with government interference in the South African economy, however, caused international sentiment toward South Africa to shift dramatically.¹²⁹ The international community's opposing stance toward the Apartheid government was expressed and solidified through the facilitation of a boycott campaign against South Africa that culminated in the implementation several official sanctions in the 1980s.¹³⁰ Most notably, the trade and financial sanctions imposed by the international community effectively ensured that South Africa was cut-off from foreign capital markets.¹³¹ This resulted in a mass exodus of established foreign capital from South Africa.¹³²

¹²⁴ Mmiselo Qumba 'Safeguarding foreign direct investment in South Africa: Does the Protection of Investment Act live up to its name?' 25 *South African Journal of International Affairs* 341 at 341.

¹²⁵ Michael Kransdorff 'Tax Incentives and foreign direct investment in South Africa' (2010) 3(1) *Consilience: The Journal of Sustainable Development* 68 at 72 (Kransdorff). See also A Black and S Gelb 'Foreign direct investment in South Africa' in Saul Estrin and Klaus Meyer (eds) *Investment Strategies in Emerging Markets* (2004) at 177-8 (Black). See also Clark op cit note 61 at 340-4.

¹²⁶ Kransdorff *ibid.* See also Black *ibid.* See also Clark *ibid.*

¹²⁷ Kransdorff *ibid.* See also Black *ibid.* See also Clark *ibid.*

¹²⁸ Kransdorff *ibid.* See also Clark *ibid.*

¹²⁹ Kransdorff *ibid.* See also Black *ibid.* See also Clark *ibid.*

¹³⁰ Kransdorff *ibid.* See also Black *ibid.* See also Clark *ibid.*

¹³¹ Kransdorff *ibid.* at 73. See also Clark *ibid.*

¹³² Kransdorff *ibid.* See also Clark *ibid.*

However, in the 1990s South Africa entered a period of political and economic renewal when negotiations to end Apartheid were initiated.¹³³ The introduction of a democratically elected government and economic reforms from then to date has done much to improve the sentiments of foreign investors toward South Africa.¹³⁴ However, in comparison with other developing countries, South Africa's ability to attract significant amounts of FDI has not improved substantially.¹³⁵ To improve South Africa's ability to attract FDI, and specifically to exploit the potential of FDI to enhance economic development and increase job creation, the post-apartheid South African Government has introduced and implemented several economic policy models.¹³⁶ These policies are briefly outlined below.

2.2.1 South African Economic Policy

To attract FDI for the purpose of *inter alia* enhancing economic development, the post-apartheid South African Government has introduced and implemented several economic policy models.¹³⁷ These include: the Reconstruction and Development Programme (RDP); the Growth, Employment and Redistribution: A Macroeconomic Strategy for South Africa policy (GEAR); the Accelerated and Shared Growth Initiative for South Africa (AsgiSA); the New Growth Path (NGP) and the National Development Plan (NDP).¹³⁸ Entrenched in each of these policies is an acknowledgement of the importance of FDI for South Africa and, accordingly, the commensurate desire to attract greater FDI to South Africa.¹³⁹

In 1994 the RDP confirmed the first post-apartheid South African Government's desire to attract FDI to South Africa¹⁴⁰ and create an enabling environment that would encourage investment for the purpose of stimulating economic development and growth in South Africa.¹⁴¹ The RDP specifically recognised that the attraction of foreign investment could only be achieved by 'establishing a climate of political stability, economic growth, and transparent, stable and consistent policies'¹⁴² that would encourage investment for the purpose of economic development.¹⁴³ In 1996 the South African Government introduced the GEAR.¹⁴⁴ The GEAR was intended to build on the RDP by facilitating a liberalisation of the South

¹³³ Kransdorff op cit note 125 at 73. See also Clark op cit note 61.

¹³⁴ Kransdorff *ibid.* See also Clark *ibid.*

¹³⁵ Kransdorff *ibid.* See also Clark *ibid.*

¹³⁶ Masipa op cit note 93 at 1. See also in general RDP op cit note 11; GEAR op cit note 11; NGP op cit note 11; NDP op cit note 11.

¹³⁷ Masipa *ibid.*

¹³⁸ Masipa *ibid.*

¹³⁹ Masipa *ibid.*

¹⁴⁰ RDP op cit note 11 paragraph 3.5.3.

¹⁴¹ *Ibid* paragraph 3.5 in general.

¹⁴² *Ibid* paragraph 3.5.3.

¹⁴³ RDP op cit note 11 paragraph 3.5.3. in general.

¹⁴⁴ GEAR op cit note 11.

African economy¹⁴⁵ to, amongst other objectives: accelerate economic growth, increase job creation, and improve the distribution of economic opportunities and wealth in South Africa.¹⁴⁶ The GEAR recognised that encouraging increased economic growth and development in South Africa depends, in part, on attracting FDI¹⁴⁷ which can only be achieved by maintaining a favourable investment climate.¹⁴⁸ The GEAR specifically noted that FDI encourages growth in several ways, such as: technology, skills and expertise transfer; facilitating access to external sources of finance; and enhancing access to global markets.¹⁴⁹ The GEAR further noted that the fundamental determinants of international investment decisions include the availability of: political and economic stability, sustained economic growth; investment incentives and labour market flexibility and stability.¹⁵⁰ In 2010 the NGP was introduced in South Africa to facilitate 'strong and sustained, inclusive economic growth.'¹⁵¹ The NGP confirmed that, to meet South Africa's economic goals, investment, such as FDI, would need to be looked to and attracted.¹⁵² Specifically, the NGP acknowledged that the South African Government 'must encourage stronger investment...to grow employment-creating activities rapidly while maintaining and incrementally improving South Africa's core strengths [in its key industries].'¹⁵³

In 2012 the National Development Plan 2030: Our future – make it work (NDP) was adopted¹⁵⁴ and is, at present, South Africa's current economic policy framework. The NDP, in providing South Africa's socio-economic development strategy until 2030, is intended to provide the national blueprint for the elimination of poverty and the reduction of inequality in South Africa.¹⁵⁵ The NDP acknowledges the significance of foreign investment and its ability to increase 'output, incomes and employment growth.'¹⁵⁶ The NDP confirms the South African Government's desire to achieve higher rates of investment¹⁵⁷ whilst simultaneously maximising the domestic benefit thereof.¹⁵⁸

The attraction of FDI in South Africa post-1994 to date, as seen from the above economic policies, has been an important facet of the post-apartheid South African Government's plan to facilitate and catalyse growth and development in South Africa. In understanding this, what must then be considered is the

¹⁴⁵ Op cit note 29.

¹⁴⁶ GEAR op cit note 11 at 22.

¹⁴⁷ Ibid and Appendix 12.

¹⁴⁸ Ibid at 6.

¹⁴⁹ Ibid Appendix 12.

¹⁵⁰ Ibid at 4 and Appendix 12.

¹⁵¹ NGP op cit note 11 at 2.

¹⁵² Ibid at 20 and 61.

¹⁵³ Ibid at 20.

¹⁵⁴ NDP op cit note 11 at 20.

¹⁵⁵ Ibid at 24.

¹⁵⁶ Ibid at 127.

¹⁵⁷ Ibid at 27 and 34.

¹⁵⁸ Ibid at 24 and 166.

specific role FDI plays in the South African mineral and mining industry. This discussion will be facilitated by way of reference to the general protection afforded to investors and their investments occasioned by the enactment of the Protection of Investment Act 22 of 2015 (the PIA), as well as a brief consideration of the need for FDI as a direct result of the nature of the mineral and mining industry.

2.2.2 The Protection of Investment Act

In recognition of the importance that 'investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa'¹⁵⁹ and its desire to promote 'investment by creating an environment that facilitates processes that may affect investments,'¹⁶⁰ the South African Government has enacted the PIA. The PIA defines 'investment' as *inter alia* 'any lawful enterprise established, acquired or expanded by an investor in accordance with the laws of the Republic [of South Africa], committing resources of economic value over a reasonable period of time, in anticipation of profit.'¹⁶¹ Further, the PIA defines an 'investor' as 'an enterprise making an investment in [South Africa] regardless of nationality.'¹⁶²

Prior to the enactment of the PIA, South Africa was subject to the terms of several Bilateral Investment Treaties (BITs).¹⁶³ Mhlongo explains that the primary purpose of BITs is to protect foreign investors by shielding 'foreign investments from state interference'¹⁶⁴ and establishing mechanisms to manage conflicts that could arise between said investors and host states.¹⁶⁵ After its first democratic election in 1994, the South African Government – with a view to encouraging increased foreign investment – entered into several BITs with several developed countries.¹⁶⁶ The terms of these BITs eventually led to several disputes between the South African Government and investors.¹⁶⁷ After a review of the perceived adverse impact of the BITs, the South African Government deemed the continuation of said agreements to be inconsistent with its policy goals for South Africa and its people.¹⁶⁸ Specifically, in its reasoning justifying the termination of the BITs, the South African Government 'found that the international investment regime mainly focused on narrow issues of economic interests, while matters of

¹⁵⁹ Supra note 12 see the Preamble thereto.

¹⁶⁰ Ibid.

¹⁶¹ Ibid section 2(1)(a).

¹⁶² Ibid section 1.

¹⁶³ Jonathan Lang 'Bilateral Investment Treaties – a shield or a sword?' Bowman Gilfillan at 2 available at https://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_10383, accessed on 23 June 2021.

¹⁶⁴ Lindelwa Mhlongo 'A critical analysis of the Protection of Investment Act 22 of 2015' (2019) 34 *Southern African Public Law* 1 at 2.

¹⁶⁵ Ibid.

¹⁶⁶ Op cit note 163.

¹⁶⁷ Op cit note 164. See for example *Piero Foresti, Laura De Carli v Republic of South Africa* (ICSID case No ARB (AF)/07/1).

¹⁶⁸ Op cit note 124 at 342.

national interest were exposed to an unpredictable system of international arbitration.¹⁶⁹ Qumba explains that the South African Government's prevailing understanding was that no substantial connection existed between the attraction of FDI to South Africa and the extant BITs and that, in general, South Africa's socio-economic development objectives were hindered, rather than assisted, by the BITs.¹⁷⁰

The PIA, in serving to replace the function of BITs, confirms that its purpose is to 'protect investment in accordance with and subject to the Constitution [of the Republic of South Africa, 1996], in a manner which balances the public interest and the rights and obligations of investors.'¹⁷¹ This provision makes clear the South African Government's commitment to striking a balance between meeting its own development and growth aims for South Africa, on the one hand, and safeguarding the interests of investors, on the other.¹⁷² Further, the PIA provides that '[f]oreign investors and their investments must not be treated less favourably than South African investors in like circumstances.'¹⁷³ This provision makes clear the South African Government's intention to ensure that fair competition between domestic and foreign investors is encouraged.¹⁷⁴

In addition to the general provisions affirming that the South African Government's approach to investors' interests will be balanced and fair, the PIA provides further specific protections to investors. Namely, investors are afforded the protections of the right to property, as stipulated in the Constitution of the Republic of South Africa, 1996.¹⁷⁵ That is, investors are afforded certain protections against the arbitrary deprivation and expropriation of their investments.¹⁷⁶ Further, the South African Government is obliged to afford foreign investors' 'investments a level of physical security as may be generally provided to domestic investors in accordance with [the] minimum standards of customary international law.'¹⁷⁷

In respect of repatriation of profit, the PIA provides that '[a] foreign investor may, in respect of an investment, repatriate funds subject to taxation and other applicable legislation.'¹⁷⁸ Although this section provides some certainty in the sense that investors are aware that repatriation of funds is not

¹⁶⁹ Op cit note 124 at 342.

¹⁷⁰ Ibid.

¹⁷¹ Supra note 12 section 4(a).

¹⁷² Op cit note 124 at 345.

¹⁷³ Supra note 12 section 8(1).

¹⁷⁴ Op cit note 124 at 346.

¹⁷⁵ Supra note 12 section 10.

¹⁷⁶ Supra note 44 sections 25(1) and (2).

¹⁷⁷ Supra note 12 section 9.

¹⁷⁸ Ibid section 11.

unrestricted and subject to certain rules, without unbridled freedom to transfer funds and being faced with the possibility that legislation may frequently change, investors may be reluctant to invest.¹⁷⁹

The PIA also provides for the resolution of disputes.¹⁸⁰ Should an investor have a grievance in respect of action taken by the South African Government, which action detrimentally impacts the investment of said investor, the investor may request that the South African Department of Trade and Industry assign a third-party mediator to enable and facilitate the amicable resolution of the grievance.¹⁸¹ In addition, an investor, once becoming aware of a grievance, may approach any competent authoritative body (as prescribed by the PIA) within South Africa to enable the settlement of the grievance.¹⁸² Further, in the case of a foreign investor, the South African Government may provide its consent to the international arbitration of the issue, provided that all available domestic remedies have been resorted to and exhausted.¹⁸³

The PIA, in replacing South Africa's BITs and providing the basis for South Africa's investment legal framework, seeks to ensure that a balance is struck between the public interest, to meet the State's developmental and growth aims, and the interests of investors, to increase investment in South Africa.¹⁸⁴ The purpose of which is to ensure that investment continues to play a positive role 'in job creation, economic growth, sustainable development, and the well-being of the people of South Africa.'¹⁸⁵

2.2.3 The South African Mineral and Mining Industry

The South African Government has an interest in ensuring that South Africa derives benefit from the exploitation of its natural resources, and specifically the proceeds acquired from participation in its mineral and mining industry.¹⁸⁶ Participation in the mineral and mining industry, however, in general is capital intensive, high risk and often has long lead times from the prospecting phase to the production phase.¹⁸⁷ Due to these factors, however, exploiting South Africa's mineral resources with recourse to purely domestically available financing, expertise and/or equipment is challenging, if not nearly

¹⁷⁹ Op cit note 124 at 349.

¹⁸⁰ Supra note 12 see section 13.

¹⁸¹ Ibid section 13(1).

¹⁸² Supra note 86 sections 13(4) and 6(4).

¹⁸³ Ibid section 13(5).

¹⁸⁴ Supra note 12 see the Preamble thereto.

¹⁸⁵ Ibid.

¹⁸⁶ See Chapter 2.

¹⁸⁷ 'Mining Charter III: certainty, but at a cost' (2019) Herbert Smith Freehills: Client Brief at 16 available at <https://www.herbertsmithfreehills.com/latest-thinking/mining-charter-iii-certainty-but-at-a-cost>. See also Paige Muller 'Increased regulatory certainty bolsters direct foreign investment' (2019) available at www.miningweekly.com/article/increased-regulatory-certainty-bolsters-direct-foreign-investment-2019-01-22, accessed on 23 June 2021.

impossible, and therefore requires capital, investment and input from external sources.¹⁸⁸ Said capital, investment and input specifically entering South Africa by way of FDI.¹⁸⁹ As such, the South African mineral and mining industry plays host to several industry participants that are either foreign entities themselves or domestic entities that are effectively controlled by foreign entities.¹⁹⁰ Accordingly, by its very nature, the South African mineral and mining industry is thus dependent upon FDI to facilitate its continuation and enable its profitability.¹⁹¹

2.3 Conclusion

FDI has a long and important history in South Africa, especially the South African mineral and mining industry.¹⁹² Specifically, and more importantly for the purposes of this research, FDI enables South Africa to exploit its natural wealth and derive benefit from said exploitation. This importance is further evidenced by the South African Government's enactment of the PIA to ensure that, in respect of investment, a balance is struck between the public interest and the interests of investors¹⁹³ However, to enable the enhancement of the domestic benefit received from the participation of investors / foreign entities / foreign-controlled entities in the South African mineral and mining industry, the South African Government has, among other things, formulated and imposed instruments referred to as local content requirements (LCRs) applicable to the mineral and mining industry. LCRs are discussed in further detail in Chapter 3.

¹⁸⁸ Martin Creamer 'South Africa lacks funding for capital-intensive mining, needs to encourage foreign investment' (2018) Mining Weekly available at www.miningweekly.com/article/south-africa-lacks-funding-for-capital-intensive-mining-needs-to-encourage-foreign-investment-2018-07-27, accessed on 23 June 2021.

¹⁸⁹ Ibid.

¹⁹⁰ See M Garside 'Market capitalization of the leading mining companies in South Africa in 2020' (2020) available at <https://www.statista.com/statistics/1014904/south-africa-leading-mining-companies/>, accessed on 23 June 2021.

¹⁹¹ Op cit note 188.

¹⁹² Op cit note 125 at 72.

¹⁹³ Supra note 12, see the Preamble thereto.

3. Chapter 3: Local Content Requirements

3.1 Introduction

Increasing numbers of resource-rich countries¹⁹⁴ have, during the course of their development,¹⁹⁵ implemented specific legislative and policy instruments aimed at increasing and enhancing domestic participation and procurement in their respective mineral and mining industries.¹⁹⁶ The general purpose of the implementation of these instruments is to maximise the domestic benefit received by a host government from the exploitation of its mineral resources by the relevant actor / industry participant.¹⁹⁷ These legislative and policy instruments are commonly referred to as local content law and policy and serve to prescribe local content requirements (LCRs).

This chapter discusses the concept of local content and LCRs. Further, this chapter will analyse the significance of LCRs with specific emphasis on the impact the implementation of LCRs is perceived to facilitate in a targeted industry and / or economy. The chapter will then discuss the development of South Africa's law and policy in respect of the LCRs relating to employment, procurement and ownership in the South African mineral and mining industry. Finally, the chapter will outline the current South African LCRs regime in respect of employment, procurement, and ownership, as applicable to the South African mineral and mining industry.

3.2 Local Content Requirements: The Concept

The term 'local content' does not have a universally recognised definition.¹⁹⁸ This is attributed to the fact that the content, scope, applicability and requirements of 'local content' are country and context specific.¹⁹⁹ A further reason is that 'local content' is defined and imposed in a given country in

¹⁹⁴ See Jane Korinek and Isabelle Ramdoo 'Local content policies in mineral-exporting countries' (2017) OECD Trade Policy Papers No. 209 OECD Publishing at 6-9.

¹⁹⁵ Eduardo Pereira, Christopher Mathews and Heike Trischmann 'Local Content Policies in the Petroleum Industry: Lessons Learned' (2019) 4 Oil and Gas, Natural Resources and Energy Journal 631 at 638.

¹⁹⁶ Op cit note 194 at 10.

¹⁹⁷ Ibid. See also op cit note 64 at 489.

¹⁹⁸ Silvana Tordo, Michael Warner, Osmel Manzano and Yahya Anouti 'Local Content in the Oil and Gas Sector' (2013) *International Bank for Reconstruction and Development / The World Bank* at 4; Berryl Asiago 'Fact or fiction: Harmonising and unifying legal principles of local content requirements' (2016) 34 *Journal of Energy and Natural Resources Law* 337 at 338.

¹⁹⁹ Kennedy Chege 'Designing Local Content Frameworks in the Oil, Gas and Mining sectors in Africa: Principles and Guidelines' (2020) available at <http://www.mlia.uct.ac.za/news/designing-local-content-frameworks-oil-gas-and-mining-sectors-africa-principles-and-guidelines>, accessed on 23 June 2021. See also op cit note 2 at 8; and

accordance with said country's socio-political, economic and/or general developmental objectives.²⁰⁰ A consideration of the constituents of the term 'local content' i.e. 'local' and 'content', respectively, indicates how the term can, and is, understood and applied differently from country to country. This consideration is outlined below.

3.2.1 Local and Content

The term 'local' may be used to refer to the immediate, physical vicinity of the targeted industry's area of operation.²⁰¹ Alternatively, the term may be used to refer to any person: (i) that is a national of the country; or (ii) whose company is registered, wherein the targeted industry is located.²⁰² It is also possible that 'local' may be ascribed a meaning completely unique to the country in which the term would be applied. The term 'content' may be used to refer to any one, or all, of the following: (a) a workforce comprising skilled and/or unskilled labour; (b) goods; (c) services; and (d) expertise and knowledge.²⁰³ 'Content' could further refer to the acquisition and/or the development of any or all of the foregoing.²⁰⁴ The above indicates that the terms 'local' and 'content' could individually embody a plethora of meanings. When context and country-specific socio-political and/or economic policy objectives are considered, what may be meant by the term 'local content' is afforded further complexity.²⁰⁵ It is therefore evident why, and how, the definition ascribed to the term 'local content' could, and does, differ from country to country.²⁰⁶

Chege notes that despite the proliferation of country-specific definitions and applications, 'local content' generally consists of two aspects, these being: 'local procurement and capacity building.'²⁰⁷ Domestic or local procurement is generally understood to refer to the acquisition of domestically-sourced goods and/or services.²⁰⁸ Such procurement can be classified into two categories, specifically procurement

Wendy Nyakabawo 'South Africa's local content policies: challenges and lessons to consider' (2017) Trade and Industrial Policy Strategies (TIPS) Policy Brief 7/2017 at 2.

²⁰⁰ Op cit note 199. See also op cit note 2 at 8; and Wendy op cit note 199 at 2.

²⁰¹ Trade and Agriculture Directorate Trade Committee 'Local content policies in minerals-exporting countries' (2017) TAD/TC/WP(2016)3/PART1/FINAL Organisation for Economic Co-operation and Development (OECD) at 7 available at

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2016\)3/PART1/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2016)3/PART1/FINAL&docLanguage=En), accessed on 23 June 2021.

²⁰² Ibid at 7.

²⁰³ Ibid at 8.

²⁰⁴ Ibid.

²⁰⁵ Berryl op cit note 198 at 341.

²⁰⁶ Ibid.

²⁰⁷ Kennedy Chege 'Designing Local Content Frameworks in the Oil, Gas and Mining sectors in Africa: Principles and Guidelines' (2020) The Extractives Hub-Initiative of the Centre for Energy, petroleum and Mineral Law and Policy (CEPMPL), University of Dundee (UK) at 9 available at <https://extractiveshub.org/servefile/getFile/id/7576>, accessed on 23 June 2021.

²⁰⁸ Wendy op cit note 199 at 2.

that is: (i) requirement-based; or (ii) incentives-driven.²⁰⁹ Further, domestic or local procurement can also involve the imposition of qualitative and/or quantitative requirements.²¹⁰ Domestic capacity building is generally understood to refer to requirements imposed on relevant actors to contribute to the development of domestic businesses.²¹¹ As such, the concept may also refer to contributions to the development of specific technical and/or operational skills through the facilitation of training programs.²¹² Further, depending on the objectives of a given country, domestic procurement and capacity building may either be compulsory or may rely on the best efforts of relevant actors to endeavour to meet predetermined requirements.²¹³ It is thus arguable that the ‘domestic procurement’ aspect of ‘local content’ focuses on deriving an immediate benefit for a given country, whereas the ‘domestic capacity building’ aspect focuses on deriving a long-term benefit for a given country.²¹⁴

In the light of the above, LCRs can be described as mechanisms whereby countries oblige relevant actors to domestically acquire predetermined percentages of goods and/or services from predetermined vendors of such goods and/or services.²¹⁵ On a broader level, LCRs could be described as ‘a strategy which emphasizes the establishment of new and fortification of existing economic linkages through nonfiscal measures, and efforts which extend beyond the direct contribution to the Gross Domestic Product (GDP) and government revenues.’²¹⁶ Adherence to these mechanisms and strategies may result in ‘spill over effects.’²¹⁷ These may include stimulating innovation and/or skills, knowledge and technology transfer.²¹⁸ Further, LCRs may be imposed as a condition that must be met by a relevant actor prior to said actor being authorised to participate, and/or to continue participating, in a targeted

²⁰⁹ Op cit note 201 at 10.

²¹⁰ Ibid.

²¹¹ Op cit note 195 at 646.

²¹² Ibid at 655.

²¹³ Op cit note 201 at 9.

²¹⁴ Op cit note 198 at 2.

²¹⁵ ‘Local content requirements impact global economy’ (Undated) OECD available at <https://www.oecd.org/trade/topics/local-content-requirements/>, accessed on 23 June 2021; Op cit note 1 at 3. See also Wendy op cit note 199 at 2. Berryl op cit note 198 at 338; op cit note 198 at 2-3. See also Rene Belderbos, Clive Jie-A-Joen and Leo Sleuwaegen ‘Local content requirements, vertical cooperation, and foreign direct investment’ (2002) 150 *De Economist* 155 at 155 (Blederbos). See also Jesper Jensen and David Tarr ‘Impact of Local Content Restrictions and Barriers Against Foreign Direct Investment in Services: The Case of Kazakhstan’s Accession to the World Trade Organization’ (2008) 46 *Eastern European Economics* 5 at 11 (Jensen). See also Christopher Ettmayr and Hendrik Lloyd ‘Local content requirements and the impact on the South African renewable energy sector: A survey-based analysis’ (2017) 20 *South African Journal of Economic and Management Sciences* 1 at 4 (Ettmayr). See also Jan-Christoph Kuntze and Tom Moerenhout ‘Local content requirements and the renewable energy industry – A good match’ (2013) International Centre for Trade and Sustainable Development at 6 – 9 available at <https://www.greengrowthknowledge.org/sites/default/files/downloads/resource/local-content--requirements-renewable-energy-industry-ICTSD.pdf>, accessed on 23 June 2021 (Kuntze).

²¹⁶ Op cit note 64.

²¹⁷ Op cit note 201 at 7. See also op cit note 64.

²¹⁸ Op cit note 207. See also Ayentimi op cit note 3 at 355.

industry.²¹⁹ Accordingly, after considering the above descriptions, 'local content' should be understood as the value, whether social or economic, derived by a country²²⁰ from the participation of a relevant actor in a targeted industry.²²¹ This participation being in accordance with predetermined, government-imposed obligations.²²² In understanding what 'local content' is and generally entails, what must then be explored is why governments are motivated to design and implement LCRs.

3.2.2 Significance and Impact

The reasons underlying why governments design and implement LCRs are context specific and, therefore, differ from country to country.²²³ Nyakabawo, however, notes that the basic rationale for designing and imposing LCRs is linked to both economic and socio-political considerations.²²⁴ It is not possible, nor is it the intention of this research, to canvas each country-specific consideration. However, what these considerations generally entail will be discussed.

On the economic front, Pereira, Mathews, and Trischmann note that the formulation and imposition LCRs are generally understood to catalyse increased investment and economic development.²²⁵ LCRs are perceived to have the potential to achieve this in several ways.²²⁶ One such way is through encouraging the growth of industries and increasing technological capabilities.²²⁷ Another is that LCRs could create and increase domestic employment opportunities²²⁸ that, in addition to creating new income sources, could stimulate integral competencies through skills and knowledge transfer.²²⁹ In general, the formulation and implementation of LCRs are intended (and believed) to stimulate, facilitate and sustain economic growth and development in a targeted industry.²³⁰

From a socio-political standpoint, LCRs are perceived to be a mechanism whereby specific government-policy objectives could be achieved.²³¹ For example, the imposition of LCRs could assist to facilitate the equitable redistribution of capital and/or economic or social benefits arising from certain

²¹⁹ Op cit note 215; op cit note 1 at 3; Berryl op cit note 198 at 338. See also Belderbos op cit note 215. See also Jensen op cit note 215. See also Jensen op cit note 215. See also Ettmayr op cit note 215 at 4. See also Kuntze op cit note 215.

²²⁰ Op cit note 207. See also op cit note 64.

²²¹ Berryl op cit note 198 at 338. See also Belderbos op cit note 215. See also Jensen op cit note 215. See also Ettmayr op cit note 215 at 4. See also Kuntze op cit note 215.

²²² Berryl op cit note 215. Belderbos op cit note 215. See also Jensen op cit note 215. See also Ettmayr op cit note 215 at 4. See also Kuntze op cit note 215.

²²³ Op cit note 195 at 636.

²²⁴ Wendy op cit note 199 at 2. See also op cit note 64.

²²⁵ Op cit note 195 at 636. See also op cit note 64.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Wendy op cit note 199 at 2. See also op cit note 64.

²³⁰ Op cit note 64 at 488-9.

²³¹ Op cit note 198 at 23.

economic activities.²³² LCRs can therefore be used to manage and achieve domestic expectations in respect of wealth redistribution and socio-political redress.²³³ Further, LCRs can be used to mitigate the impact of certain economic activities on groups through employment generation, skills transfer, as well as infrastructure development.²³⁴ The formulation and implementation of LCRs are therefore perceived to be capable of facilitating and achieving socio-political objectives.²³⁵ In being understood to have the potential to facilitate the achievement of a country's economic and socio-political objectives, the formulation and implementation of LCRs are perceived to generate value for the country wherein the LCRs apply.²³⁶

Notwithstanding the economic and socio-political advantages LCRs have the potential to catalyse or facilitate, LCRs are also noted to have the potential to bring about negative consequences to an industry or a country.²³⁷ Such negative consequences could include: (a) local businesses and service providers colluding to inflate prices for goods and services, which in turn decreases natural competition; and (b) companies, to whom LCRs apply, acting to employ fewer staff due to increased expenses, which in turn could impede the transfer of skills, knowledge and technology.²³⁸ For the purposes of this research, however, it is not necessary to discuss these types of potential disadvantages in further detail.

3.3 Local Content Requirements in South Africa

South Africa's mineral and petroleum industry is noted to have one of the most detailed and complex local content frameworks in the world.²³⁹ This framework is broad in scope and extends to: (a) employment; (b) ownership; and (c) procurement targets, to name a few.²⁴⁰ Korinek and Ramdoo note that the LCRs in the South African mineral and petroleum sector represent an attempt to correct historical inequities by increasing the participation of local actors in the South African mineral and petroleum industry.²⁴¹ As noted above, the scope of this research is focussed on the LCRs pertaining to South Africa's mineral and mining industry. The LCRs applicable to the South African petroleum industry will therefore not be discussed. The present formulation of the LCRs regime applicable to the South African minerals and mining industry will be outlined and discussed below. For the purposes of

²³² Wendy op cit note 199 at 2. See also op cit note 64 at 488.

²³³ Damilola Olawuyi 'Local content requirements in oil and gas contracts: regional trends in the Middle East and North Africa' (2019) 37 *Journal of Energy and Natural Resources Law* 93 at 101.

²³⁴ Op cit note 198 at 26.

²³⁵ Wendy op cit note 199 at 2. See also op cit note 64 at 489.

²³⁶ Op cit note 198 at 24.

²³⁷ See also Etmayr op cit note 215 at 5. See also Kuntze op cit note 215.

²³⁸ See Etmayr *ibid*. See also Kuntze *ibid*.

²³⁹ Op cit note 194 at 8.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid*.

this research, the discussion will be limited to the LCRs prescribed in respect of ownership, procurement, and employment.

3.3.1 The Mineral and Petroleum Resources Development Act

To regulate its mineral and petroleum extractives industry, the South African Government has enacted the Mineral and Petroleum Resources Development Act²⁴² (MPRDA). One of the stated objects of the MPRDA is to increase opportunities for persons disadvantaged by the Apartheid regime²⁴³ (historically disadvantaged persons) ‘substantially and meaningfully’,²⁴⁴ to allow them to participate in the South African mineral and mining industry.²⁴⁵ The expansion of these opportunities is to enable historically disadvantaged persons to benefit from the exploitation of South Africa’s mineral resources.²⁴⁶ The MPRDA provides that ‘historically disadvantaged persons’ (HDPs) refer to any person disadvantaged by discrimination that was unfair before the Constitution of the Republic of South Africa, 1996 (the Constitution) took effect.²⁴⁷ Section 9 of the Constitution provides the right to equality.²⁴⁸ According to section 9, a person may not be unfairly discriminated against on the basis of *inter alia* race, colour, disability and gender.²⁴⁹ The Constitutional Court has noted that ‘unfair discrimination’ entails ‘treating persons differently in a way that impairs their fundamental dignity as human beings.’²⁵⁰

HDPs also include any association, a majority of whose members are HDPs.²⁵¹ Further, HDPs include juristic persons, other than associations, that are controlled or managed by HDPs who collectively own and control a majority of the members’ interest or issued share capital.²⁵² The MPRDA’s definition of HDPs, however, does not explicitly state that such persons be South African and/or based in South Africa.

To achieve the socio-economic objective of ‘substantially and meaningfully’²⁵³ increasing opportunities for HDPs in the South African mineral and mining industry,²⁵⁴ the MPRDA obliges the Minister of Minerals and Energy (the Minister) to develop and implement ‘a broad-based socio-economic

²⁴² Supra note 20 see the Preamble thereto.

²⁴³ Ibid section 2(d).

²⁴⁴ Ibid section 2(d).

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid section 1.

²⁴⁸ Supra note 44 section 9.

²⁴⁹ Ibid sections 9(3), (4) and (5).

²⁵⁰ *Prinsloo v Van der Linde and Another* [1997] ZACC 5 para 31.

²⁵¹ Supra note 20 section 1.

²⁵² Ibid section 1.

²⁵³ Ibid section 2(d).

²⁵⁴ Ibid section 100(2)(a).

empowerment Charter'²⁵⁵ (the envisioned charter). The envisioned charter is required to set the framework for facilitating the participation of 'historically disadvantaged South Africans'²⁵⁶ (HDSA) in the mineral and mining industry for the purpose of aiding their socio-economic development.²⁵⁷

The MPRDA uses the term HDSA, as opposed to HDPs, when referring to the envisioned charter and the aims thereof.²⁵⁸ Unlike the term HDPs, the MPRDA does not define the term HDSA. As will be discussed in greater detail below, the initial iterations of the envisioned charter served to address this by defining the term HDSA. However, over time, and as presently formulated, the envisioned charter did away with the term HDSA in favour of the term HDPs. It is possible that the term HDSA remains in the MPRDA due to: (a) the South African Legislature (who formulate the MPRDA); and (b) the Minister of Mineral Resources (who formulates the envisioned charter) being at loggerheads as to what language should be used to help describe, regulate and facilitate the South African Government's socio-economic developmental objectives in the South African mineral and mining industry. This however is unlikely as the present iteration of the envisioned charter incorporates the term HDPs as defined in the MPRDA.²⁵⁹ It is more likely that the inclusion of HDSA in the MPRDA should be attributed to a legislative oversight that has not yet been amended to refer to HDPs. This possibility notwithstanding, a definite incongruence does exist in respect of the terminology used, which in turn perpetuates legislative uncertainty. However, what is made clear is that the transformational provisions of the envisioned charter are intended to empower South African people.

The envisioned charter is intended by the South African Government to ensure that HDSA are able to derive benefit from the exploitation and the beneficiation of South Africa's mining and mineral resources.²⁶⁰ In this way, the MPRDA 'serves as a legislative expression of the RDPs vision [for] the [mineral and] mining industry of [South Africa].'²⁶¹ In pursuance of this intention, several charters have been designed and implemented since 2004,²⁶² culminating in the most recent iteration thereof in 2018: the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter), 2018²⁶³ (Mining Charter 2018). These charters are discussed below.

²⁵⁵ Supra note 20 section 100(2)(a).

²⁵⁶ Ibid.

²⁵⁷ Ibid section 1.

²⁵⁸ Ibid section 100(2)(a).

²⁵⁹ Supra note 23 the 'Definitions' section.

²⁶⁰ Supra note 20 section 100(2)(a).

²⁶¹ S Rungan, F Cawood and R Minnitt 'Incorporating BEE into the new mineral law framework for the South African mining industry' (2005) 105 *The Journal of the South African Institute of Mining and Metallurgy* 735 at 736.

²⁶² See the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry published in 2004, as amended in 2010; and the Broad-Based Socio-Economic empowerment Charter for the Mining and Minerals Industry published in 2017.

²⁶³ See supra note 23 the 'Mission'.

The MPRDA, in establishing the present South African mineral and mining rights and licencing regime, provides the basis upon which participation in South Africa's mineral and mining industry is permitted and authorised.²⁶⁴ The MPRDA provides that, if certain requirements are met, the Minister has no discretion and must grant a mining right.²⁶⁵ Specifically, and relevant to the purposes of this research, the MPRDA provides that a mining right must be granted to an applicant if the objects of the envisioned charter will be furthered by the granting of such right.²⁶⁶ In particular, granting the right must further the objects of: (i) expanding opportunities for HDPs;²⁶⁷ and (ii) increasing employment opportunities and enhancing socio-economic welfare.²⁶⁸ What must be noted, however, is that the MPRDA, despite requiring that the objects of the envisioned charter be furthered, does not explicitly state that the prescripts of the envisioned charter are / will be binding on applicants / rights holders once a right is granted. While it is true that the MPRDA requires rights holders to submit an annual report detailing the respective rights holder's compliance with the envisioned charter,²⁶⁹ the MPRDA does not specifically compel compliance. Further, the MPRDA does not confirm the status of the envisioned charter as an instrument that creates legally binding and enforceable obligations. Accordingly, although it appears that a relevant actor must comply with the requirements of the MPRDA and the present iteration of the envisioned charter before the Minister will grant a right to participate in the South African mineral and mining industry,²⁷⁰ it is unclear whether the prescripts of the envisioned charter require (or can even impose) strict compliance. Thus, whether adherence to the aforementioned prescripts is a precondition to participation remains unclear. This point is further discussed in Chapter 4.

3.3.2 The Mining Charter: 2004, 2010 and 2017

There have been several iterations of the envisioned charter over the past decade. In 2004 the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter 2004) was published.²⁷¹ The Mining Charter 2004 was intended to 'provide a framework for progressing the empowerment of historically disadvantaged South Africans in the [m]ining and [m]inerals [i]ndustry.'²⁷² Further, it was intended to facilitate 'transformation at the tiers of ownership, management,

²⁶⁴ Supra note 20 see section 5.

²⁶⁵ Ibid see sections 23(1)(a)-(h).

²⁶⁶ Ibid section 23(1)(h).

²⁶⁷ Ibid section 2(d).

²⁶⁸ Ibid section 2(f).

²⁶⁹ Ibid section 25(1)(h); section 28(2)(c).

²⁷⁰ Otsile Matlou 'Empowering the mining industry: Lessons from the last 10 years' (undated) available at <http://businessmediamags.co.za/mining/sa-mining/sa-mining-columnist/empowering-the-mining-industry-lessons-from-the-last-10-years/>, accessed on 23 June 2021.

²⁷¹ See GN 1639/2004 in GG 26661 of 13 August 2004.

²⁷² The Preamble to the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry published in GN 1639/2004 in GG 26661 of 13 August 2004.

skills development, employment equity, procurement and rural development.²⁷³ In line with the wording of the requirements established by the MPRDA for the implementation of the envisioned charter,²⁷⁴ the Mining Charter 2004 applied specifically to 'Historically Disadvantaged South Africans' (HDSA 2004).²⁷⁵ The Mining Charter 2004 defined HDSA 2004 as 'any person, 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.'²⁷⁶ The Mining Charter 2004 also applied to 'HDSA Companies' being companies owned or controlled by HDSA 2004.²⁷⁷

Following an assessment of the implementation of the provisions of the Mining Charter 2004, specifically the ability of those provisions to achieve the Mining Charter 2004's stated objectives, the South African Government noted several shortcomings.²⁷⁸ Accordingly, to expedite the realisation of the objectives of the Mining Charter 2004, several aspects thereof were amended in 2010²⁷⁹ (the 2010 Amendment). The 2010 Amendment extended the definition of HDSA 2004 to require that the persons to whom the definition applied 'should be representative of the demographics of [South Africa]'²⁸⁰ (HDSA 2010). Further, the 2010 Amendment was clearly influenced by the Broad-Based Economic Empowerment Act²⁸¹ (BEE Act) when it introduced the concept of 'BEE entity'.²⁸² For the purposes of this research, it is not necessary to discuss the influence of the BEE Act on the development of the envisioned charter in further depth.

In 2017 the Mining Charter 2004, as amended by the 2010 Amendment, was repealed and replaced²⁸³ by the Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals industry, 2017²⁸⁴ (Mining Charter 2017). The Mining Charter 2017 explicitly acknowledged its objective to harmonise the principles applicable to the mineral and mining industry²⁸⁵ with the provisions of the BEE Act. In so doing, the Mining Charter 2017, despite retaining references to historically

²⁷³ Supra note 272 the Preamble.

²⁷⁴ Supra note 20 see section 100(2)(a).

²⁷⁵ Supra note 272 paragraph 2.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ See the Preamble to the Broad-Based Socio-Economic Empowerment Charter for the South African mining and minerals industry published in GN 838 in GG 33573 of 20 September 2010.

²⁷⁹ See supra note 278; 'Local content policies in minerals-exporting countries: The case of South Africa' (2017) Organisation for Economic Co-operation and Development Trade Policy Note at 3 available at <https://www.oecd.org/trade/topics/trade-in-raw-materials/documents/trade-raw-materials-south-africa-country-note.pdf>, accessed on 23 June 2021.

²⁸⁰ Supra note 278 the 'Definitions' section.

²⁸¹ Act 53 of 2003.

²⁸² See supra note 278 the 'Definitions' section.

²⁸³ Paragraph 2.14 of the Reviewed Broad Based Black-Economic Empowerment Charter for the South African Mining and Minerals industry published in in GN 581 in GG 40923 of 15 June 2017.

²⁸⁴ Published in in GN 581 in GG 40923 of 15 June 2017.

²⁸⁵ See supra note 283 the 'Preamble'.

disadvantaged persons,²⁸⁶ discarded the concept of HDSA 2010 and replaced it with the term 'Black Person'.²⁸⁷ The Mining Charter 2017 noted that 'Black Person' was a generic term that referred to Africans, Coloureds and Indians.²⁸⁸ These persons had to be South African citizens by birth, descent or naturalisation²⁸⁹ (Natural Black Person). The term 'Black Person' was also used to refer to juristic persons.²⁹⁰ Specifically, juristic persons that were *inter alia* managed and controlled by Natural Black.²⁹¹

The frequency of the amendments to the envisioned charter from 2004 to 2017 indicate that the South African Government had not as yet struck a practical balance between: (a) formulating and implementing transformational objectives for the South African mineral and mining industry; and (b) ensuring that mining rights holders could actually participate in the mineral and mining industry while helping to achieve said transformational objectives. Further, and by inevitable consequence, the frequency of the amendments to the envisioned charter provided scope for a decrease in legal certainty in respect of what was required for lawful participation in the South African mineral and mining industry. The decrease in legal certainty is particularly concerning when one considers that the life cycle of a mining project may extend for several years or decades.²⁹² The impact of the frequent amendment to the envisioned charter is discussed in more detail in Chapter 4.

3.3.3 The Mining Charter 2018

Following several iterations of the envisioned charter, the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter) 2018 was published.²⁹³ This iteration, however, was amended three months later²⁹⁴ (Mining Charter 2018). The Mining Charter 2018 repealed the Mining Charter 2004, as amended by the 2010 Amendment, as well as the Mining Charter 2017.²⁹⁵ The Mining Charter 2018 is therefore the present iteration of the envisioned charter applicable to the South African mineral and mining industry.

²⁸⁶ Supra note 283, see the definition of 'BEE Transaction'.

²⁸⁷ Ibid the 'Definitions' section.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² 'Mining cycle' available at <https://www.exploresmines.com/en/mining-industry/mining-cycle.html>, accessed on 23 June 2021.

²⁹³ See GN 1002 in GG 41934 of 27 September 2018.

²⁹⁴ See GN 1398 in GG 42118 of 19 December 2018.

²⁹⁵ Supra note 23 paragraph 11. See also Anri Heyns and Hanri Mostert 'Three mining charters and a draft: How the politics and rhetoric of development in the South African mining sector are keeping communities in poverty' (2018) 11 *Law and Development Review* 801 at 803-4.

The Mining Charter 2018 confirms that its primary objective is to ‘facilitate [the] sustainable transformation, growth, and development of the [South African mineral and] mining industry.’²⁹⁶ The Mining Charter 2018, unlike the preceding charters, defines ‘local content’ as ‘the value added during assembly or manufacturing of the mining good that is produced in South Africa.’²⁹⁷ This definition is consistent with the discussion of the concept of ‘local content’ above.

The Mining Charter 2018 does not incorporate the term ‘Black Persons’ as used in the Mining Charter 2017. The Mining Charter 2018 does however incorporate the term HDPs as defined in the MPRDA.²⁹⁸ Nevertheless, the term HDPs as used in the Mining Charter 2018 does somewhat resolve the uncertainty in respect of whether HDPs refer strictly to South African citizens and/or entities based in South Africa. Given the MPRDA’s reference to ‘historically disadvantaged South Africans’²⁹⁹ for whose benefit the envisioned charter is to operate, it can be safely assumed that HDPs refer to South African citizens and/or entities. The Mining Charter 2018 further introduces the concept of a ‘Historically Disadvantaged Persons Owned and Controlled Company’³⁰⁰ (HDPs Company) to the South African mineral and mining law regime.³⁰¹ ‘HDPs Company’ is defined as a company in which HDPs hold at least fifty-one percent of the economic interest and exercisable voting rights.³⁰²

The Mining Charter 2018 also introduces the concept of ‘BEE Shareholding’ which it defines as ‘shares held by BEE Entrepreneur(s), Host Communities and qualifying employees.’³⁰³ A ‘BEE entrepreneur’ is defined as a HDP or ‘enterprise that is at least 51 [percent] owned by [HDPs] (excluding host communities and qualifying employees) with at least 51 [percent] of exercisable voting rights and 51 [percent] of economic interest.’³⁰⁴ A ‘Host community’ refers to a community adjacent to the area wherein the mining right may be exercised.³⁰⁵ A ‘qualifying employee’ refers to ‘employees of a mining company, excluding employees who already hold shares in the same company as a condition of their employment agreement.’³⁰⁶

²⁹⁶ Supra note 23 the ‘Vision’.

²⁹⁷ Ibid the ‘Definitions’ section.

²⁹⁸ Ibid.

²⁹⁹ Supra note 20 section 100(2)(a).

³⁰⁰ Supra note 23 the ‘Definitions’ section.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

The Mining Charter 2018 prescribes several LCRs for the mining and mineral industry.³⁰⁷ What is noteworthy is that the Mining Charter 2018 only provides non-compliance measures in respect of its ownership and mine community development provisions.³⁰⁸ It does not, however, provide for corrective and/or punitive measures in instances of non-compliance with any of the other LCRs it prescribes. Further, and as will be expanded upon in Chapter 4 of this research, the Mining Charter 2018 itself and the MPRDA do not explicitly confirm the status of the prescripts of the Mining Charter 2018 as legally binding. This, arguably, lends itself to the view that the Mining Charter 2018 merely provides a guideline for ideal participation in the South African mineral and mining industry as opposed to a peremptory framework that must be upheld and adhered to. While this may admittedly ease any urgency in respect of compliance on the part of a mineral and mining rights holder, this does create uncertainty in respect of how the LCRs regime for the South African mineral and mining industry, and specifically how participation therein, is regulated. This, however, is further discussed in Chapter 4. The LCRs prescribed in the Mining Charter 2018 in respect of: employment; procurement and ownership³⁰⁹ are outlined below.

In respect of ownership, the Mining Charter 2018 prescribes requirements for both existing mining and mineral rights holders and new mining and mineral rights holders.³¹⁰ An existing mining rights holder who, prior to the operation of the Mining Charter 2018, achieved 26 percent BEE shareholding at minimum, is for the duration of said mining and mineral right recognised as compliant with the Mining Charter 2018.³¹¹ A new mining and mineral rights holder must ensure a minimum of thirty percent BEE shareholding: (i) for each mining and mineral right it holds; or (ii) in the juristic entity that is entitled to the mineral and mining right(s).³¹² Further, the mandatory distribution of the minimum 30 percent BEE shareholding is prescribed.³¹³ Specifically, qualifying employees are to be provided with 5 percent non-transferable carried interest at minimum.³¹⁴ Similarly, host communities must be distributed 5 percent non-transferable carried interest at minimum.³¹⁵ Further, 20 percent ownership, as evidenced by shareholding, must be allocated to a BEE Entrepreneur at minimum, women to be distributed 5 percent thereof.³¹⁶

³⁰⁷ Supra note 23 paragraph 2.

³⁰⁸ Ibid paragraphs 9.1 and 9.2.

³⁰⁹ Ibid paragraphs 2.1, 2.2 and 2.4.

³¹⁰ Ibid paragraphs 2.1.1 and 2.1.3.

³¹¹ Ibid paragraph 2.1.1.1.

³¹² Ibid paragraph 2.1.3.1.

³¹³ Ibid.

³¹⁴ Ibid paragraph 2.1.3.1 (i), (ii), (iii), (iv) and (v).

³¹⁵ Ibid.

³¹⁶ Ibid.

The Mining Charter 2018 prescribes procurement requirements for both mining goods and mining services.³¹⁷ In terms of mining goods, 70 percent of the total spend therefor must be allocated to South African-manufactured goods at minimum.³¹⁸ Further, the allocation of the minimum 70 percent spend is prescribed.³¹⁹ Specifically, twenty-one percent thereof must be allocated to goods supplied by a HDPs Company.³²⁰ In addition, 5 percent thereof must be allocated to goods produced by a youth or women owned and controlled company³²¹ and 44 percent thereof must be allocated to goods supplied by a BEE compliant company.³²² In respect of mining services, 80 percent of the total spend therefor must be obtained from a South African-based company at minimum.³²³ Further, the allocation of the minimum 80 percent spend is prescribed.³²⁴ Specifically, 50 percent thereof must be allocated to services provided by a HDPs Company.³²⁵ In addition, 15 percent thereof must be allocated to services provided by women owned and controlled companies.³²⁶ Further, 5 percent thereof must be allocated to youth-provided services and 10 percent thereof must be allocated to services provided by a BEE-compliant company.³²⁷

The Mining Charter 2018 prescribes minimum thresholds for the employment of HDPs at several occupational levels in the South African mineral and mining industry.³²⁸ The meeting of the relevant prescribed threshold must be reflective of South Africa's population demographics.³²⁹ 50 percent HDPs must be employed and must proportionally represent provincial or national population demographics at board level at minimum.³³⁰ Specifically, 20 percent of these HDPs must be women.³³¹ 50 percent HDPs, as a percentage of a company's executive directors, must be employed and must proportionally represent provincial or national population demographics at executive management level at minimum.³³²

³¹⁷ Supra note 23 paragraph 2.2.

³¹⁸ Ibid paragraph 2.2.1.1.

³¹⁹ Ibid.

³²⁰ Ibid paragraph 2.2.1.1.1.

³²¹ Ibid paragraph 2.2.1.1.2. Ibid, the 'Definitions' section provides that a 'women owned and controlled company' is 'an entity in which South African women hold at least 51% of exercisable voting rights and economic interest' and provides that 'Youth' refers to *inter alia* 'young South African citizens between the ages of 18 to 35.'

³²² Ibid paragraph 2.2.1.1.3. Ibid, the 'Definitions' section provides that a 'BEE Compliant Company' is 'a company with a minimum B-BBEE level 4 status in terms of the Department of Trade and Industry's Broad-Based Black Economic Empowerment Codes of Good Practice, and minimum 25% +1 vote ownership' by HDPs.

³²³ Ibid paragraph 2.2.2.

³²⁴ Ibid paragraph 2.2.2.1.

³²⁵ Ibid paragraph 2.2.2.1.1.

³²⁶ Ibid paragraph 2.2.2.1.2.

³²⁷ Ibid paragraphs 2.2.2.1.3 and 2.2.2.1.4.

³²⁸ Ibid paragraph 2.4.

³²⁹ Ibid.

³³⁰ Ibid paragraph 2.4.1.1.

³³¹ Ibid.

³³² Ibid paragraph 2.4.2.1.

Specifically, 20 percent of these HDPs must be women.³³³ 60 percent HDPs must be employed and must proportionally represent provincial or national population demographics at senior management level at minimum.³³⁴ Specifically, 25 percent of these HDPs must be women.³³⁵ 60 percent HDPs must be employed and must proportionally represent provincial or national population demographics at middle management level at minimum.³³⁶ Specifically, 25 percent of these HDPs must be women.³³⁷ Finally, 70 percent HDPs must be employed and must proportionally represent provincial or national population demographics at junior management level at minimum.³³⁸ Specifically, 30 percent of these HDPs must be women.³³⁹ In addition, mining rights holders must ensure that 1.5 percent of all their employees are individuals with disabilities at minimum, and that the placement of said employees are reflective of national or provincial population demographics.³⁴⁰ Further, a mining and mineral rights holder must ensure that 60 percent HDPs are represented in its core and critical skills employee pool at minimum.³⁴¹

3.4 Conclusion

The formulation and implementation of LCRs in the South African mineral and mining industry are aimed at enhancing the domestic benefit³⁴² received from the exploitation of South Africa's natural resources by increasing domestic participation and procurement.³⁴³ Specifically, the LCRs prescribed in the Mining Charter 2018 in respect of employment, procurement and ownership³⁴⁴ clearly indicate the South African Government's objective to ensure the participation of HDSA³⁴⁵ in the industry for the purpose of enhancing their socio-economic development and welfare.³⁴⁶ Further, the publication of the aforementioned LCRs allow mining and mineral rights holders – and, by extension, investors – to be aware of what is required for their ideal participation in the South African mineral and mining industry. In consideration of this, the question of whether the LCRs prescribed in the Mining Charter 2018 strike an adequate balance between facilitating the South African Government's redress and transformation objectives for its mineral and mining industry, on the one hand, and ensuring that new and continued

³³³ Supra note 23 paragraph 2.4.2.1.

³³⁴ Ibid paragraph 2.4.3.1.

³³⁵ Ibid.

³³⁶ Ibid paragraph 2.4.4.1.

³³⁷ Ibid.

³³⁸ Ibid paragraph 2.4.5.1.

³³⁹ Ibid.

³⁴⁰ Ibid paragraph 2.4.6.1.

³⁴¹ Ibid paragraph 2.4.7.1.

³⁴² Op cit note 194 at 10. See also op cit note 64 at 489.

³⁴³ Ibid.

³⁴⁴ Ibid paragraphs 2.1, 2.2 and 2.4.

³⁴⁵ Supra note 20 section 100(2)(a).

³⁴⁶ Ibid section 1.

FDI into the mineral and mining industry is promoted, on the other, will be discussed in Chapter 4. In addition, the status of the LCRs prescribed by the Mining Charter 2018 as legally binding and enforceable is unclear. The relevance of this lack of legal certainty, in the context of the attraction of FDI into the South African mineral and mining industry, is discussed in Chapter 4.

4. Chapter 4: FDI and LCRs

4.1 Introduction

The South African Government has an interest in ensuring that South Africa derives benefit from: (a) the exploitation of its natural resources, in general; and (b) participation in its mineral and mining industry, specifically.³⁴⁷ Due to the capital-intensive nature of participation in the South African mineral and mining industry,³⁴⁸ however, exploiting South Africa's mineral resources with recourse to purely domestic means is challenging and therefore requires capital, investment and input from external sources.³⁴⁹ Said capital, investment, and input enters South Africa through *inter alia* Foreign Direct Investment (FDI) occasioned by the participation of foreign entities and/or foreign-controlled entities in the South African mineral and mining industry.³⁵⁰ To ensure that the domestic benefit received from this participation is enhanced, the South African Government has, among other things, enacted and imposed instruments referred to as local content requirements (LCRs) applicable to participants in the South African mineral and mining industry.³⁵¹

This chapter will discuss the relationship between FDI and the LCRs imposed in the South African mineral and mining industry. Specifically, it discusses whether, in the light of the factors accepted to be required to promote the attraction of FDI, the LCRs imposed in the South African mineral and mining industry create an environment conducive to attracting FDI.

4.2 The Attraction of FDI

The attraction of FDI in general is an important facet in the South African Government's approach to facilitating and enabling South Africa's economic development and growth.³⁵² Each economic model adopted by the post-apartheid South African Government from 1994 to date has in one way or another indicated that the attraction of FDI is integral to enhancing economic development and prosperity in South Africa.³⁵³ Poor domestic regulation of FDI by a country could be interpreted by an investor as a failure to adequately protect and promote said investor's interests which, in turn, could cause said

³⁴⁷ See Chapter 2.

³⁴⁸ Op cit note 187.

³⁴⁹ Op cit note 188.

³⁵⁰ Ibid.

³⁵¹ See Chapter 3. See also op cit note 64 at 491.

³⁵² See Chapter 2. See also op cit note 61 at 348.

³⁵³ Op cit note 136.

investor to be reluctant to invest.³⁵⁴ As such, South Africa's FDI regulatory regime, and specifically as such regime relates to the exploitation of South Africa's mineral resources, therefore seeks to *inter alia* accommodate the best interests of foreign investors and provide for both their protection and the protection of their assets,³⁵⁵ on the one hand, while also securing 'ecologically sustainable development...while promoting justifiable economic and social development'³⁵⁶ in South Africa, on the other.³⁵⁷

The South African Government's approach to attracting FDI can thus be described as a balancing act between upholding domestic interests on the one hand, and catering to investor interests on the other.³⁵⁸ In addition to understanding the South African Government's approach to the attraction of FDI, it is necessary to canvass what attracts investors to decide to engage in FDI.

4.2.1 The Case for Certainty

Chapter 2 of this research broadly outlines what FDI entails. In so doing, Chapter 2 *inter alia* discusses the motives underlying the decision to invest, and the potential factors and determinants that impact the decision to engage in FDI in a given host country.³⁵⁹ Reconsidering what these motives and determinants are, is helpful in understanding what ultimately attracts investors to decide to engage in FDI.

The general motives underlying the decision to engage in FDI are widely accepted as being related to an investor's desire to exploit the: (i) specific markets; (ii) specific resources; (iii) specific efficiency enabling factors; and/or (iv) strategic assets,³⁶⁰ located outside of the home country of the investor.³⁶¹ As discussed in Chapter 2, market-seeking FDI is motivated by an investor's desire to enter, and participate in, a market³⁶² to capitalise on the market-specific benefits and advantages occasioned by participating therein.³⁶³ Resource-seeking FDI is motivated by an investor's desire to seek and secure resources available in a host country.³⁶⁴ Efficiency-seeking FDI is motivated by an investor's desire to

³⁵⁴ Op cit note 164.

³⁵⁵ Supra note 12 see the Preamble in general.

³⁵⁶ Supra note 44 section 24(b) (iii), as read with the preamble to the Protection of Investment Act 22 of 2015.

³⁵⁷ See Chapter 2.

³⁵⁸ Supra note 12 section 4(a).

³⁵⁹ See Chapter 2. See also Tocar op cit note 107 at 167; See also for example Simplice op cit note 107; Walsh op cit note 107.

³⁶⁰ See Chapter 2. See also op cit note 90; op cit note 91 at 3; op cit note 85 at 220; op cit note 93.

³⁶¹ Ibid.

³⁶² Op cit note 88 at 171-2. See also op cit note 89 at 136.

³⁶³ Op cit note 90 at 135.

³⁶⁴ Op cit note 88 at 171-2. See also op cit note 89 at 136.

enhance the competitiveness of its operation³⁶⁵ so that costs are reduced and profit is increased.³⁶⁶ Finally, strategic asset-seeking FDI is motivated by an investor's desire to advance its operational enterprise's international and/or regional strategic objectives into foreign networks and capitalise on the advantages occasioned thereby.³⁶⁷

Of the potential determinants influencing the attraction of FDI,³⁶⁸ this research focuses specifically on the influence of the economic, infrastructural, political and legal factors that may exist in a given host country and that may potentially influence the decision to engage in FDI. Economic factors include market size, market-size growth and GDP.³⁶⁹ Such factors broadly refer to the ability of investors to save costs, increase profit and/or gain a competitive advantage through participation and/or investment in a specific economy.³⁷⁰ Infrastructural factors, such as the availability of power, communication and transportation facilities, influence the efficiency and effectiveness of operations and production.³⁷¹ Political factors, such as political instability and corruption, influence the level of certainty that investors may rely upon in respect of any number of *inter alia* legal, social and economic regimes applicable to their investment, when making decisions to invest.³⁷² Finally, legal factors, such as the frequency of regulatory regime changes, differences in the legal requirements of the investor's country and the host country, onerous and/or unclear provisions and lack of incentives, can influence the decision to invest.³⁷³

After considering the factors that influence the decision to engage in FDI, what arguably attracts FDI can be reduced to a single item: certainty.³⁷⁴ Without a particular level of certainty, investors will be reluctant to invest³⁷⁵ and a particular host country or industry will not be viewed as an attractive destination for investment.³⁷⁶ The importance of certainty, specifically policy certainty, and its ability to attract *inter alia* FDI to the South African mineral and mining industry was further stated by South African President Cyril Ramaphosa in his opening address in the virtual Investing in African Mining

³⁶⁵ Op cit note 88 at 171-2. See also op cit note 89 at 136.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Tocar op cit note 107 at 166. See also in general Simplicio op cit note 107; Walsh op cit note 107.

³⁶⁹ Tocar Ibid at 167-8. See also in general Simplicio ibid; Walsh ibid.

³⁷⁰ Tocar Ibid. See also in general Simplicio ibid; Walsh ibid.

³⁷¹ Tocar Ibid at 172. See also in general Simplicio ibid; Walsh ibid.

³⁷² Tocar Ibid at 173. See also in general Simplicio ibid; Walsh ibid.

³⁷³ Tocar Ibid at 180. See also in general Simplicio ibid; Walsh ibid.

³⁷⁴ Amanda Perry 'An ideal legal system for attracting foreign direct investment? Some theory and reality' (2000) 15 *American University International Law Review* 1627 at 1629.

³⁷⁵ Ahmad Muliadi 'Applying principles of legal certainty and equal in the implementation of investment in Indonesia' (2017) 20(4A) *European Research Studies Journal* 133 at 137.

³⁷⁶ Shirley Webber 'Stable regulatory regime needed for Africa mining to shine' (2020) *Business Day* available at www.businesslive.co.za/bd/opinion/2020-02-03-stable-regulatory-regime-needed-for-africa-mining-to-shine/, accessed on 23 June 2021.

Indaba 2021.³⁷⁷ Specifically, that the South African mineral and mining industry should adapt to ‘provide greater policy certainty [to] attract higher levels of investment and protect livelihoods at the same time.’³⁷⁸

Notwithstanding the existence and availability of relevant motivating factors and determinants conducive to making a decision to invest, investors are concerned with the primary question of whether their investment will be able to bring about their desired outcome(s),³⁷⁹ and specifically whether their investment will yield a favourable, often pecuniary, return.³⁸⁰ It is trite to note that the ultimate object of investment is to generate a profit.³⁸¹ That said, investors want to be certain that exploiting the factors encompassed by motivations for, and determinants of, FDI when investing will yield the desired and/or projected outcome(s).³⁸²

In the light of the above, it is not enough that the factors forming the content of the motivations underlying the decision to engage in FDI merely exist. There must be some level of certainty in respect of their potential to be readily exploited. In consideration of the motivations underlying the decision to engage in FDI,³⁸³ investors will most likely ask questions along the following lines prior to making the decision as to whether to invest –

- i. Is it certain that participation in a given market is readily possible?
- ii. Is it certain that the resources required to achieve the desired outcome(s) are accessible?
- iii. Does the target market provide certainty in the availability of efficiency measures?
- iv. Is it certain that the strategic asset required to achieve the desired outcome(s) is readily available?

Similarly, it is not enough that the factors forming the content of the determinants underlying the decision to engage in FDI merely exist. There must be some level of certainty in respect of their potential to be readily exploited. In respect of the determinants underlying the decision to engage in FDI, investors will most likely ask questions along the following lines prior to making the decision as to whether to invest –

³⁷⁷ Opening address by President Cyril Ramaphosa at the virtual Investing in African Mining Indaba 2021 available at <http://www.thepresidency.gov.za/speeches/opening-address-president-cyril-ramaphosa-virtual-investing-african-mining-indaba-2021>, accessed on 23 June 2021.

³⁷⁸ *Ibid.*

³⁷⁹ Op cit note 89 at 136.

³⁸⁰ Op cit note 124 at 341.

³⁸¹ Investopedia ‘Basic investment objectives’ (2020) available at <https://www.investopedia.com/managing-wealth/basic-investment-objectives/>, accessed on 23 June 2021.

³⁸² Op cit note 381.

³⁸³ As canvassed more fully in Chapter 2.

- i. Is it certain that the economic factors that exist in a given market or industry are conducive to achieving the desired outcome(s) of investment?
- ii. Is it certain that the infrastructural factors that exist in a given market or industry are conducive to achieving the desired outcome(s) of investment?
- iii. Is it certain that the political factors that govern and/or influence a given market or industry are conducive to achieving the desired outcome(s) of investment?
- iv. Is it certain that the legal factors, such as the applicable legal framework and the manner in which it is imposed, are conducive to achieving the desired outcome(s) of investment?

The above notwithstanding, this research concerns the question of whether the LCRs in the South African mineral and mining industry promote (or, in the converse, detract from) the attraction of FDI.³⁸⁴ As such, the consideration of certainty, as the overarching consideration influencing the decision to engage in FDI, will thus be confined to whether the LCRs imposed in the South African mineral and mining industry – that being the regulatory framework for local content in the South African mineral and mining industry – ensure certainty and, therefore, promote (or, in the converse, detract from) the attraction of FDI.

4.2.2 Achieving Certainty

In submitting that the overarching factor influencing the decision to engage in FDI is certainty, what must necessarily be asked is: how is certainty achieved? Perry explains that, in respect of a legal or regulatory system, certainty is achieved where the laws, rules, policies and/or regulations are stable, accessible and clear.³⁸⁵ Further, in the context of the rule of law, the South African Constitutional Court has also explained that certainty requires rules to be ‘ascertainable in advance to be predictable.’³⁸⁶

Certainty – which requires stability, predictability, accessibility and clarity – in respect of a legal or regulatory framework is an indispensable requirement ‘for investment in mining, which is a high risk, capital intensive industry with long lead times from prospecting to production.’³⁸⁷ Certainty enables investors when entering an industry, or deciding whether to enter and participate in a given industry, to: (a) regulate their conduct; and (b) ‘reasonably anticipate the consequences of their actions.’³⁸⁸ Therefore, ‘[o]ne of the key issues for investors is to ensure that they have a reasonable level of

³⁸⁴ See Chapter 1.

³⁸⁵ Op cit note 374 at 1631.

³⁸⁶ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1 para 39.

³⁸⁷ Op cit note 187.

³⁸⁸ Patricia Popelier ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) 2 *Legisprudence* 47 at 48.

certainty concerning the legislative requirements in a particular country.³⁸⁹ The specific question of whether the LCRs applicable to the South African mineral and mining industry create certainty, and therefore, promote the attraction of FDI, is discussed below.

4.3 Local Content Requirements in the South African Mineral and Mining Industry

Chapter 3 of this research broadly outlines what is meant by LCRs, what they entail and what form they take in the South African mineral and mining industry. To regulate its mineral and petroleum extractives industry, the South African Government has enacted the Mineral and Petroleum Resources Development Act³⁹⁰ (MPRDA). The MPRDA is intended to *inter alia* 'substantially and meaningfully'³⁹¹ expand opportunities for persons disadvantaged by the Apartheid regime (historically disadvantaged persons) to participate in the South African mineral and mining industry.³⁹² This participation is intended to enable historically disadvantaged persons to benefit from the exploitation of South Africa's mineral resources.³⁹³ The provisions of the MPRDA in this respect represent a clear attempt by the South African Government to correct the historical inequities and continued legacy occasioned by the Apartheid regime in so far as they relate to the unequal benefit of South Africa's natural resources prior to the advent of South Africa's democracy.³⁹⁴ This is further in keeping with the constitutional mandate imposed on the South African Government to 'secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'³⁹⁵

To achieve the above, the MPRDA obliges the South African Minister of Minerals and Energy to develop and implement a framework for facilitating the participation of 'historically disadvantaged South Africans'³⁹⁶ in the South African mineral and mining industry.³⁹⁷ Several such frameworks, or charters, have been designed and implemented since 2004,³⁹⁸ culminating in the most recent iteration thereof in 2018: the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry

³⁸⁹ Marleny Arnoldi 'Regulatory uncertainty, economic issues limiting SA's potential to benefit from mining investment' (2019) available at https://www.miningweekly.com/article/regulatory-uncertainty-economic-issues-limiting-sas-potential-to-benefit-from-mining-investment-2019-12-06/rep_id:3650, accessed on 23 June 2021.

³⁹⁰ Supra note 20 the Preamble thereto. See also Chapter 3 in general.

³⁹¹ Supra note 20 section 2(d).

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Op cit note 194 at 8.

³⁹⁵ Supra note 44 section 24(b)(iii).

³⁹⁶ Supra note 20 section 100(2)(a).

³⁹⁷ Ibid.

³⁹⁸ See the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry published in 2004, as amended in 2010; and the Broad-Based Socio-Economic empowerment Charter for the Mining and Minerals Industry published in 2017.

(Mining Charter), 2018³⁹⁹ (Mining Charter 2018). The Mining Charter 2018 sets of the LCRs applicable to the South African mineral and mining industry.⁴⁰⁰

The Mining Charter 2018 prescribes several LCRs for the South African mineral and mining industry,⁴⁰¹ of which only the LCRs prescribed in respect of ownership, procurement and employment have been focussed on in this research. What must now be considered is whether the LCR regime as imposed and implemented in the South African mineral and mining industry provide certainty and, accordingly, serve to promote the attraction of FDI to the South African mineral and mining industry. This discussion will be facilitated with reference to two issues concerning certainty, these being: (a) the status of the LCRs as imposing binding obligations; and (b) the content and imposition of the LCRs prescribed by the Mining Charter 2018, in the South African mineral and mining industry.

4.3.1 Local Content Requirements in the South African Mineral and Mining Industry: The Status of Local Content Requirements

In considering whether the LCRs applicable to the South African mineral and mining industry create certainty in a manner that ultimately attracts FDI, it is necessary to consider the status of these LCRs. Specifically, it is necessary to consider whether they have legally binding effect and must be adhered to by investors and participants in the South African mineral and mining industry or, alternatively, merely constitute policy instruments and are accordingly to serve as a guideline for ideal participation in the industry.

The question of the status of the LCRs applicable to the South African mineral and mining industry was considered by the South African High Court (the High Court) in *Chamber of Mines of South Africa v Minister of Mineral Resources*⁴⁰² (the *Chamber of Mines* case). This consideration, however, was in the context of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry published in 2004 and its 2010 amendment (the impugned Charter).⁴⁰³ In the *Chamber of Mines* case, the Minerals Council of South Africa approached the High Court and requested it to issue a declaratory order in respect of the obligations of mining rights holders.⁴⁰⁴ Specifically, the High Court was requested to confirm *inter alia* whether a mining company has a legal obligation to meet the

³⁹⁹ Supra note 23 the 'Mission'.

⁴⁰⁰ See Chapter 3.

⁴⁰¹ Supra note 23 paragraph 2.

⁴⁰² [2018] 2 All SA 391 (GP).

⁴⁰³ See discussion in Chapter 3.

⁴⁰⁴ *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* [2018] 2 All SA 391 (GP) para 12.

ownership target stipulated in the impugned Charter after the grant of a new mining right or the conversion of an old mining right.⁴⁰⁵

In response, Barrie AJ explained that each reference to the legal framework / charter envisioned in section 100 of the MPRDA does not contemplate said charter / legal framework having ‘any binding effect, i.e. [having] force or effect as “an enactment having the force of law” as referred to in the definition of the term “law” in section 2 of the Interpretation Act.’⁴⁰⁶ Further, that the legal framework / charter ‘accordingly finds application and legal significance in an indirect manner only through application of the other sections of the MPRDA that refer to it.’⁴⁰⁷

Pursuant to this reasoning, Barrie AJ for the majority held that –

“I cannot on the basis of reasonable interpretation in the light of all relevant and potentially relevant provisions of the MPRDA, including its long title and preamble, and with due regard to the spirit, purport and objects of the Bill of Rights contained in the Constitution [of the Republic of South Africa, 1996], construe section 23, or, for that matter, section 25 , as imposing any self-standing obligation on the holder of a mining right to comply with “the charter contemplated in section 100”, in whatever incarnation, in circumstances where no such obligation had been imposed in the mining right at the time when the mining right was granted.”⁴⁰⁸

This notwithstanding, however, the minority, per Siwendu J, found the opposite.⁴⁰⁹ Specifically, Siwendu J found that a constitutionally appropriate interpretation of the impugned Charter was that it was in fact a ‘binding regulatory instrument and/or statutory instrument designed to ensure that the objects of the MPRDA and the Constitution [of the Republic of South Africa, 1996] are realised.’⁴¹⁰ Accordingly, Siwendu J concluded that, unlike the other sectoral charters implemented in South Africa, the impugned Charter’s provisions are peremptory and therefore create binding legal obligations for mining right holders.⁴¹¹

The High Court's decision concerns the impugned Charter i.e. the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry published in 2004 and its 2010

⁴⁰⁵ Supra note 404 para 13.

⁴⁰⁶ Ibid para 80.

⁴⁰⁷ Ibid para 81.

⁴⁰⁸ Ibid para 105.

⁴⁰⁹ Ibid para 181.

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

amendment.⁴¹² Despite this however, this decision may have a significant impact on the Mining Charter 2018.⁴¹³ Like its predecessors, the Mining Charter 2018 itself, and the relevant references thereto in the MPRDA, do not explicitly state that the LCRs contained in the Mining Charter 2018 create legally binding obligations on mineral and mining rights holders. It may therefore be possible to argue, similar to the reasoning of the majority in the *Chamber of Mines* case, that the prescripts of the Mining Charter 2018 serve as mere guidelines for ideal participation until the terms of the mineral and mining right granted expressly and specifically oblige compliance therewith.⁴¹⁴ Conversely, it may be possible to argue, in line with the reasoning of the minority in the *Chamber of Mines* case, that the prescripts of the Mining Charter 2018 are in fact legally binding and therefore peremptory, without reference to the terms of a mineral and mining right.

The decision of the High Court in the *Chamber of Mines* case is now pending before the South African Supreme Court of Appeal, on appeal.⁴¹⁵ While South Africa awaits ultimate confirmation of the status of the impugned Charter, it also remains unclear, and therefore uncertain, what the status of the Mining Charter 2018 is. Specifically, whether the Mining Charter 2018 provides binding obligations in respect of *inter alia* the ownership, procurement and employment requirements it prescribes when relevant actors participate in the South African mineral and mining industry. Accordingly, it is submitted that the outstanding question of the legal status of the prescripts of the Mining Charter 2018 creates uncertainty for investors and, therefore, does not serve to promote the attraction of FDI.

4.3.2 Local Content Requirements in the South African Mineral and Mining Industry: The Content and Imposition of Local Content Requirements

Chapter 3 sets out the content of the LCRs prescribed by the Mining Charter 2018 in respect of ownership, procurement, and employment. In respect of ownership, LCRs are prescribed for both existing mining right holders and new mining right holders.⁴¹⁶ In brief, mining rights holders must achieve certain shareholding thresholds to be considered compliant with the Mining Charter 2018.⁴¹⁷ In respect of procurement, LCRs are prescribed in respect of both the procurement of mining goods and mining services.⁴¹⁸ Specifically, mandatory percentage targets are set for procurement spend on South

⁴¹² See Chapter 3 and the discussion thereon.

⁴¹³ Op cit note 187.

⁴¹⁴ Supra note 404 para 105. See also op cit note 187.

⁴¹⁵ *Minerals Council South Africa v Minister of Mineral Resources and Another* [2020] 4 All SA 150 (GP) para 2.

⁴¹⁶ Supra note 23 paragraphs 2.1.1 and 2.1.3.

⁴¹⁷ Ibid paragraphs 2.1.1.1, 2.1.3.1, 2.1.5.1 and 2.1.5.2.

⁴¹⁸ Ibid paragraph 2.2.

African-manufactured goods and the entities from whom such goods are to be procured from.⁴¹⁹ In addition, mandatory percentage targets are set for procurement spend on services procured from South African-based companies and the representative demographic composition of the entities from whom such services are to be procured from.⁴²⁰ In respect of employment, LCRs are prescribed for the employment of historically disadvantaged persons at several occupational levels in the South African mineral and mining industry.⁴²¹ Further, meeting the relevant prescribed thresholds must be reflective of South African population demographics.⁴²²

As noted above, certainty requires stability, predictability, accessibility and clarity.⁴²³ The question that therefore must be necessarily asked is whether the content and imposition of the LCRs prescribed by the Mining Charter 2018 ensure certainty, to promote the attraction of FDI.

The Mining Charter 2018, like each previous iteration of the charter / legal framework envisioned in section 100 of the MPRDA, has been publicly published in the Government Gazette.⁴²⁴ The Mining Charter 2018 is therefore, on the face of it, accessible and, by virtue of being written, the prescripts thereof – specifically as these relate to ownership, procurement and employment – have been made clear. It would therefore appear that the Mining Charter 2018 creates certainty in respect of its requirements. This notwithstanding, an argument can be made that despite being published, the prescripts of the Mining Charter 2018 remain inaccessible and unclear. This is evidenced by the publication of the Implementation Guidelines for the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 in December of 2018⁴²⁵ (the Guidelines). The aim of the Guidelines is to ‘outline processes, procedures, forms and templates to facilitate compliance with the requirements of the Mining Charter, 2018.’⁴²⁶ Despite the extensive negotiation and public participation processes that preceded the publication of the Mining Charter 2018,⁴²⁷ it was understood that the Mining Charter 2018 in and of itself was not sufficient to clearly and concisely outline all of the requirements for industry compliance and that, accordingly, the Guidelines were required to supplement it.

⁴¹⁹ Supra note 23 paragraphs 2.2.1.1, 2.2.1.1.1, 2.2.1.1.2 and 2.2.1.1.3.

⁴²⁰ Ibid paragraphs 2.2.2, 2.2.2.1, 2.2.2.1.1, 2.2.2.1.2, 2.2.2.1.3 and 2.2.2.1.4.

⁴²¹ Ibid paragraph 2.4.

⁴²² Ibid paragraph 2.4.

⁴²³ Op cit note 374 at 1631.

⁴²⁴ See GN 1002 in GG 41934 of 27 September 2018 and See GN 1398 IN GG 42118 of 19 December 2018.

⁴²⁵ See GN 1399 IN GG 42122 of 19 December 2018.

⁴²⁶ The Implementation Guidelines for the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry at 3, published in GN 1399 IN GG 42122 of 19 December 2018.

⁴²⁷ Mining Charter III: certainty, but at a cost’ (2019) Herbert Smith Freehills: Client Brief at 1 available at <https://www.herbertsmithfreehills.com/latest-thinking/mining-charter-iii-certainty-but-at-a-cost>, accessed on 23 June 2021.

In respect of being predictable and stable, the Mining Charter 2018 leaves much to be desired. The charter / legal framework envisioned in section 100 of the MPRDA has undergone several iterations and amendments since 2004.⁴²⁸ This has resulted in several versions of the envisioned charter / legal framework being imposed. The Mining Charter 2018 itself was amended a mere three months after it was published.⁴²⁹ The frequency of the amendments to the envisioned charter indicate that the South African Government has not as yet struck an adequate and practical balance between upholding its domestic interests – namely facilitating South Africa’s redress and transformation objectives for the mineral and mining industry – on the one hand, and catering to investor interests – and therefore ensuring that new and continued FDI is attracted to the mineral and mining industry – on the other.⁴³⁰ It is trite to restate that given that the average mining project life-cycle may extend for several years or decades, is high-risk and capital intensive,⁴³¹ a lack stability in respect of the regulatory requirements for the South African mineral and mining industry is particularly disconcerting for investors.⁴³² One of the primary concerns of investors is uncertainty occasioned by frequent amendments to laws, rules and regulations.⁴³³ Frequent amendment to the requirements imposed by the Mining Charter 2018 in respect of ownership, procurement and employment i.e. moving the goal posts,⁴³⁴ renders investors unable to reasonably predict what the requirements imposed by the Mining Charter 2018 may be throughout the duration of their mining project. This in turn renders investors unable to efficiently regulate their conduct and ‘reasonably anticipate the consequences of their actions’⁴³⁵ for the purpose of achieving their desired investment outcome(s).⁴³⁶ For these reasons, the frequency of amendment of the Mining Charter 2018 renders its provisions unstable and unpredictable, and accordingly creates uncertainty.

Despite the content of the Mining Charter 2018 being published and therefore being accessible, the lack of clarity in respect of the status of the Mining Charter 2018, and the lack of stability it has been encumbered with due to the frequency of the amendment thereof, creates uncertainty. It is argued that

⁴²⁸ Supra note 23 paragraph 11. See also GN 1639/2004 in GG 26661 of 13 August 2004; GN 838 in GG 33573 of 20 September 2010; ‘Local content policies in minerals-exporting countries: The case of South Africa’ (2017) Organisation for Economic Co-operation and Development Trade Policy Note at 3 available at <https://www.oecd.org/trade/topics/trade-in-raw-materials/documents/trade-raw-materials-south-africa-country-note.pdf>, accessed on 23 June 2021; See also GN 581 in GG 40923 of 15 June 2017.

⁴²⁹ See Chapter 3. See also GN 1002 in GG 41934 of 27 September 2018 read with GN 1002 in GG 41934 of 27 September 2018.

⁴³⁰ Supra note 12 see section 4(a).

⁴³¹ Op cit note 187.

⁴³² ‘Mining in Africa in 2020’ Eversheds Sutherland available at https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/global/South-africa/Mining_in_Africa_in_2020, accessed on 23 June 2021.

⁴³³ Op cit note 432.

⁴³⁴ Ibid.

⁴³⁵ Op cit note 388 at 48.

⁴³⁶ Ibid.

this uncertainty, in turn, renders the LCRs prescribed in terms of the Mining Charter 2018 uncondusive to attracting FDI to the South African mineral and mining industry.

4.4 Conclusion

The Mining Charter 2018 has been a significant source of uncertainty since a first draft thereof was published for public comment in 2016.⁴³⁷ As argued above, the status and the imposition of the LCRs contained in the Mining Charter 2018 are, and remain, uncertain. It is submitted that this in turn results in the LCRs so imposed detracting from the promotion of FDI in the South African mineral and mining industry.

⁴³⁷ Op cit note 187 at 2. See also GN 450 in GG No 39933 of 15 April 2016.

5. Chapter 5: Conclusion and Recommendations

5.1 Introduction

This research seeks to provide a view on the issue of whether the Local Content Requirements (LCRs) applicable to, and imposed in, the South African mineral and mining industry promote the attraction of Foreign Direct Investment (FDI). Specifically, whether the LCRs in respect of ownership, procurement and employment, as prescribed by the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter), 2018⁴³⁸ (Mining Charter 2018), promote the attraction of FDI. To do so, Chapter 2 of this research: broadly considers what the possible motivating factors and determinants of FDI are, discusses the general significance of FDI and further outlines the specific significance of FDI in South Africa. Chapter 3 of this research discusses the concept of local content and analyses the significance of LCRs, with specific emphasis on the outcomes the implementation of LCRs is perceived to facilitate. Chapter 3 then discusses South Africa's LCRs relating to employment, procurement and ownership as prescribed for the South African mineral and mining industry and outlines the current South African LCRs regime in respect thereof. Chapter 4 discusses the relationship between FDI and the LCRs imposed in the South African mineral and mining industry. Specifically, Chapter 4 discusses whether, in the light of the factors accepted to be required to promote the attraction of FDI, the LCRs, and the manner in which they are imposed in the South African mineral and mining industry, create an environment conducive to attracting, and promoting the attraction of, FDI to South Africa and its mineral and mining industry.

This Chapter briefly summarises the important points discussed in each preceding chapter. Thereafter this chapter, in the light of the content of the preceding chapters, makes two recommendations in respect of legal reform in South Africa.

5.2 Summary of Main Issues

Chapter 2 of this research discusses the potential of FDI to facilitate economic development in the country wherein it is secured.⁴³⁹ The introduction of FDI into the economy of a host country can play a crucial role in enhancing the welfare of said host country through the economic, developmental and social benefits it may yield.⁴⁴⁰ Accordingly, countries, and specifically developing countries, are often

⁴³⁸ Supra note 23 the 'Mission'.

⁴³⁹ OECD op cit note 60 at 3.

⁴⁴⁰ Op cit note 85 at 219.

eager to attract FDI.⁴⁴¹ The history and impact of FDI in South Africa spans several centuries.⁴⁴² From as early as 1652, foreign capital from European companies has largely spurred South Africa's industrial development.⁴⁴³ Since 1994, the post-apartheid South African Government has introduced and implemented several economic policy models,⁴⁴⁴ each acknowledging the importance, and desirability, of attracting FDI to South Africa.⁴⁴⁵ To promote the attraction of FDI to South Africa by protecting and accommodating investor interests, on the one hand, and to ensure that its interest in securing optimum domestic benefit from foreign participation in South African industries is achieved, on the other,⁴⁴⁶ the South African Government has enacted specific legislation in the form of the Protection of Investment Act 22 of 2015. This legal mechanism is especially important given the capital-intensive nature of the mineral and mining industry and the reliance of the South African Government on FDI to effectively exploit its mineral wealth.⁴⁴⁷

Chapter 3 of this research discusses the concept of local content and the local content regime applicable to the South African mineral and mining industry. LCRs are intended to increase and enhance domestic participation and procurement in the industry to which they apply.⁴⁴⁸ The general purpose of the implementation of these mechanisms and strategies is to maximise the domestic benefit received by a host government from participation in a relevant industry.⁴⁴⁹ Through the Mineral and Petroleum Resources Development Act⁴⁵⁰ (MPRDA) the South African Government has specifically sought to 'substantially and meaningfully'⁴⁵¹ expand opportunities for persons disadvantaged by the Apartheid regime to participate in the South African mineral and mining industry.⁴⁵² To do so the Minister of Minerals and Energy has developed and implemented 'a broad-based socio-economic empowerment Charter',⁴⁵³ the present iteration of which is the Mining Charter 2018. The Mining Charter 2018 is purposed to enable historically disadvantaged South Africans to derive benefit from the exploitation and the beneficiation of South Africa's mining and mineral resources.⁴⁵⁴ The Mining Charter 2018 prescribes LCRs for the South African mineral and mining industry which outlines ideal conduct for mineral and mining rights holders in respect of several fields pertaining to their participation in the

⁴⁴¹ Op cit note 85 at 219.

⁴⁴² Op cit note 125 at 72.

⁴⁴³ Ibid.

⁴⁴⁴ Op cit note 136.

⁴⁴⁵ Ibid.

⁴⁴⁶ Supra note 12 see the Preamble thereto.

⁴⁴⁷ Op cit note 187. See also op cit note 187.

⁴⁴⁸ Op cit note 194 at 10.

⁴⁴⁹ Ibid.

⁴⁵⁰ Supra note 20 see the Preamble thereto.

⁴⁵¹ Ibid section 2(d).

⁴⁵² Ibid.

⁴⁵³ Ibid section 100(2)(a).

⁴⁵⁴ Ibid.

industry – the requirements stipulated for ownership, procurement and employment being specifically focussed on in this research. While the content of these provisions, and the LCRs in general, are certain, the status of these provisions as legally binding and enforceable are not.

Chapter 4 of this research discusses whether, in the light of the factors accepted to be required to promote the attraction of FDI, the LCRs, and the manner in which they are imposed in the South African mineral and mining industry, create an environment conducive to attracting, and promoting the attraction of, FDI. Considering the specific content underpinning the motivations for, and determinants of, the decision to engage in FDI, what Chapter 4 argues and concludes is that the overarching attracting factor of FDI is: certainty.⁴⁵⁵ This is because certainty enables investors when entering an industry, or deciding whether to enter and participate in a given industry, to: (a) regulate their conduct; and (b) 'reasonably anticipate the consequences of their actions.'⁴⁵⁶ This in turn enables investors to adequately plan to achieve their desired outcome(s). Certainty requires stability, accessibility, clarity and predictability.⁴⁵⁷ When considering LCRs, as an instrument employed by the South African Government to regulate participation in the South African mineral and mining industry, investors require a reasonable level of certainty⁴⁵⁸ in respect of these LCRs, namely their status and their content. The legal status of the Mining Charter 2018 is unclear.⁴⁵⁹ Like its predecessors, the Mining Charter 2018 itself, and the relevant references thereto in the MPRDA, do not explicitly state that the LCRs contained in the Mining Charter 2018 create legally binding obligations on mineral rights holders. This creates uncertainty as to the degree of compliance required to be carried out by participants in the mineral and mining industry which, in turn, detracts from investor's willingness to engage in FDI. In addition, the frequency of amendment to the charter envisioned in section 100 of the MPRDA⁴⁶⁰ (the envisioned charter) creates instability and detracts from investors' ability to predict how the South African mineral and mining industry is, and will be, regulated and, in turn, how to regulate, and continue to regulate, their own conduct. This in turn detracts from investors' willingness to engage in FDI.

5.3 Concluding Recommendations

The preceding chapters of this research present the view that the South African Government has an interest in ensuring that South Africa and its people derive benefit from the exploitation of South Africa's

⁴⁵⁵ Op cit note 374 at 1629.

⁴⁵⁶ Op cit note 388 at 48.

⁴⁵⁷ Op cit note 374 at 1631. Op cit note 386 para 39.

⁴⁵⁸ Op cit note 389.

⁴⁵⁹ See Chapter 4.

⁴⁶⁰ Supra note 20 section 100(2)(a).

natural resources in general, and participation in its mineral and mining industry specifically.⁴⁶¹ Cognisant of the high-risk and capital-intensive nature of participating in the mineral and mining industry,⁴⁶² however, the South African Government has welcomed participation by foreign entities and/or foreign controlled entities for the purposes of securing FDI to enable the exploitation of its natural resources.⁴⁶³ To ensure that the domestic benefit received from this participation is enhanced, the South African Government has, among other things, published and imposed LCRs. Chapter 4 concludes, however, that the status of the LCRs imposed, as well as the frequency of their amendment, create uncertainty in South Africa's mineral and mining industry and, pursuant thereto, these LCRs detract from the promotion of FDI therein. In the light of this conclusion, the following recommendations are offered as a potential means to address this uncertainty: (a) the legislative confirmation of the status of the Mining Charter 2018 / the envisioned charter; and (b) the introduction of a stabilisation provision / freezing clause applicable to the current iteration of the envisioned charter. These recommendations are discussed below.

5.3.1 Legislative Confirmation

The status of the LCRs applicable to the South African mineral and mining industry remain uncertain.⁴⁶⁴ In the light thereof, it is recommended that the South African Legislature amend the MPRDA to confirm the legal status of the envisioned charter.

Certainty is an essential requirement for investment in mining.⁴⁶⁵ Providing certainty in respect of whether the provisions of the envisioned charter are peremptory or, alternatively, serve as mere guidelines for ideal conduct in the South African mineral and mining industry will provide certainty to investors. Such confirmation will enable investors to make an informed decision as to whether to engage in FDI in the South African mineral and mining industry. Should an investor decide to engage in FDI, said investor will be able to better regulate its conduct and plan its investment accordingly. This certainty will further attract the promotion of FDI to the South African mineral and mining industry.

⁴⁶¹ See Chapter 2.

⁴⁶² Op cit note 188.

⁴⁶³ Ibid.

⁴⁶⁴ Supra note 404 paras 105 and 181.

⁴⁶⁵ Op cit note 187.

5.3.2 Stabilisation provision

The envisioned charter has been subject to frequent amendment.⁴⁶⁶ In the light of the frequent amendment to the envisioned charter, the formal incorporation of a stability provision into the MPRDA, in respect of the prescripts of the present iteration of the charter, is recommended.

Legislatively authorising the South African Government to conclude an agreement with a mineral and mining rights holder, whereby both parties agree that the provisions of the iteration of the envisioned charter in force, as at the time of the grant of a mining right, shall apply for the duration of that right, will enable certainty. The agreement will ensure that the mineral and mining rights holder can be certain that for the duration of the right so held, certain local content provisions will be applicable and will not change in so far as they apply to said holder. Further, this agreement will enable the South African Government to accommodate the interest of the mineral and mining rights holder in having certainty in respect of the regulatory regime. In addition, said agreement will not impede the South African Government from amending the present iteration of the envisioned charter independent of the agreement entered into with the rights holder, to accommodate the public interest. This will ensure that the South African Government can continue to balance both investor interests and the public interest.

This type of mechanism has already been implemented in the South African extractives industry by means of the Tenth Schedule (TS) to the Income Tax Act⁴⁶⁷ (ITA). Paragraph 8 of the TS provides for what is referred to as 'fiscal stability'.⁴⁶⁸ Specifically, paragraph 8(1) provides that –

“The Minister may enter into a binding agreement with any oil and gas company in respect of an oil and gas right held by that company, and that agreement so entered into *must guarantee that the provisions of this Schedule (as at the date on which the agreement was concluded) apply in respect of that right as long as the right is held by the oil and gas company.*”⁴⁶⁹ (emphasis added).

Such provision will enable the stabilisation of the regulatory environment in so far as it relates to LCRs in the South African mineral and mining industry and will, in turn, serve to promote the attraction of FDI thereto.

⁴⁶⁶ See Chapter 3.

⁴⁶⁷ The Income Tax Act 58 of 1962.

⁴⁶⁸ See Ben Strauss 'New developments in oil and gas tax' (2014) available at <https://www.thesait.org.za/news/164756/New-developments-in-oil-and-gas-tax.htm>, accessed on 23 June 2021.

⁴⁶⁹ Paragraph 8 of the Tenth Schedule to the Income Tax Act 58 of 1962.

5.4 Conclusion

One of South Africa's core economic sectors is its extractives industry, specifically its mineral and mining industry.⁴⁷⁰ Given the capital-intensive nature of participation in the South African mineral and mining industry,⁴⁷¹ however, exploiting South Africa's mineral resources with recourse to purely domestic means is challenging and therefore requires capital, investment and input from external sources,⁴⁷² often by way of FDI and through the participation of foreign entities.⁴⁷³ To ensure that the domestic benefit received from this participation is enhanced, the South African Government has imposed LCRs in its mineral and mining industry.⁴⁷⁴

Notwithstanding the content of the LCRs so imposed, it is the view of the author that, to promote the attraction of FDI to the South African mineral and mining industry, the South African Government has to ensure that its LCR regime provides an enhanced degree of certainty, which requires *inter alia* clarity as to the legal status of the LCRs, as well as stability in respect of their application. As discussed and argued in this research, it is concluded that the present uncertain state of the LCR regime for the South African mineral and mining industry is not, however, conducive to the attraction of FDI.

⁴⁷⁰ 'Foreign direct investment (FDI) in South Africa' (undated) available at <https://www.nordeatrade.com/dk/explore-new-market/south-africa/investment>, accessed on 23 June 2021.

⁴⁷¹ Op cit note 187.

⁴⁷² Op cit note 188.

⁴⁷³ See Chapter 2.

⁴⁷⁴ See op cit note 377 wherein the South African Government confirmed its desire to 'increase the contribution of [mining]...to [meet South Africa's] developmental aspirations.'

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